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CASES ARGUED AND DECIDED
IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERMS, 1903, 1904, IN
195 196 197 198 U. S.

BOOK 49,

LAWYERS' EDITION,

COMPLETE WITH HEADLINES, HEADNOTES, STATEMENTS OF CASES, POINTS AND
AUTHORITIES OF COUNSEL, FOOTNOTES AND PARALLEL REFERENCES,

BY

THE PUBLISHERS' EDITORIAL STAFF.

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JUSTICES
OF THE
SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE,

HON. MELVILLE WESTON FULLER.

ASSOCIATE JUSTICES,

HON. JOHN MARSHALL HARLAN,

HON. RUFUS W. PECKHAM,

HON. DAVID JOSIAH BREWER,

HON. JOSEPH MCKENNA,

HON. HENRY BILLINGS BROWN,

HON. OLIVER WENDELL HOLMES,

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HON. CHARLES HENRY BUTLER.

MARSHAL,

JOHN MONTGOMERY WRIGHT, Esq.

ALLOTMENT, ETC., OF THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

March 9, 1903.

TOGETHER WITH THE DATES OF THEIR COMMISSIONS AND COMMENCEMENT
OF SERVICE, RESPECTIVELY.

For Order of Court Making Allotment, see 47 L. ed., Appendix IX. p. 1201.

NAMES OF JUSTICES, AND WHENCE APPOINTED.	BY WHOM APPOINTED.	CIRCUITS. 1902-1903.	COMMI- SIONED.	SWORN IN.
ASSOCIATE JUSTICE OLIVER WENDELL HOLMES, Massachusetts.	President ROOSEVELT.	FIRST. ME., N. H., MASS., R. I.	1902. (Dec. 4.)	1902. (Dec. 8.)
ASSOCIATE JUSTICE RUFUS W. PECKHAM, New York.	President CLEVELAND.	SECOND. VERMONT, CONN., NEW YORK.	1895. (Dec. 9.)	1896. (Jan. 6.)
ASSOCIATE JUSTICE HENRY B. BROWN, Michigan.	President HARRISON.	THIRD. NEW JERSEY, PA., DEL.	1890. (Dec. 29.)	1891. (Jan. 6.)
CHIEF JUSTICE MELVILLE W. FULLER, Illinois.	President CLEVELAND.	FOURTH. MD., VA., N. C., W. VA., S. C.	1888. (July 20.)	1888. (Oct. 8.)
ASSOCIATE JUSTICE EDWARD D. WHITE, Louisiana.	President CLEVELAND.	FIFTH. GA., ALA., FLA., MISS., LA., TEX.	1894. (Feb. 19.)	1894. (Mar. 12.)
ASSOCIATE JUSTICE JOHN M. HARLAN, Kentucky.	President HAYES.	SIXTH. KY., TENN., OHIO, MICH.	1877. (Nov. 29.)	1877. (Dec. 10.)
ASSOCIATE JUSTICE WILLIAM R. DAY, Ohio.	President ROOSEVELT.	SEVENTH. IND., ILL., WIS.	1903. (Feb. 23.)	1903. (Mar. 2.)
ASSOCIATE JUSTICE DAVID J. BREWER, Kansas.	President HARRISON.	EIGHTH. MINN., IOWA, MO., KAN., ARK., NEB., COLO., N. D., S. D., UTAH, WYO., NEW MEX.,* OKLA.*	1889. (Dec. 18.)	1890. (Jan. 6.)
ASSOCIATE JUSTICE JOSEPH MCKENNA, California.	President MCKINLEY.	NINTH. CAL., OR., NEV., MONT., WASH., IDAHO, ALASKA,* ARIZONA,* HAWAII.*	1898. (Jan. 21.)	1898. (Jan. 26.)

*Territories assigned to circuits by order of the Supreme Court.

GENERAL TABLE OF CASES REPORTED IN THIS BOOK.

VOLUMES 195, 196, 197, 198.

A.

Abbeville Electric Light & P. Co., Western Electrical Supply Co. v.	765
A. Booth & Co., Davis v. (Mem.)	355
Adams Express Co. v. Iowa (196 U. S. 147)	424
Ætna Ins. Co. v. Lewis (Mem.) (195 U. S. 629)	352
Ah Sin v. Wittman (198 U. S. 500) ..	1142
Aikens v. Wisconsin (195 U. S. 194) ..	154
Aitken, Oceanic Steam Nav. Co. v.	610
Alabama & G. Mfg. Co., Riverdale Cot- ton Mills v.	1008
Alleghany Co., Allen v.	551
Allen v. Alleghany Co. (196 U. S. 458) v. Arguimbau (198 U. S. 149) ..	990
Davenport v. (Mem.)	630
Amado v. United States (195 U. S. 172)	145
American Alkali Co. v. Salom (Mem.) (196 U. S. 641)	631
American Automatic Loom Co., Ken- dall v.	1133
American Bonding & T. Co. v. Bowland (Mem.) (197 U. S. 626) ..	912
American Cotton Co., Rembert Roller Compress Co. v. (Mem.) ..	910
American Express Co. v. Iowa (196 U. S. 133)	417
American Fur Ref. Co., Cimiotti Un- hairing Co. v.	1100
American Soda Fountain Co., McPhar- son v. (Mem.)	1175
Sample v. (Mem.)	354
American Sugar Ref. Co. v. United States (Mem.) (195 U. S. 635)	354
American Surety Co. v. Bowland (Mem.) (197 U. S. 636) ..	912
Shelton v. (Mem.)	354
American Trading Co., Northern P. R. Co. v.	269
Anderson v. Morton (Mem.) (195 U. S. 639)	356
Andrews v. Chicago & N. W. R. Co. (Mem.) (195 U. S. 628) ..	351

U. S., Book 49.

Anglo-American Land Mortg. & Agency Co., Lombard v. (Mem.) ..	630
Arguimbau, Allen v.	990
Armour Packing Co. v. Metropolitan Water Co. (Mem.) (195 U. S. 634)	354
Astrich v. German-American Ins. Co. (Mem.) (198 U. S. 583) ..	1173
Atlanta, K. & N. R. Co. v. Southern R. Co. (Mem.) (195 U. S. 634)	354
Atlantic Coast Line R. Co., Wilson v. (Mem.)	1173
Atlantic Lumber Co. v. L. Bucki & Son Lumber Co. (Mem.) (198 U. S. 588)	1175
Avery, Humbird v.	286

B.

Baker, Butte City Water Co. v.	409
New Mexico ex rel. Caledonian Coal Co. v.	540
Balk, Harris v.	1023
Baltimore, Baltimore Shipbuilding & Dry Dock Co. v.	242
Corry v.	556
Baltimore & O. Coal Co. v. Colonial Trust Co. (Mem.) (195 U. S. 634)	354
Baltimore Shipbuilding & Dry Dock Co. v. Baltimore (195 U. S. 375)	242
Bank, Boatmen's, Fritzlen v. (Mem.) ..	1174
Citizens' Nat., v. Donnell (195 U. S. 369)	238
Columbia, Birkett v.	231
Eureka County, v. Clarke (Mem.) (195 U. S. 631) ..	353
First Nat., Brown v. (Mem.) ..	631
First Nat., Buckingham v. (Mem.)	352
First Nat., v. Chicago Title & T. Co. (198 U. S. 280)	1051
First Nat., v. Covington (198 U. S. 100)	963
First Nat., Covington v.	963

CASES REPORTED.

Bank, First Nat., v. Lasater (196 U. S. 115)	408	Boston Water & Light Co. v. Farmers' Loan & T. Co. (Mem.) (197 U. S. 622)	910
First Nat., v. Staaake (Mem.) (197 U. S. 622)	910	Bowland, American Bonding & T. Co. v. (Mem.)	912
First Nat., Zartman v. (Mem.)	910	American Surety Co. v. (Mem.) ..	912
Keene Five Cent Sav., v. Ramsden (Mem.) (196 U. S. 638)	630	Fidelity & C. Co. v. (Mem.) ..	912
Leathers Mfrs.' Nat., v. Treat (Mem.) (198 U. S. 584) ..	1173	Scottish Union & Nat. Ins. Co. v.	619
Middletown Nat., v. Toledo, A. A. & N. M. R. Co. (197 U. S. 394)	803	v. Scottish Union & Nat. Ins. Co. (196 U. S. 611)	619
National Exch., v. Wiley (195 U. S. 257)	184	Bradford v. Southern R. Co. (195 U. S. 243) ..	178
of Le Roy, MacNabb v. (Mem.) ..	1173	Bradley v. Lightcap (195 U. S. 1) ...	65
People's Nat., Van Reed v.	1161	v. Lightcap (195 U. S. 24)	75
San Francisco Nat., v. Dodge (197 U. S. 70)	669	v. Lightcap (195 U. S. 25)	76
Tiffin Sav., Keppel v.	790	Brennan & Co. S. W. Agricultural Works v. Dowagiac Mfg. Co. (Mem.) (195 U. S. 630)	352
Baquero v. Rauschenplat (Mem.) (196 U. S. 642)	632	British & F. M. Ins. Co., Portland Flouring Mills Co. v. (Mem.)	352
Barber v. Lazarus (Mem.) (198 U. S. 585)	1174	Broadnax, United Engineering & Contracting Co. v. (Mem.) ...	911
Barber Asphalt Paving Co., Louisville & N. R. Co. v.	819	Broadwell v. United States (195 U. S. 65)	99
Barnes, District of Columbia v.	699	Brockman, Grand Canal Co. v. (Mem.) ..	356
Barrett, Ex parte (Mem.) (196 U. S. 636)	629	Brooks v. United States (Mem.) (196 U. S. 642)	632
Bartlett v. United States (197 U. S. 230)	735	Brown v. First Nat. Bank (Mem.) (196 U. S. 641)	631
Bartram v. United States (Mem.) (195 U. S. 635)	354	Schweer v.	144
Bay Mfg. Co., Orrell v. (Mem.)	1172	Tennessee Oil, Gas & Mineral Co. v. (Mem.)	910
Beavers v. Haubert (198 U. S. 77)	950	Western Tie & Timber Co. v. ...	571
Belden v. Midway Co. (Mem.) (195 U. S. 638)	356	Brunswick-Balke-Collender Co. v. Klumpp (Mem.) (198 U. S. 587)	1174
Benner, Lane v. (Mem.)	1171	Bryan v. Dupoyster (Mem.) (198 U. S. 585)	1174
Benson v. Henkel (198 U. S. 1)	919	Buckingham v. First Nat. Bank (Mem.) (195 U. S. 630) ..	352
Bessette, Ex parte (Mem.) (196 U. S. 635)	629	Buffalo Tin Can Co. v. E. W. Bliss Co. (Mem.) (195 U. S. 630) ..	352
v. W. B. Conkey Co. (Mem.) (196 U. S. 638)	630	Bullis v. O'Beirne (195 U. S. 606) ..	340
Beltendorf Patents Co. v. J. R. Little Metal Wheel Co. (Mem.) (195 U. S. 628)	351	Bunker Hill & S. Min. & Concentrating Co. v. Jones (Mem.) (195 U. S. 629)	352
Binyon v. United States (Mem.) (195 U. S. 623)	349	Burke, Crawford v.	147
Birkett v. Columbia Bank (195 U. S. 345)	231	Burrill v. Crossman (Mem.) (195 U. S. 628)	351
Birrell v. New York & H. R. Co. (198 U. S. 390)	1096	Burton v. United States (196 U. S. 283)	482
Bishop v. United States (197 U. S. 334)	780	Butte & B. Consol. Min. Co., Heinze v. (Mem.)	353
Black Hills & N. W. R. Co., Tacoma Mill Co. v. (Mem.)	351	Butte City Water Co. v. Baker (196 U. S. 119)	409
Blair, Thomas v. (Mem.)	630		
Blue Mountain Iron & Steel Co. v. Portner (Mem.) (195 U. S. 636)	355		
Boatmen's Bank, Fritzlen v. (Mem.) ..	1174		
Bong Meng, United States v. (Mem.) ..	629		
Bonin v. Gulf Co. (198 U. S. 115)	970		

C.

Cadarr, United States v.	842
United States v. (Mem.)	355

CASES REPORTED.

Cahill v. Norris & C. Dredging Co. (Mem.) (198 U. S. 582) ..	1172	Cliff v. United States (195 U. S. 159)	139
v. Olsen (Mem.) (198 U. S. 582)	1172	Clough, Munsey v.	515
Caledonian Coal Co., New Mexico ex rel., v. Baker (196 U. S. 432)	540	Clyatt v. United States (197 U. S. 207)	726
California, Lee Look v. (Mem.)	349	Coburn, Moulton v. (Mem.)	631
Cannel Coal Co. v. Seattle & L. W. Waterway Co. (Mem.) (195 U. S. 624)	350	Colombia, Ex parte (195 U. S. 604) ..	338
Carew, Scott v.	403	Colonial Trust Co., Baltimore & O. Coal Co. v. (Mem.)	354
Caro v. Davidson (197 U. S. 197)	723	Columbia Ave. Sav. Fund, S. D. Title & T. Co., Dawson v.	713
Carter v. Gear (197 U. S. 348)	787	Columbia Bank, Birkett v.	231
Castillo v. Corton (Mem.) (198 U. S. 588)	1175	Combe, Stillman v.	822
Cawthon-Coleman Co., Lucius v.	425	Comstock v. S. Eagleton (196 U. S. 99)	402
Central Commercial Co. v. Chicago Title & T. Co. (Mem.) (197 U. S. 622)	910	Consumers' Gas Trust Co. v. Quinby (Mem.) (198 U. S. 585) ..	1174
Central of Ga. R. Co. v. Murphey (196 U. S. 194)	444	Cook v. Marshall County (196 U. S. 261)	471
Central P. R. Co., Remington v.	959	Copper King v. Johnson (Mem.) (195 U. S. 627)	351
Charalambis v. Williams (Mem.) (196 U. S. 643)	632	Cornell S. B. Co., United States v. (Mem.)	1173
Cheshire Provident Inst. v. Ramsden (Mem.) (196 U. S. 638) ..	630	Corry v. Baltimore (196 U. S. 466) ..	556
Chicago, Elkins v. (Mem.)	355	Corton, Castillo v. (Mem.)	1175
Chicago & N. W. R. Co., Andrews v. (Mem.)	351	Coulter v. Louisville & N. R. Co. (196 U. S. 599)	615
Warner v. (Mem.)	355	Courtney v. Pradt (196 U. S. 89) ..	398
Chicago & W. I. R. Co. v. Newell (Mem.) (198 U. S. 579) ..	1171	Covington, First Nat. Bank v.	963
Chicago, B. & Q. R. Co., Union Stock Yards Co. v.	453	v. First Nat. Bank (198 U. S. 100)	963
Chicago Bd. of Trade v. Christie Grain & Stock Co. (198 U. S. 236)	1031	Cramer v. Wilson (195 U. S. 408)	256
v. Hammond Elevator Co. (198 U. S. 424)	1111	Crawford v. Burke (195 U. S. 176) ..	147
L. A. Kinsey Co. v.	1031	Creede & C. C. Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co. (196 U. S. 337)	501
Chicago, I. & L. R. Co. v. McGuire (196 U. S. 128)	413	Crenshaw, Pabst Brewing Co. v.	925
Chicago, M. & St. P. R. Co., Gunnison v. (Mem.)	911	Crosley, United States v.	497
v. United States (198 U. S. 385)	1094	Crossman, Burrill v. (Mem.)	351
United States v.	306	Crown Cork & Seal Co., Ideal Stopper Co. v. (Mem.)	354
Chicago Title & T. Co., Central Com- mercial Co. v. (Mem.)	910	Cueli v. Rodriguez (Mem.) (198 U. S. 581)	1172
First Nat. Bank v.	1051	Cunnius v. Reading School Dist. (198 U. S. 458)	1125
Choctaw, O. & G. R. Co., Kilpatrick v. (Mem.)	349	Curley v. United States (Mem.) (195 U. S. 628)	351
Chrisman v. Miller (197 U. S. 313) ..	770	Currie, Jaster v.	988
Christian, Dennison v. (Mem.)	630	Curtis, Scherf v. (Mem.)	1175
Christie Grain & Stock Co., Chicago Bd. of Trade v.	1031		
Cimiotti Unhairing Co. v. American Fur Ref. Co. (198 U. S. 399)	1100	D.	
Citizens' Nat. Bank v. Dnnnell (195 U. S. 369)	238	Dallemagne v. Moisan (197 U. S. 169)	709
Clark v. Nash (198 U. S. 361)	1085	Daly v. Elton (195 U. S. 242)	177
Clarke, Eureka County Bank v. (Mem.)	353	Darden, Thompson v.	1064
		Darnal v. United States (Mem.) (198 U. S. 586)	1174
		Dashiell, Texas & P. R. Co. v.	1150
		Davenport v. Allen (Mem.) (196 U. S. 639)	630
		Davidson, Caro v.	723
		Davis v. A. Booth & Co. (Mem.) (195 U. S. 636)	355
		Dawson v. Columbia Ave. Sav. Fund, S. D. Title & T. Co. (197 U. S. 178)	713

CASES REPORTED.

Delaware, L. & W. R. Co. v. Pennsylv-	
vania (198 U. S. 341)	1077
Dennison v. Christian (Mem.) (196	
U. S. 637)	630
De Wolfe, Oklahoma ex rel. Oklahoma	
Gas & Electric Co. v.	
(Mem.)	632
Diamond Drill & Mach. Co., Kelley v.	
(Mem.)	1173
Dieckerhoff, United States v. (Mem.)	1173
Dillon v. Mares (Mem.) (196 U. S.	
644)	632
Dines, Stratton's Independence v.	
(Mem.)	911
Direct Nav. Co., Heineken v. (Mem.)	1174
Ralli v. (Mem.)	1174
District of Columbia v. Barnes (197	
U. S. 146)	699
Duehay v. (Mem.)	1174
v. Eslin (Mem.) (197 U. S.	
625)	912
Eslin v. (Mem.)	912
Gordon v. (Mem.)	912
v. Lee (Mem.) (198 U. S. 584)	1173
Ritchie v. (Mem.)	912
Wolff v.	426
Dobbins v. Los Angeles (195 U. S. 223)	169
Doctor v. Harrington (196 U. S. 579)	606
Dodge v. Ellis (Mem.) (195 U. S. 626)	350
San Francisco Nat. Bank v....	669
v. United States (Mem.) (195	
U. S. 632)	353
Dodwell & Co., Munich Assur. Co. v.	
(Mem.)	352
Dolan, Ex parte (Mem.) (196 U. S.	
636)	629
Donnell, Citizens' Nat. Bank v.	238
Dorr v. United States (195 U. S. 138)	128
Dowagiac Mfg. Co., Brennan & Co. S.	
W. Agricultural Works v.	
(Mem.)	352
Minnesota Moline Plow Co. v.	
(Mem.)	352
Duehay v. District of Columbia	
(Mem.) (198 U. S. 586) ..	1174
Dunbar v. Green (198 U. S. 166)	998
Dupoyster, Bryan v. (Mem.)	1174

E.

Eagleton, Comstock v.	402
Edison, Lubin v. (Mem.)	349
Edwards, United States ex rel., v. Taft	
(Mem.) (195 U. S. 626) ..	350
Eidman, Vanderbilt v.	563
Elkins v. Chicago (Mem.) (195 U. S.	
637)	355
Ellis, Dodge v. (Mem.)	350
Elton, Daly v.	177
Ely, Northern P. R. Co. v.	639
Empire State-Idaho Min. & Developing	
Co. v. Hanley (198 U. S.	
292)	1056

Engard, United States v.	575
Eslin v. District of Columbia (Mem.)	
(197 U. S. 625)	912
District of Columbia v. (Mem.)	912
Eureka County Bank v. Clarke (Mem.)	
(195 U. S. 631)	353
Evans, United States v.	236
E. W. Bliss Co., Buffalo Tin Can Co.	
v. (Mem.)	352
Ex parte Barrett (Mem.) (196 U. S.	
636)	629
Bessette (Mem.) (196 U. S. 635)	629
Colombia (195 U. S. 604)	338
Dolan (Mem.) (196 U. S. 636)	629
Garrett (Mem.) (196 U. S. 636)	629
Glaser (198 U. S. 171)	1000
Oli Nifou (Mem.) (198 U. S.	
581)	1172
McCaully (Mem.) (198 U. S.	
582)	1172
Massachusetts (197 U. S. 482)	845
Miller (Mem.) (197 U. S. 619)	909

F.

Fain, Stevenson v.	142
Fairbanks, Thompson v.	577
Farmers' Loan & T. Co., Boston Water	
& Light Co. v. (Mem.)	910
v. Lake Street Elev. R. Co.	
(Mem.) (195 U. S. 638) ..	356
New England Waterworks Co. v.	
(Mem.)	910
Fayerweather v. Ritch (195 U. S. 276)	193
Felici v. Whitehead (Mem.) (195 U.	
S. 639)	356
Ferrum Min. Co., McMillen v.	784
Fidelity & C. Co. v. Bowland (Mem.)	
(197 U. S. 626)	912
First Nat. Bank, Brown v. (Mem.)	631
Buckingham v. (Mem.)	352
v. Chicago Title & T. Co. (198	
U. S. 280)	1051
Covington v.	963
v. Covington (198 U. S. 100) ..	963
v. Lasater (196 U. S. 115)	408
v. Staake (Mem.) (197 U. S.	
622)	910
Zartman v. (Mem.)	910
Flanigan v. Sierra County (196 U. S.	
553)	597
Flannery v. Lewis (Mem.) (195 U. S.	
628)	351
Fowler, Great Northern R. Co. v.	
(Mem.)	911
Frauenhar, Russia Cement Co. v.	
(Mem.)	631
Friend, Talcott v. (Mem.)	909
Fritzlen v. Boatmen's Bank (Mem.)	
(198 U. S. 586)	1174
Fullerton v. Texas (196 U. S. 192) ...	443

CASES REPORTED.

G.

Garrett, Ex parte (Mem.) (196 U. S. 636)	629
Gastonia Cotton Mfg. Co., W. L. Wells Co. v.	1003
Gear, Carter v.	787
Gerald, Lytle v. (Mem.)	632
German-American Ins. Co., Astrich v. (Mem.)	1173
Germania Iron Co., James v. (Mem.)	356
Glaser, Ex parte (198 U. S. 171)	1000
Goldenberg Bros. & Co. v. United States (Mem.) (195 U. S. 634)	354
Gordon v. District of Columbia (Mem.) (197 U. S. 625)	912
Gould, Maricopa Canal Co. v. (Mem.)	356
Grand Canal Co. v. Brockman (Mem.) (195 U. S. 639)	356
Great Northern R. Co. v. Fowler (Mem.) (197 U. S. 624) ..	911
Great Western Min. & Mfg. Co. v. Harris (198 U. S. 561)	1163
Green, Dunbar v.	998
Greer County v. Texas (197 U. S. 235) ..	736
Gregg v. Metropolitan Trust Co. (197 U. S. 183)	717
Grube, Hamburg American S. S. Co. v.	529
Gulf Co., Bonin v.	970
Gunnison v. Chicago, M. & St. P. R. Co. (Mem.) (197 U. S. 623) ..	911
Gurvich v. United States (Mem.) (198 U. S. 581)	1172
Guthrie, Sparks v. (Mem.)	353
Guyon, Pacific Mail S. S. Co. v. (Mem.)	353

H.

Hackfeld v. United States (197 U. S. 442)	826
Hamburg American S. S. Co. v. Grube (196 U. S. 407)	529
Hammond Elevator Co., Chicago Bd. of Trade v.	1111
Hanley, Empire State-Idaho Min. & Developing Co. v.	1056
Hanselmann, Western Electric Co. v. (Mem.)	911
Harding v. Harding (198 U. S. 317) ..	1066
v. Illinois (196 U. S. 78)	394
Harley v. United States (198 U. S. 229)	1029
Harriman v. Northern Securities Co. (Mem.) (196 U. S. 641) ..	631
v. Northern Securities Co. (197 U. S. 244)	739
Harrington, Doctor v.	606
Harris v. Balk (198 U. S. 215)	1023
Great Western Min. & Mfg. Co. v.	1163

Harrison, Perea v. (Mem.)	349
Hartford F. Ins. Co. v. Perkins (Mem.) (196 U. S. 643)	632
Hartigan v. United States (196 U. S. 169)	434
Hartwell v. Havighorst (Mem.) (196 U. S. 635)	629
Harvey Steel Co., United States v.	492
Hasse, Northern P. R. Co. v.	642
Hatch v. Ketcham (Mem.) (198 U. S. 580)	1172
Haubert, Beavers v.	950
Havighorst, Hartwell v. (Mem.)	629
Heff, Re (197 U. S. 488)	848
Heineken v. Direct Nav. Co. (Mem.) (198 U. S. 586)	1174
Heinze v. Butte & B. Consol. Min. Co. (Mem.) (195 U. S. 631) ..	353
Helena, Helena Waterworks Co. v.	245
Helena Waterworks Co. v. Helena (195 U. S. 383)	245
Hemphill, Schlosser v.	1000
Henkel, Benson v.	919
Hernan v. Texas (Mem.) (198 U. S. 579)	1171
Hewitt, Patterson v.	214
Hill v. McCord (195 U. S. 395)	251
H. Meyer Boot & Shoe Mfg. Co., Shoemaker v. (Mem.)	1172
Hodge v. Muscatine County (196 U. S. 276)	477
Holden v. Stratton (198 U. S. 202) ...	1018
v. United States (Mem.) (196 U. S. 639)	631
Hough, Schubach v. (Mem.)	632
Howell v. United States (Mem.) (195 U. S. 635)	354
Howe Scale Co. v. Wyckoff, Seamen & Benedict (198 U. S. 118) ..	972
Hoyt v. Wisconsin (195 U. S. 194) ...	154
Huegin v. Wisconsin (195 U. S. 194) .	154
Humbird v. Avery (195 U. S. 480) ..	286
Humphrey v. Tatman (198 U. S. 91) ..	956
Hunsaker v. Toltec Ranch Co. (Mem.) (195 U. S. 640)	356
v. Toltec Ranch Co. (Mem.) (197 U. S. 625)	912
Hunt v. Springfield F. & M. Ins. Co. (196 U. S. 47)	381

I.

I. B. Kleinert Rubber Co. v. Stein (Mem.) (196 U. S. 641) ..	631
Ideal Stopper Co. v. Crown Cork & Seal Co. (Mem.) (195 U. S. 633)	354
Illinois, Harding v.	394
Paulsen v. (Mem.)	356
Insurance Co., Aetna, v. Lewis (Mem.) (195 U. S. 629)	352
British & F. M., Portland Flouring Mills Co. v. (Mem.) ...	352

CASES REPORTED.

Insurance Co., German-American, As- trich v. (Mem.) 1173	Kehrer v. Stewart (197 U. S. 60) ... 663
Hartford F., v. Perkins (Mem.) (196 U. S. 643) 632	Kelleher, Seattle v. 232
Pennsylvania Lumbermen's Mut. F., v. Meyer (197 U. S. 407) 810	Kelley v. Diamond Drill & Mach. Co. (Mem.) (198 U. S. 584) .. 1173
Scottish Union & Nat., v. Bow- land (196 U. S. 611) 619	Kendall v. American Automatic Loom Co. (198 U. S. 477) 1133
Scottish Union & Nat., Bow- land v. 619	Kenney v. Louie (Mem.) (195 U. S. 632) 353
Springfield F. & M., Hunt v. 381	Kentucky, Sanders v. (Mem.) 632
United States L., v. McMahon (Mem.) (197 U. S. 621) .. 910	Kepner v. United States (195 U. S. 100) 114
Interstate Commerce Commission v. Nashville, C. & St. L. R. Co. (Mem.) (195 U. S. 638) 356	Keppel v. Tiffin Sav. Bank (197 U. S. 356) 790
v. Southern R. Co. (Mem.) (195 U. S. 639) 356	Kerr v. United States (Mem.) (198 U. S. 589) 1175
Ionia Transp. Co. v. J. I. Case Thresh- ing Mach. Co. (Mem.) (197 U. S. 622) 910	Ketcham, Hatch v. (Mem.) 1172
Iowa, Adams Express Co. v. 424	Kierns v. New York & H. R. Co. (198 U. S. 390) 1096
American Express Co. v. 417	Kilpatrick v. Choctaw, O. & G. R. Co. (Mem.) (195 U. S. 624) .. 349
Iron Cliffs Co. v. Negaunee Iron Co. (197 U. S. 463) 836	Kinsey Co. v. Chicago Bd. of Trade (198 U. S. 236) 1031
	Klump, Brunswick-Balke-Collender Co. v. (Mem.) 1174
	Knapp, United States ex rel., v. Lake Shore & M. S. R. Co. (197 U. S. 536) 870
	Knott v. Louisville Trust Co. (Mem.) (195 U. S. 631) 353

J.

Jacobson v. Massachusetts (197 U. S. 11) 643
James v. Germania Iron Co. (Mem.) (195 U. S. 638) 356
Jaster v. Currie (198 U. S. 144) 988
Jessup v. Southampton (Mem.) (195 U. S. 624) 349
Jewell v. Superior (Mem.) (198 U. S. 583) 1173
J. I. Case Threshing Mach. Co., Ionia Transp. Co. v. (Mem.) 910
Jock Coe, United States v. (Mem.) ... 629
Johnson, Copper King v. (Mem.) 351
v. Southern P. Co. (196 U. S. 1) 363
v. Thomas (Mem.) (197 U. S. 619) 909
Jones, Bunker Hill & S. Min. & Con- centrating Co. v. (Mem.) 352
J. R. Little Metal Wheel Co., Betten- dorf Patents Co. v. (Mem.) 351
Ju Toy, United States v. 1040

K.

Kansas, Smiley v. 546
Kansas City S. R. Co. v. Prunty (Mem.) (197 U. S. 623) .. 911
Kaufman v. Tredway (195 U. S. 271) 190
Keely v. Moore (196 U. S. 38) 376
Keene Five Cent Sav. Bank v. Rams- den (Mem.) (196 U. S. 638) 630

L.

Lake Shore & M. S. R. Co., United States ex rel. Knapp v. 870
Lake Street Elev. R. Co., Farmers' Loan & T. Co. v. (Mem.) 356
L. A. Kinsey Co. v. Chicago Bd. of Trade (198 U. S. 236) 1031
Lane v. Benner (Mem.) (198 U. S. 579) 1171
Lasater, First Nat. Bank v. 408
Laugenour, Smalley v. 400
Lavagnino v. Uhlig (198 U. S. 443) .. 1119
Lazarus, Barber v. (Mem.) 1174
L. Bucki & Son Lumber Co., Atlantic Lumber Co. v. (Mem.) 1175
Leather Mfrs., Nat. Bank v. Treat (Mem.) (198 U. S. 584) .. 1173
Lee, District of Columbia v. (Mem.) .. 1173
v. Robinson (196 U. S. 64) ... 388
Leeds, Lockhart v. 263
Lee Look v. California (Mem.) (195 U. S. 623) 349
v. Ross (Mem.) (198 U. S. 579) 1171
Leonard, Ludington Novelty Co. v. (Mem.) 909
v. Vicksburg, S. & P. R. Co. (198 U. S. 416) 1108
Letson, Memphis Consol. Gas & Elec- tric Co. v. (Mem.) 911
Lewis, Aetna Ins. Co. v. (Mem.) 352
Flannery v. (Mem.) 351

CASES REPORTED.

Lightcap, Bradley v.	65	McMillen v. Ferrum Min. Co. (197 U. S. 343)	784
Bradley v.	75	MacNabb v. Bank of Le Roy (Mem.) (198 U. S. 583)	1173
Bradley v.	76	Macon, Toney v. (Mem.)	350
Lincoln v. United States (197 U. S. 419)	816	McPherson v. American Soda Fountain Co. (Mem.) (198 U. S. 587)	1175
Lindsay, Wulff v. (Mem.)	632	McQuesten, Steigleder v.	986
Lochner v. New York (198 U. S. 45) ..	937	Madisonville Traction Co. v. Saint Bernard Min. Co. (196 U. S. 239)	462
Lockhart v. Leeds (195 U. S. 427)	263	Manogue, McCaffrey v.	600
Lombard v. Anglo-American Land Mortg. & Agency Co. (Mem.) (196 U. S. 638) ..	630	Marande v. Texas & P. R. Co. (Mem.) (197 U. S. 626)	912
Loomis, Warder v. (Mem.)	909	Mares, Dillon v. (Mem.)	632
Lorenz v. United States (Mem.) (196 U. S. 640)	631	Maricopa Canal Co. v. Gould (Mem.) (195 U. S. 639)	356
Los Angeles, Dobbins v.	169	Markoe, Wetmore v.	390
Louie, Kenney v. (Mem.)	353	Marshall County, Cook v.	471
Louisville & N. R. Co. v. Barber Asphalt Paving Co. (197 U. S. 430)	819	Martinez, United States v.	282
Coulter v.	615	Massachusetts, Ex parte (197 U. S. 482)	845
v. West Coast Naval Stores Co. (198 U. S. 483)	1135	Jacobson v.	643
Wright v.	167	Maxwell, Sage v. (Mem.)	911
Louisville Trust Co., Knott v. (Mem.)	353	Meffert v. Packer (Mem.) (195 U. S. 625)	350
Lubin v. Edison (Mem.) (195 U. S. 624)	349	Memphis Consol. Gas & Electric Co. v. Letson (Mem.) (197 U. S. 623)	911
Lucius v. Cawthon-Coleman Co. (196 U. S. 149)	425	Mendezona v. United States (195 U. S. 158)	136
Ludington Novelty Co. v. Leonard (Mem.) (197 U. S. 620)	909	Merchants' & M. Transp. Co. v. The Thornhill (Mem.) (197 U. S. 620)	909
Lytle v. Gerald (Mem.) (196 U. S. 643)	632	Merchants' Bkg. Co., Shewan Tomes & Co. v. (Mem.)	630
M.		Metropolitan R. Co. v. Macfarland (195 U. S. 322)	219
McBride, Whitaker v.	857	Metropolitan Trust Co., Gregg v.	717
McCaffrey v. Manogue (196 U. S. 563)	600	Metropolitan Water Co., Armour Packing Co. v. (Mem.)	354
McCahan Sugar Ref. Co. v. The Wildcroft (Mem.) (195 U. S. 635)	355	Meyer, Pennsylvania Lumbermen's Mut. F. Ins. Co. v.	810
McCaully, Ex parte (Mem.) (198 U. S. 582)	1172	Supreme Lodge, K. of P. v.	1146
v. United States (Mem.) (198 U. S. 586)	1174	Middletown Nat. Bank v. Toledo, A. A. & N. M. R. Co. (197 U. S. 394)	803
McClaine v. Rankin (197 U. S. 154) ..	702	Midway Co., Belden v. (Mem.)	356
McClure v. United States Mortg. & T. Co. (Mem.) (197 U. S. 624) ..	911	Miller, Ex parte (Mem.) (197 U. S. 619)	909
McCord, Hill v.	251	Chrisman v.	770
McCray v. United States (195 U. S. 27)	78	Mills, United States v.	732
McDaniel v. Traylor (196 U. S. 415) ..	533	Mineral Development Co. v. Scott (Mem.) (196 U. S. 640) ..	631
Macfarland, Metropolitan R. Co. v. ...	219	Minnesota Moline Plow Co. v. Dowagiac Mfg. Co. (Mem.) (195 U. S. 630)	352
McGraw v. Woods (Mem.) (197 U. S. 621)	910	Minnesota S. S. Co., Western Transit Co. v. (Mem.)	355
McGuire, Chicago, I. & L. R. Co. v. ...	413	Missouri v. Nebraska (196 U. S. 23) ..	372
McHarg v. Staake (Mem.) (197 U. S. 622)	910	v. Nebraska (197 U. S. 577) ..	881
McMahon, United States L. Ins. Co. v. (Mem.)	910	Nebraska v.	372
McMaster, Oklahoma City v.	587	Moar, Walp v. (Mem.)	1175
McMichael v. Murphy (197 U. S. 304) ..	766		

CASES REPORTED.

8

CASES REPORTED.

People's Nat. Bank, Van Reed v.	1161	Railroad Co., New York & H., Muhler v.	872
Perea v. Harrison (Mem.) (195 U. S. 623)	349	Pennsylvania, Western U. Teleg. Co. v.	312
Perkins, Hartford F. Ins. Co. v. (Mem.)	632	Pennsylvania, Western U. Teleg. Co. v.	332
Petty, Moore v. (Mem.)	911	Vicksburg, S. & P., Leonard v.	1108
Pennsylvania, Delaware, L. & W. R. Co. v.	1077	Yazoo & M. Valley, v. Truman (Mem.) (195 U. S. 625) ..	350
Pennsylvania Lumbermen's Mut. F. Ins. Co. v. Meyer (197 U. S. 407)	810	Railway Co., Atlanta, K. & N., v. Southern R. Co. (Mem.) (195 U. S. 634)	354
Pennsylvania R. Co., Western U. Teleg. Co. v.	312	Black Hills & N. W., Tacoma Mill Co. v. (Mem.)	351
Western U. Teleg. Co. v.	332	Central of Ga., v. Murphey (196 U. S. 194)	444
Persons, Wirgman v. (Mem.)	629	Chicago & N. W., Andrews v. (Mem.)	351
Philpot v. O'Brien (Mem.) (196 U. S. 643)	632	Chicago & N. W., Warner v. (Mem.)	355
Pitch Pine Lumber Co. v. Rosasco (Mem.) (198 U. S. 587) ..	1174	Chicago, I. & L., v. McGuire (196 U. S. 128)	413
Plumas County, Wheeler v.	599	Chicago, M. & St. P., Gunnison v. (Mem.)	911
Plymouth Cordage Co. v. Smith (Mem.) (198 U. S. 588) ..	1175	Chicago, M. & St. P., v. United States (198 U. S. 385) ...	1094
Portland Flouring Mills Co. v. British & F. M. Ins. Co. (Mem.) (195 U. S. 629)	352	Chicago, M. & St. P., United States v.	306
Portner, Blue Mountain Iron & Steel Co. v. (Mem.)	355	Great Northern, v. Fowler (Mem.) (197 U. S. 624) ..	911
Pradt, Courtney v.	398	Kansas City S., v. Prunty (Mem.) (197 U. S. 623) ..	911
Prunty, Kansas City S. R. Co. v. (Mem.)	911	Lake Shore & M. S., United States ex rel. Knapp v.	870
Q.		Nashville, C. & St. L., Interstate Commerce Commission v. (Mem.)	356
Quinby, Consumers' Gas Trust Co. v. (Mem.)	1174	Northern P., v. American Trading Co. (195 U. S. 439) ...	269
R.		Northern P., v. Ely (197 U. S. 1)	639
Railroad Co., Atlantic Coast Line, Wilson v. (Mem.)	1173	Northern P., v. Hasse (197 U. S. 9)	642
Central P., Remington v.	959	Rio Grande W., Raphael v. (Mem.)	1175
Chicago & W. I., v. Newell (Mem.) (198 U. S. 579) ..	1171	Savannah, T. & I. of H., v. Savannah (198 U. S. 392) ...	1097
Chicago, B. & Q., Union Stock Yards Co. v.	453	Southern, Atlanta, K. & N. R. Co. v. (Mem.)	354
Choctaw, O. & G., Kilpatrick v. (Mem.)	349	Southern, Bradford v.	178
Delaware, L. & W., v. Pennsylvania (198 U. S. 341)	1077	Southern, Interstate Commerce Commission v. (Mem.)	356
Lake Street Elev., Farmers' Loan & T. Co. v. (Mem.) ..	356	Texas & P., v. Dashiell (198 U. S. 521)	1150
Louisville & N., v. Barber Asphalt Paving Co. (197 U. S. 430)	819	Texas & P., Marande v. (Mem.)	912
Louisville & N., Coulter v.	615	Texas & P., v. Swearingen (196 U. S. 51)	382
Louisville & N., v. West Coast Naval Stores Co. (198 U. S. 483)	1135	Toledo, A. A. & N. M., Middle-town Nat. Bank v.	803
Louisville & N., Wright v.	167	Worcester Consol. Street, Worcester v.	591
Metropolitan, v. Macfarland (195 U. S. 322)	219	Rakestraw, Small v.	527
New York & H., Birrell v.	1096	Ralli v. Direct Nav. Co. (Mem.) (198 U. S. 586)	1174
New York & H., Kierns v.	1096		

CASES REPORTED.

Ramsden, Cheshire Provident Inst. v. (Mem.).....	630	St. Louis Expanded Metal Fireproofing Co. v. Standard Fireproofing Co. (Mem.) (195 U. S. 627).....	351
Keene Five Cent Sav. Bank v. (Mem.).....	630	Salom, American Alkali Co. v. (Mem.)	631
Ramsey v. Tacoma Land Co. (196 U. S. 360).....	513	Salt River Valley Canal Co. v. Slosser (Mem.) (195 U. S. 639).....	356
Rankin, McClaine v.....	702	Sample v. American Soda Fountain Co. (Mem.) (195 U. S. 634).....	354
Raphael v. Rio Grande W. R. Co. (Mem.) (198 U. S. 587) ..	1175	Sanders v. Kentucky (Mem.) (196 U. S. 644).....	632
Rassinussen v. United States (197 U. S. 516).....	862	San Francisco Nat. Bank v. Dodge (197 U. S. 70).....	669
Rauschenplat, Baquero v. (Mem.)	632	San Juan v. St. John's Gas Co. (195 U. S. 510).....	299
Re Heff (197 U. S. 488).....	848	Sarria, Sixto v.....	436
Strauss (197 U. S. 324).....	774	Savannah, Savannah, T. & I. of H. R. Co. v.....	1097
Reading Co., Morse v. (Mem.).....	630	Savannah, T. & I. of H. R. Co. v. Sa- vannah (198 U. S. 392) ...	1097
Reading School Dist., Cunnius v.....	1125	Scherf v. Curtis (Mem.) (198 U. S. 589).....	1175
Rembert Roller Compress Co. v. Amer- ican Cotton Co. (Mem.) (197 U. S. 620).....	910	Schiek v. United States (195 U. S. 65)	99
Remington v. Central P. R. Co. (198 U. S. 95).....	959	Schlosser v. Hemphill (198 U. S. 173)	1000
Reynolds v. Ritch (195 U. S. 276)	193	Schubach v. Hough (Mem.) (196 U. S. 644).....	632
R. F. Downing & Co., United States v. (Mem.)	352	Schweer v. Brown (195 U. S. 171)....	144
Rio Grande W. R. Co., Raphael v. (Mem.)	1175	Scott v. Carew (196 U. S. 100).....	403
Ritch, Fayerweather v.....	193	Mineral Development Co. v. (Mem.).....	631
Reynolds v.....	193	Scottish Union & Nat. Ins. Co. v. Bow- land (196 U. S. 611).....	619
Ritchie v. District of Columbia (Mem.) (197 U. S. 625).....	912	Bowland v.	619
Riverdale Cotton Mills v. Alabama & G. Mfg. Co. (198 U. S. 188)	1008	Seattle v. Kelleher (195 U. S. 351) ..	232
Riverside County v. Thompson (Mem.) (196 U. S. 637).....	630	Seattle & L. W. Waterway Co., Cannel Coal Co. v. (Mem.).....	350
Robinson, Lee v.....	388	Seattle Dock Co. v. (Mem.)	350
v. Wingate (Mem.) (198 U. S. 580).....	1171	Seattle Dock Co. v. Seattle & L. W. Waterway Co. (Mem.) (195 U. S. 624).....	350
Rodriguez, Cueli v. (Mem.).....	1172	Shaffer v. United States (Mem.) (196 U. S. 639).....	631
v. United States (198 U. S. 156)	994	Shelton v. American Surety Co. (Mem.) (195 U. S. 633) ..	354
Rooney v. North Dakota (196 U. S. 319).....	494	Shewan Tones & Co. v. Merchants' Bkg. Co. (Mem.) (196 U. S. 639).....	630
Rosasco, Pitch Pine Lumber Co. v. (Mem.).....	1174	Shoesmith v. H. Meyer Boot & Shoe Mfg. Co. (Mem.) (198 U. S. 582).....	1172
Ross, Lee Look v. (Mem.).....	1171	Sierra County, Flanigan v.....	597
Rumford Chemical Works, New York Baking Powder Co. v. (Mem.).....	354	Sixto v. Sarria (196 U. S. 175).....	436
Russell v. Russell (Mem.) (198 U. S. 584).....	1173	Skillin, Thompson v. (Mem.).....	631
Russia Cement Co. v. Frauenhar (Mem.) (196 U. S. 640) ..	631	Slavens v. United States (196 U. S. 229).....	457
S.		Slosser, Salt River Valley Canal Co. v. (Mem.).....	356
Sage v. Maxwell (Mem.) (197 U. S. 625).....	911	Small v. Rakestraw (196 U. S. 403) ..	527
v. Munsterman (Mem.) (197 U. S. 625).....	911	Smalley v. Laugenour (196 U. S. 93)	400
Saint Bernard Min. Co., Madisonville Traction Co. v.....	462	Smiley v. Kansas (196 U. S. 447)	546
St. John's Gas Co., San Juan v.....	299		

CASES REPORTED.

Smith, Olsen v.....	224	Texas, Fullerton v.....	443
Plymouth Cordage Co. v.		Greer County v.....	736
(Mem.).....	1175	Hernan v. (Mem.).....	1171
United States v.....	801	National Cotton Oil Co. v.....	689
Southampton Jessup v. (Mem.).....	349	Southern Cotton Oil Co. v.....	696
Southern Cotton Oil Co. v. Texas (197		Texas & P. R. Co. v. Dashiell (198 U.	
U. S. 134).....	696	S. 521).....	1150
Southern P. Co., Johnson v.....	363	Marande v. (Mem.).....	912
Southern R. Co., Atlanta, K. & N. R.		v. Swearingen (196 U. S. 51) ..	382
Co. v. (Mem.).....	354	Thomas v. Blair (Mem.) (196 U. S.	
Bradford v.....	178	637).....	630
Interstate Commerce Commis-		Johnson v. (Mem.).....	909
sion v. (Mem.).....	356	v. Ohio State University Trus-	
Sparks v. Guthrie (Mem.) (195 U. S.		tees (195 U. S. 207).....	160
633).....	353	v. United States (195 U. S. 418)	259
Springfield F. & M. Ins. Co., Hunt v..	381	United States v.....	259
S. P. Shotter Co., United States v.		Thompson v. Darden (198 U. S. 310)	1064
(Mem.).....	355	v. Fairbanks (196 U. S. 516) ..	577
Staaake, First Nat. Bank v. (Mem.) ..	910	Riverside County v. (Mem.) ..	630
McHarg v. (Mem.).....	910	v. Skillin (Mem.) (196 U. S.	
v. Watts (Mem.) (198 U. S.		642).....	631
587) ..	1175	Thornhill, The, Merchants' & M.	
Standard Fireproofing Co., St. Louis		Transp. Co. v. (Mem.)	909
Expanded Metal Fireproof-		Thornton v. Natchez (Mem.) (197 U.	
ing Co. v. (Mem.).....	351	S. 620).....	909
Stanley Instrument Co. v. Westing-		Tiffin Sav. Bank, Keppel v.....	790
house Electric & Mfg. Co.		Toledo, Western U. Teleg. Co. v.	
(Mem.) (195 U. S. 633) ..	354	(Mem.).....	355
Steigleder v. McQuesten (198 U. S.		Toledo, A. A. & N. M. R. Co., Middle-	
141).....	986	town Nat. Bank v.....	803
Stein, I. B. Kleinert Rubber Co. v.		Toltec Ranch Co., Hunsaker v. (Mem.)	356
(Mem.).....	631	Hunsaker v. (Mem.).....	912
Steyenson v. Fain (195 U. S. 165) ..	142	Toney v. Macon (Mem.) (195 U. S.	
Stewart, Kehrler v.....	663	625) ..	350
Stillman v. Combe (197 U. S. 436) ..	822	Travis v. United States (196 U. S.	
Stinson, United States v.....	724	239).....	461
Stratton, Holden v.....	1018	Traylor, McDaniel v.....	533
Stratton's Independence v. Dines		Treat, Leather Mfrs.' Nat. Bank v.	
(Mem.) (197 U. S. 623) ..	911	(Mem.).....	1173
Strauss, Re (197 U. S. 324).....	774	New York Teleph. Co. v.	
Superior, Jewell v. (Mem.).....	1173	(Mem.).....	1173
Supreme Lodge, K. of P. v. Meyer (198		Tredway, Kaufman v.....	190
U. S. 508).....	1146	Truman, Yazoo & M. Valley R. Co. v.	
Swan, Western U. Teleg. Co. v.		(Mem.).....	350
(Mem.).....	351		
Swearingen, Texas & P. R. Co. v.....	382		
Swift & Co. v. United States (196 U.			
S. 375).....	518		

U.

T

Tacoma Land Co., Ramsey v.....	513	Uhlig, Lavagnino v.	1119
Tacoma Mill Co. v. Black Hills & N.		Uinta Tunnel Min. & Transp. Co.,	
W. R. Co. (Mem.) (195 U.		Creede & C. C. Min. & Mill.	
S. 627).....	351	Co. v.....	501
Taft, United States ex rel. Edwards		Union Stock Yards Co. v. Chicago, B.	
v. (Mem.).....	350	& Q. R. Co. (196 U. S. 217)	453
Talcott v. Friend (Mem.) (197 U. S.		Union Trust Co. v. Wilson (198 U. S.	
620).....	909	530).....	1154
Tatman, Humphrey v.....	956	United Engineering & Contracting Co.	
Tennessee Oil, Gas & Mineral Co. v.		v. Broadnax (Mem.) (197	
Brown (Mem.) (197 U. S.		U. S. 624).....	911
621) ..	910	United States, Amado v.....	145
		American Sugar Ref. Co. v.	
		(Mem.).....	354
		Bartlett v.....	735
		Bartram v. (Mem.).....	354

CASES REPORTED.

United States Binyon v. (Mem.)....	349	United States v. Stinson (197 U. S. .	
Bishop v.	780	200)	724
v. Bong Meng (Mem.) (196 U.		Swift & Co. v.	518
S. 635)	629	v. Thomas (195 U. S. 418)....	259
Broadwell v.	99	Thomas v.	259
Brooks v. (Mem.)	632	Travis v.	461
Burton v.	482	v. United Verde Copper Co. (196	
v. Cadarr (Mem.) (195 U. S.		U. S. 207)	449
635)	355	Warner, B. & Co. v.	816
v. Cadarr (197 U. S. 475)....	842	v. Whitridge (Mem.) (195 U.	
v. Chicago, M. & St. P. R. Co.		S. 633)	353
(195 U. S. 524)	306	v. Whitridge (197 U. S. 135) ..	696
Chicago, M. & St. P. R. Co. v. .	1094	v. Winans (198 U. S. 371)....	1089
Cliff v.	139	v. Woo Joe (Mem.) (196 U. S.	
Clyatt v.	726	635)	629
v. Cornell S. B. Co. (Mem.)		United States ex rel. Knapp v. Lake	
(193 U. S. 583)	1173	Shore & M. S. R. Co. (197	
v. Crosley (196 U. S. 327)....	497	U. S. 536)	870
Curley v. (Mem.)	351	Edwards v. Taft (Mem.) (195	
Darnal v. (Mem.)	1174	U. S. 626)	350
v. Dieckerhoff (Mem.) (198 U.		United States L. Ins. Co. v. McMahon	
S. 583)	1173	(Mem.) (197 U. S. 621) ..	910
Dodge v. (Mem.)	353	United States Mortg. & T. Co., Mc-	
Dorr v.	128	Clure v. (Mem.)	911
v. Engard (196 U. S. 511)....	575	United Verde Copper Co., United	
v. Evans (195 U. S. 361)....	236	States v.	449
Goldenberg Bros. & Co. v.		Utermehle v. Norment (197 U. S. 40) .	655
(Mem.)	354		
Gurvich v. (Mem.)	1172		
Hackfeld v.	826		
Harley v.	1029		
Hartigan v.	434		
v. Harvey Steel Co. (196 U. S.			
310)	492		
Holden v. (Mem.)	631		
Howell v. (Mem.)	354		
v. Jock Coe (Mem.) (196 U. S.			
635)	629		
v. Ju Toy (198 U. S. 253)....	1040		
Kepner v.	114		
Kerr v. (Mem.)	1175		
Lincoln v.	816		
Lorenz v. (Mem.)	631		
McCaully v. (Mem.)	1174		
McCray v.	78		
v. Martinez (195 U. S. 469)....	282		
Mendezona v.	136		
v. Mills (197 U. S. 223)	732		
v. Montana Lumber & Mfg. Co.			
(196 U. S. 573)	604		
Moore v.	428		
Moses v. (Mem.)	353		
Ng Hong Li v. (Mem.)	629		
Peacock v. (Mem.)	356		
Rasmussen v.	862		
v. R. F. Downing & Co. (Mem.)			
(195 U. S. 631)	352		
Rodriguez v.	994		
Schick v.	99		
Shaffer v. (Mem.)	631		
Slavens v.	457		
v. Smith (197 U. S. 386)	801		
v. S. P. Shotter Co. (Mem.)			
(195 U. S. 636)	355		

V.

Vanderbilt v. Eidman (196 U. S. 480)	563
Van Reed v. People's Nat. Bank (198	
U. S. 554)	1161
Vicksburg, S. & P. R. Co., Leonard v. .	1108
Virginia, Old Dominion S. S. Co. v.	1059

W.

Walp v. Moar (Mem.) (198 U. S.	
588)	1175
Warder v. Loomis (Mem.) (197 U. S.	
619)	909
Warner v. Chicago & N. W. R. Co.	
(Mem.) (195 U. S. 637) ..	355
Warner, B. & Co. v. United States	
(197 U. S. 419)	816
Watts, Staake v. (Mem.)	1175
W. B. Conkey Co., Bessette v. (Mem.)	630
Wells Co. v. Gastonia Cotton Mfg. Co.	
(198 U. S. 177)	1003
Wenman, Whitney v.	1157
West Coast Naval Stores Co., Louis-	
ville & N. R. Co. v.	1135
Western Electrical Supply Co. v. Abbe-	
ville Electric Light & P.	
Co. (197 U. S. 299)	765
Western Electric Co. v. Hanselmann	
(Mem.) (197 U. S. 624) ..	911
Western Tie & Timber Co. v. Brown	
(196 U. S. 502)	571
Western Transit Co. v. Minnesota S. S.	
Co. (Mem.) (195 U. S. 636)	355

CASES REPORTED.

<p>Western U. Teleg. Co. v. Pennsylvania R. Co. (195 U. S. 540).... 312</p> <p>v. Pennsylvania R. Co. (195 U. S. 594)..... 332</p> <p>v. Swan (Mem.) (195 U. S. 628)..... 351</p> <p>v. Toledo (Mem.) (195 U. S. 637)..... 355</p> <p>Westinghouse Electric & Mfg. Co., Stanley Instrument Co. v. (Mem.)..... 354</p> <p>Wetmore v. Markoe (196 U. S. 68).. 390</p> <p>Whceler v. Plumas County (196 U. S. 562)..... 599</p> <p>Whitaker v. McBride (197 U. S. 510) 857</p> <p>Whitehead, Felici v. (Mem.)..... 356</p> <p>Whitney v. Wenman (198 U. S. 539). 1157</p> <p>Whitridge, United States v..... 696</p> <p>United States v. (Mem.)..... 353</p> <p>Wilderoft, The, W. J. McCahan Sugar Ref. Co. v. (Mem.)..... 355</p> <p>Wiley, National Exch. Bank v..... 184</p> <p>Williams, Charalambis v. (Mem.).... 632</p> <p>Pearson v. (Mem.)..... 1174</p> <p>Zarccone v. (Mem.)..... 355</p> <p>Wilson v. Atlantic Coast Line R. Co. (Mem.) (198 U. S. 585).. 1173</p> <p>Cramer v..... 256</p> <p>Union Trust Co. v..... 1154</p> <p>Winans, United States v..... 1089</p> <p>Wingate, Robinson v. (Mem.)..... 1171</p> <p>Wirgman v. Persons (Mem.) (196 U. S. 636)..... 629</p> <p>Wisconsin, Aikens v..... 154</p> <p>Hoyt v..... 154</p> <p>Huegin v..... 154</p>	<p>Wittman, Ah Sin v..... 1142</p> <p>W. J. McCahan Sugar Ref. Co. v. The Wilderoft (Mem.) (195 U. S. 635)..... 355</p> <p>W. L. Wells Co. v. Gastonia Cotton Mfg. Co. (198 U. S. 177).. 1003</p> <p>Wolff v. District of Columbia (196 U. S. 152)..... 426</p> <p>Woods, McGraw v. (Mem.)'..... 910</p> <p>Woo Joe, United States v. (Mem.).. 629</p> <p>Worcester v. Worcester Consol. Street R. Co. (196 U. S. 539).... 591</p> <p>Worcester Consol. Street R. Co., Worcester v..... 591</p> <p>Wright v. Louisville & N. R. Co. (195 U. S. 219)..... 167</p> <p>Wulff v. Lindsay (Mem.) (196 U. S. 642)..... 632</p> <p>Wyckoff, Seamans, & Benedict, Howe Scale Co. v..... 972</p> <p style="text-align: center;">Y.</p> <p>Yazoo & M. Valley R. Co. v. Truman (Mem.) (195 U. S. 625).. 350</p> <p style="text-align: center;">Z.</p> <p>Zarccone v. Williams (Mem.) (195 U. S. 637)..... 355</p> <p>Zartman v. First Nat. Bank (Mem.) (197 U. S. 621)..... 910</p>
--	--

CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

AT

OCTOBER TERM, 1903.

Vol. 195.

REFERENCE TABLE
 OF SUCH CASES
 DECIDED IN U. S. SUPREME COURT,
 OCTOBER TERMS, 1903, 1904,
 AND REPORTED HEREIN,

VOLUME 195,

 AS ALSO APPEAR IN
OFFICIAL REPORTER'S EDITION.

Off. Rep. 195 U. S.	Title.	Here in.	Off. Rep. 195 U. S.	Title.	Here in.
1-2	Bradley v. Lightcap No. 1	65	110-112	Kepner v. United States	114
2-4	" "	66	112-115	" "	118
4-6	" "	67	115-117	" "	119
16-17	" "	72	118-120	" "	120
17-20	" "	73	120-123	" "	121
20-22	" "	74	123-125	" "	122
22-24	" "	75	125-127	" "	123
24-25	Bradley v. Lightcap No. 2	75	127-130	" "	124
25	Bradley v. Lightcap No. 3	76	130-132	" "	125
25-26	" "	77	132-135	" "	126
26	" "	78	135-137	" "	127
27	McCray v. United States	78	137	" "	128
28-30	" "	79	138	Dorr v. United States	128
30	" "	80	139-141	" "	129
43	" "	90	141-144	" "	130
43-46	" "	91	144-146	" "	131
46-48	" "	92	146-148	" "	132
48-51	" "	93	148-151	" "	133
51-53	" "	94	151-154	" "	134
53-56	" "	95	154-156	" "	135
56-58	" "	96	156-158	" "	136
58-61	" "	97	158	Secundino Mendezona y Men-	
61-63	" "	98		dezona v. United States	136
63-64	" "	99	159	Cliff v. United States	139
65	{ Schich v. United States		159-161	" "	140
	{ Broadwell v. United States	99	161-164	" "	141
66-68	" "	101	164-165	" "	142
68-71	" "	102	165-166	Stevenson v. Fain	142
71-73	" "	103	166-168	" "	143
73-76	" "	104	168-170	" "	144
76-78	" "	105	171	Schweer v. Brown	144
78-81	" "	106	171-172	" "	145
81-83	" "	107	172-173	Amado v. United States	145
83-86	" "	108	173-175	" "	146
86-88	" "	109	175-176	" "	147
88-91	" "	110	176-177	Crawford v. Burke	147
91-93	" "	111	177-178	" "	148
93-96	" "	112	185-186	" "	150
96-98	" "	113	186-188	" "	151
98-100	" "	114	188-190	" "	152
100	Kepner v. United States	114	190-193	" "	153

REFERENCE TABLE.

Off. Rep. 195 U. S.	Title.	Here in.	Off. Rep. 195 U. S.	Title.	Here in.
193-194	Crawford v. Burke	154	312	Patterson v. Hewitt	216
194	{ Aikens v. Wisconsin		317	" "	217
	{ Huegin v. Wisconsin		317-320	" "	218
	{ Hoyt v. Wisconsin	154	320-322	" "	219
201-203	" "	158	322	Metropolitan R. Co. v. Dis-	
203-205	" "	159		trict of Columbia	
205-207	" "	160		("Metropolitan R. Co. v.	
207	Thomas v. Ohio State Univer-			Macfarland")	219
	sity	160	322-324	" "	220
208-210	" "	163	324-327	" "	221
210-212	" "	164	327-329	" "	222
212-215	" "	165	329-332	" "	223
215-217	" "	166	332	" "	224
217-218	" "	167	332	Olsen v. Smith	224
219-220	Wright v. Louisville & N. R.		338-340	" "	228
	Co.	167	340-342	" "	229
220-222	" "	168	342-345	" "	230
222-223	" "	169	345	" "	231
223-224	Dobbins v. Los Angeles	169	345-346	Birkett v. Columbia Bank	231
224	" "	170	349	" "	231
224-226	" "	171	349-351	" "	232
234-235	" "	174	351	Seattle v. Kelleher	232
235-237	" "	175	355-357	" "	234
237-240	" "	176	357-360	" "	235
240-242	" "	177	360	" "	236
242	Daly v. Elton	177	361	The Blackheath	
242-243	" "	178		("United States v. Evans")	236
243	Bradford v. Southern R. Co.	178	364	" "	236
243-245	" "	179	364-367	" "	237
247-248	" "	180	367-369	" "	238
248-251	" "	181	369	Citizens' Nat. Bank v. Don-	
251-252	" "	182		nell	238
252-253	New v. Oklahoma	182	372-374	" "	241
253-256	" "	183	374	" "	242
256	" "	184	375	Baltimore Shipbuilding & Dry	
257	National Exchange Bank v.			Dock Co. v. Baltimore	242
	Wiley	184	380-382	" "	244
259-261	" "	186	382	" "	245
261-263	" "	187	383	Helena Waterworks Co. v.	
263-266	" "	188		Helena	245
266-268	" "	189	383-384	" "	246
268-270	" "	190	387-389	" "	248
271	Kaufman v. Tredway	190	389-391	" "	249
271-273	" "	191	391-394	" "	250
273-275	" "	192	394	" "	251
275-276	" "	193	395	Hill v. McCord	251
276-277	{ Fayerweather v. Ritch		395-398	" "	252
	{ Reynolds v. Ritch	193	398-400	" "	253
277-280	" "	194	400-403	" "	254
280-282	" "	195	403-406	" "	255
282-285	" "	196	406-408	" "	256
285-287	" "	197	408	Cramer v. Wilson	256
287-288	" "	198	408-410	" "	257
297-298	" "	209	414-416	" "	258
298-300	" "	210	416-417	" "	259
300-303	" "	211	418	{ United States v. Thomas	
303-305	" "	212		{ Thomas v. United States	259
305-307	" "	213	418-421	" "	260
307-309	" "	214	421-423	" "	261
309-310	Patterson v. Hewitt	214	423-426	" "	262
310-312	" "	215	426-427	" "	263

REFERENCE TABLE.

Off. Rep. 195 U. S.	Title.	Here In.	Off. Rep. 195 U. S.	Title.	Here In.
427	Lockhart v. Leeds	263	527-530	United States v. Chicago, M. & St. P. R. Co.	308
427-430	" "	264			
430-431	" "	265	530	" "	309
432-434	" "	267	534-535	" "	310
434-436	" "	268	535-537	" "	311
436-438	" "	269	537-539	" "	312
439	Northern P. R. Co. v. Ameri- can Trading Co.	269	540	Western U. Teleg. Co. v. Penn- sylvania R. Co.	312
440-441	" "	270	540-542	" "	313
441-443	" "	271	542-545	" "	314
443-446	" "	272	545-547	" "	315
446-449	" "	273	547	" "	316
449-451	" "	274	557-559	" "	318
451-453	" "	275	559-562	" "	319
457	" "	277	562-565	" "	320
457-460	" "	278	565-567	" "	321
460-463	" "	279	567-569	" "	322
463-465	" "	280	569-572	" "	323
465-468	" "	281	572-575	" "	324
468-469	" "	282	575-577	" "	325
469-470	United States v. Martinez	282	577-580	" "	326
470	" "	283	580-582	" "	327
472-473	" "	283	582-584	" "	328
473-475	" "	284	584-587	" "	329
475-478	" "	285	587-589	" "	330
478-480	" "	286	589-592	" "	331
480	Humbird v. Avery	286	592-594	" "	332
481-483	" "	291	594	Western U. Teleg. Co. v. Penn- sylvania R. Co.	332
483-486	" "	292			
486-488	" "	293	595-597	" "	335
488-491	" "	294	597-599	" "	336
498	" "	294	599-602	" "	337
498-500	" "	295	602-604	" "	338
501-503	" "	296	604	Ex parte Republic of Colom- bia	338
503-505	" "	297			
505-508	" "	298	604-605	" "	339
508-510	" "	299	605-606	" "	340
510	San Juan v. St. John's Gas Co.	299	606-607	Bullis v. O'Beirne	340
511-512	" "	300	607-609	" "	341
512-514	" "	301	609-612	" "	342
514-515	" "	302	612	" "	343
515-518	" "	303	615	" "	344
518-520	" "	304	615-617	" "	345
520-523	" "	305	617-620	" "	346
523	" "	306	620-621	" "	347
524-525	United States v. Chicago, M. & St. P. R. Co.	306	623-640	Memorandum Cases	349-356
525-527	" "	307			
195 U. S.					

THE DECISIONS
OF THE
Supreme Court of the United States
AT
OCTOBER TERM, 1903.

[1]*LYDIA BRADLEY, *Plff. in Err.*,

v.

H. W. LIGHTCAP.

(See S. C. Reporter's ed. 1-24.)

Constitutional law—impairment of contract obligations—due process of law—destruction of rights of mortgagee in possession.

1. The obligation of the contract of a mortgagee in possession after condition broken, who afterwards bld in the property for less than the mortgage debt on the sale in foreclosure proceedings initiated by her before Ill. act of March 22, 1872, § 30, went into effect, is impaired by the change in the law made by the requirement of that section that the master's deed be taken out within a specified time after the expiration of the time for redemption, where failure to comply with this requirement is held by the highest state court to destroy the right of possession taken under the mortgage, to avoid the certificate of sale, and to entitle the mortgagor, without payment of the mortgage debt, to recover possession in ejectment, on the strength of a perfect title.
2. Due process of law is denied by the requirement of Ill. act of March 22, 1872, § 30, that the master's deed be taken out by the purchaser on a foreclosure sale within a specified time after the expiration of the time for redemption, where failure to comply with such requirement is held by the highest state court to destroy the rights of a mortgagee in possession after condition broken, to avoid the certificate of sale issued to her on her purchase for less than the amount of the mortgage debt at a sale in foreclosure proceedings initiated by her before such statute went into effect, and to entitle the mortgagor,

without payment of his debt, to recover possession in ejectment, on the strength of a perfect title.

[No. 243.]

Argued April 21, 1904. Decided May 31, 1904.

IN ERROR to the Supreme Court of the State of Illinois to review a judgment which affirmed a judgment of the Circuit Court of Mason County, in that state, in favor of plaintiff in ejectment. *Reversed* and remanded for further proceedings.

See same case below, 201 Ill. 511, 66 N. E. 546.

Statement by Mr. Chief Justice **Fuller**:

*Five ejectment suits were brought by [2] Lightcap against tenants of Mrs. Bradley, July 13, 1895, in the circuit court of Mason county, Illinois, and taken on change of venue to Fulton county, where they were consolidated; Mrs. Bradley was let in to defend, and the case went to judgment in her favor. This judgment was reversed by the supreme court of Illinois, after several hearings, and the case remanded to the circuit court. 186 Ill. 510, 58 N. E. 221. On the retrial, judgment was recovered by Lightcap, which was affirmed by the supreme court (201 Ill. 511, 66 N. E. 546), and this writ of error prosecuted.

On the disposition of the case when brought to the supreme court the second time the division of opinion among the sev-

NOTE.—As to what laws are void as impairing obligation of contracts—see notes to *Franklin County Grammar School v. Bailey*, 10 L. R. A. 405; *Fletcher v. Peck*, 3 L. ed. U. S. 162; *M'Canna & F. Co. v. Citizens' Trust & Surety Co.* 24 C. C. A. 20; and *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co.* 35 C. C. A. 12.

That impairing the remedy impairs the obligation of contract—see notes to *Best v. Baumgardner*, 1 L. R. A. 356; *Louisiana ex rel.* 195 U. S. U. S., Book 49.

Ranger v. New Orleans, 26 L. ed. U. S. 132; and *Phinney v. Phinney*, 4 L. R. A. 348.

As to what constitutes due process of law—see *Kuntz v. Sumption*, 2 L. R. A. 655, and note; *Re Gannon*, 5 L. R. A. 359, and note; *Uiman v. Baltimore*, 11 L. R. A. 224, and note; and *Gilman v. Tucker*, 13 L. R. A. 304, and note. And see notes to *People v. O'Brien*, 2 L. R. A. 255; *Pearson v. Yewdall*, 24 L. ed. U. S. 436; and *Wilson v. North Carolina*, 42 L. ed. U. S. 865.

en members of the court found expression. Mr. Chief Justice Magruder, Mr. Justice Carter, and Mr. Justice Ricks concurred in the opinion of Mr. Justice Cartwright in affirmation of the judgment. Mr. Justice Wilkin and Mr. Justice Boggs filed dissents, and Mr. Justice Hand, while agreeing that the legal title was in Lightcap, was of opinion that the full beneficial interest was in Mrs. Bradley, and that she, being in possession, a court of chancery might protect her equitable interest and possession by enjoining the prosecution of the ejectment suit.

The facts are in substance these:

Tobias S. Bradley loaned T. B. Breedlove, June 3, 1867, \$19,616, evidenced by notes payable in one, two, three, four, and five years, respectively, and secured by a trust deed on 1,200 acres of land in Mason county, Illinois. On Bradley's death, Lydia, his widow, became the sole owner of the trust deed and notes. October 8, 1867, Breedlove conveyed the 1,200 acres to Prettyman, subject to the mortgage to Bradley. August 13, 1868, Prettyman conveyed 680 acres to McCune, and McCune gave a trust deed thereon to E. G. Johnson, trustee, to secure the payment of \$15,000, evidenced by three notes, to the order of Lydia Bradley, and due in one, two, and three years after date. Mrs. Bradley, through her agent, accepted these notes and trust deed as part payment [3] of the *Breedlove notes, and Prettyman paid the difference, and the 1,200 acres were released from the Breedlove trust deed or mortgage.

November 13, 1868, McCune conveyed the 680 acres to Prettyman, subject to the trust deed to Johnson. No taxes were paid by McCune or by Prettyman, and no part of the mortgage debt was ever paid.

May 24, 1871, Mrs. Bradley redeemed from the tax sales for taxes of 1868 and 1869, and in 1872 for the taxes of 1871, and she has paid all other taxes assessed on the land since the trust deed or mortgage was given.

Early in the summer of 1871, Austin Johnson, whom Mrs. Bradley, in July, 1870, had appointed her business agent, went on the land on her behalf, and, in 1872, Mrs. Bradley and Austin Johnson together went upon the land, and she took personal and exclusive possession of it, which, by herself and her tenants, she has retained ever since.

February 22, 1872, Mrs. Bradley filed a bill in the circuit court of Mason county to set aside the release of the Breedlove trust deed or mortgage, on the ground of fraud, and for the foreclosure of that mortgage on the 1,200 acres for the payment of the balance of the original debt. McCune was a party, but seems to have left the state, and was brought in by publication. The bill

was contested, and on August 22, 1879, the Mason circuit court entered a decree of foreclosure and sale on the McCune trust deed, finding the amount due Mrs. Bradley to be \$31,500. The 680 acres were sold by the master in chancery, October 27, 1879, bid in for Mrs. Bradley for \$10,000, and a certificate was issued to her.

Mrs. Bradley proceeded to develop and improve the 680 acres, drained the tract, erected farm buildings, laid tiles, reduced the land to cultivation, and has maintained exclusive possession to this date.

September 4, 1893, Prettyman gave a quitclaim deed of the land to Lightcap, which was recorded November 30, 1894. July 13, 1895, these actions in ejectment were commenced.

*The McCune trust deed or mortgage was [4] executed August 13, 1868, and at that time chapter 57 of the Revised Statutes of Illinois contained these sections:

"Sec. 12. Whenever any lands or tenements shall be sold by virtue of any execution, it shall be the duty of the sheriff or other officer, instead of executing a deed for the premises sold, to give to the purchaser or purchasers of such land or tenements a certificate in writing, describing the lands or tenements purchased, and the sum paid therefor, or, if purchased by the plaintiff in the execution, the amount of his bid, and the time when the purchaser will be entitled to a deed for such lands or tenements, unless the same shall be redeemed, as is provided in this chapter, and such sheriff or other officer shall, within ten days from such sale, file in the office of the recorder of the county, a duplicate of such certificate, signed by him; and such certificate, or a certified copy thereof, shall be taken and deemed evidence of the facts therein contained.

"Sec. 13. It shall be lawful for any defendant, his heirs, executors, administrators, or grantees, whose lands or tenements shall be sold by virtue of any execution, within twelve months from such sale, to redeem such lands or tenements, by paying to the purchaser thereof, his executors, administrators, or assigns, or to the sheriff or other officer who sold the same, for the benefit of such purchaser, the sum of money which may have been paid on the purchase thereof, or the amount given or bid, if purchased by the plaintiff in the execution, together with interest thereon at the rate of 10 per centum from the time of such sale, and on such sum being made as aforesaid, the said sale and the certificate thereupon granted shall be null and void."

"Sec. 22. If such lands or tenements so sold shall not be redeemed as aforesaid, either by the defendant or by such creditor

as aforesaid, within fifteen months from the time of such sale, it shall be the duty of the sheriff or other officer, who sold the same, or his successor in office, or his ex-
[5]ecutors *or administrators, to complete such sale, by executing a deed to the purchaser;
.. ."

"Sec. 24. In all cases hereafter, where lands shall be sold under and by virtue of any decree of a court of equity, for the sale of mortgaged lands, it shall be lawful for the mortgagor of such lands, his heirs, executors, administrators, or grantees to redeem the same in the manner prescribed in this chapter for the redemption of lands sold by virtue of executions issued upon judgments at common law, and judgment creditors may redeem lands sold under any such decree in the same manner as is prescribed for the redemption of lands in like manner sold upon executions issued upon judgments at common law."

The statutes contained no limitation of time within which a sheriff's or master's deed must be taken after the period for redemption had expired, and prescribed no penalty or loss of right to the purchaser by reason of delay or failure in taking out such deed.

In *Rucker v. Dooley*, 49 Ill. 377, 95 Am. Dec. 614, the supreme court of Illinois, at its September term, 1868, reasoning by analogy, held in an equity suit, as against a purchaser of real estate at an execution sale, who was never in its possession, and had no claim to it, except under his judgment and sale, and who had taken out a sheriff's deed twenty-nine years after the sale, and in favor of a bona fide purchaser, in possession, claiming by mesne conveyances from the judgment debtor, that, for the protection of purchasers for a valuable consideration, without notice, from the judgment debtor and those claiming under him, a sheriff's deed ought not to be issued after the lapse of twenty years, and that application for a deed made after the lapse of seven years, during which the judgment was a lien, and fifteen months, the time given for redemption, and within twenty years, should be made to the proper court by rule on the sheriff and notice to the parties interested.

March 22, 1872, an act of the general assembly of Illinois was approved, entitled, "An Act in Regard to Judgments and Decrees, and the Manner of Enforcing the
[6]Same by Execution, *and to Provide for the Redemption of Real Estate Sold Under Execution or Decree," which went into force July 1, 1872, the provisions of which were not materially different from those above quoted, but § 30 was as follows, the additions to former acts being indicated by italics:

195 U. S.

"§ 30. When the premises mentioned in any such certificate shall not be redeemed in pursuance of law, the legal holder of such certificate shall be entitled to a deed therefor *at any time within five years from the expiration of the time of redemption.* The deed shall be executed by the sheriff, master in chancery, or other officer who made such sale, or by his successor in office, or by some person specially appointed by the court for the purpose. *If the time of redemption shall have elapsed before the taking effect of this act, a deed may be given within two years from the time this act shall take effect. When such deed is not taken within the time limited by this act, the certificate of purchase shall be null and void; but if such deed is wrongfully withheld by the officer whose duty it is to execute the same, or if the execution of such deed is restrained by injunction or order of a court or judge, the time during which the deed is so withheld or the execution thereof restrained shall not be taken as any part of the five years within which said holder shall take a deed.*"

Mr. John S. Miller argued the cause, and, with Messrs. Merritt Starr and W. W. Hammond, filed a brief for plaintiff in error:

The law of the land, as recognized and enforced by the courts, providing means of enforcement of contracts, becomes a part of the contract the same as though included in its terms; and a change in such law, after a contract has been made or title vested thereunder, by which change the obligation of such contract is impaired or such title is divested, impairs the obligation of contracts, and, if accomplished by a statute of a state, is obnoxious to the Federal Constitution.

Tennessee v. Sneed, 96 U. S. 69, 24 L. ed. 610; *Edwards v. Kearzey*, 96 U. S. 595, 24 L. ed. 793; *Louisiana v. New Orleans*, 102 U. S. 203, 26 L. ed. 132; *Walker v. Whitehead*, 16 Wall. 314, 21 L. ed. 357; *Field v. Brokaw*, 148 Ill. 654, 37 N. E. 80; *Barnitz v. Beverly*, 163 U. S. 118, 41 L. ed. 93, 16 Sup. Ct. Rep. 1042; *Seibert v. Lewis*, 122 U. S. 284, 30 L. ed. 1161, 7 Sup. Ct. Rep. 1206; *Bronson v. Kinzie*, 1 How. 311, 319, 11 L. ed. 143, 146; *Gunn v. Barry*, 15 Wall. 610, 21 L. ed. 212; *Shapleigh v. San Angelo*, 167 U. S. 646, 657, 42 L. ed. 310, 314, 17 Sup. Ct. Rep. 957; *Ogden v. Saunders*, 12 Wheat. 213, 257, 6 L. ed. 606, 621; *McCracken v. Hayward*, 2 How. 608, 617, 11 L. ed. 397, 401.

The English law of mortgages was adopted in Illinois. A mortgage is a conditional conveyance of the fee. The legal title passes to the mortgagee. After condition broken,

the title at law becomes absolute in the mortgagee, who may recover possession as against the mortgagor. The mortgagee is held, in law, the owner of the fee, having the *jus in rem*, as well as the *jus ad rem*. This ejectment suit was one at law, and it did not matter that the rule was different in a court of equity, as the court at law could not consider that rule.

Esler v. Heffernan, 159 Ill. 38, 41 N. E. 1113.

After condition broken, the mortgagor has only an equity of redemption. By the redemption statute in force when this mortgage was given, that equitable estate or right was continued for twelve months after a foreclosure.

Bronson v. Kinzie, 1 How. 311, 318, 11 L. ed. 143, 147.

Such was the law of the state as promulgated by the courts of last resort at and before the date of the mortgage contract in question in this case.

Bronson v. Kinzie, 1 How. 311, 318, 11 L. ed. 143, 145; *Carroll v. Ballance*, 26 Ill. 9, 79 Am. Dec. 354; *Chickering v. Failes*, 26 Ill. 507; *Nelson v. Pinegar*, 30 Ill. 473; *Griffin v. Marine Co.* 52 Ill. 130; *Kenyon v. Shreck*, 52 Ill. 382; *Kelgour v. Wood*, 64 Ill. 345; *Williams v. Bruntton*, 8 Ill. 600; *Longwith v. Butler*, 8 Ill. 32; *Kruse v. Scripps*, 11 Ill. 98.

The right of the mortgagor, or his grantees, to redeem after condition broken, is a purely equitable right,—the creation of courts of chancery,—and can be asserted only in a court of equity. It could not be recognized in a court of law in an ejectment suit, as is done in the case at bar.

Kenyon v. Shreck, 52 Ill. 382; *Bracken v. Cooper*, 80 Ill. 221; *Mulvey v. Gibbons*, 87 Ill. 367.

His right of redemption after sale and under the statute was only upon the absolute condition of making full payment, within a prescribed time, of the bid, interest, and costs.

And so the law of Illinois remained after said date, and still remains; and is enforced in cases where the statute of 1872 does not apply to change it.

Kelgour v. Wood, 64 Ill. 345; *Vallette v. Bennett*, 69 Ill. 632; *Harper v. Ely*, 70 Ill. 581; *Oldham v. Pfleger*, 84 Ill. 102; *Davis v. Connecticut Mut. L. Ins. Co.* 84 Ill. 508; *Mulvey v. Gibbons*, 87 Ill. 367; *Fitch v. Wetherbee*, 110 Ill. 475; *Smith v. Mace*, 137 Ill. 68, 26 N. E. 1092; *Esler v. Heffernan*, 159 Ill. 38, 41 N. E. 1113; *Walker v. Warner*, 179 Ill. 16, 70 Am. St. Rep. 85, 53 N. E. 594; *Ware v. Schintz*, 190 Ill. 189, 60 N. E. 67; *Farrar v. Payne*, 73 Ill. 83; *Stone v. Tyler*, 173 Ill. 147, 50 N. E. 688.

By the law of Illinois as promulgated and

enforced by the courts of last resort at and prior to the date of said mortgage contract, if the mortgagor and his grantees failed to redeem the mortgaged premises from foreclosure sale within the time limited by the statute and the decree of foreclosure, his equity of redemption was barred and foreclosed, and thereafter he had no further right, title, or claim in or to the premises.

Burgett v. Osborne, 172 Ill. 227, 50 N. E. 206; *Bozarth v. Largent*, 128 Ill. 95, 21 N. E. 218; *Smith v. Mace*, 137 Ill. 68, 26 N. E. 1002; *Stephens v. Illinois Mut. F. Ins. Co.* 43 Ill. 327; 2 Jones, *Mortg.* § 1661; *Mulvey v. Gibbons*, 87 Ill. 367; *Massey v. Westcott*, 40 Ill. 160; *Herdman v. Cooper*, 138 Ill. 583, 28 N. E. 1094; *Lucas v. Nichols*, 66 Ill. 41; *McLagan v. Brown*, 11 Ill. 519; *Fitch v. Wetherbee*, 110 Ill. 475.

Defendant in error could only recover in this ejectment suit on the strength of his own title.

Hague v. Porter, 45 Ill. 318; *Vallette v. Bennett*, 69 Ill. 632; *Hammond v. Shepard*, 186 Ill. 235, 78 Am. St. Rep. 274, 57 N. E. 867.

And this must be a legal, and not a mere equitable, title.

Vallette v. Bennett, 69 Ill. 632.

But, on the other hand, defendant in error could not recover, even if he had the legal title, while plaintiff in error rightfully held the possession of the land under a complete equitable title.

Stow v. Russell, 36 Ill. 18; *Staley v. Murphy*, 47 Ill. 241; *Kilgour v. Gockley*, 83 Ill. 109; *Sands v. Wacaser*, 149 Ill. 530, 36 N. E. 960.

As construed by the supreme court of Illinois in the case at bar, the statute of 1872 has so changed the law that, notwithstanding the mortgagor and those claiming under him did not redeem said premises from said sale according to law, when the certificate of purchase became void, the title to said premises must, in order to give practical effect to said statute, be still in the mortgagor or in the defendant in error claiming under him.

Lightcap v. Bradley, 186 Ill. 510, 58 N. E. 221.

For the purpose of determining whether it infringes the Constitution, as claimed, said statute must be understood to mean what the courts of last resort of the state have construed it to mean.

Bell v. Morrison, 1 Pet. 351, 7 L. ed. 174; *D'Wolf v. Rabaud*, 1 Pet. 476, 7 L. ed. 227; *Van Rensselaer v. Kearney*, 11 How. 297, 13 L. ed. 703; *Tioga R. Co. v. Blossburg & C. R. Co.* 20 Wall. 137, 22 L. ed. 331; *Townsend v. Todd*, 91 U. S. 452, 23 L. ed. 413; *Scipio v. Wright*, 101 U. S. 665, 25 L. ed.

1037; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

A statutory bar does not satisfy a debt, annul a contract, or deprive the holder of security.

Keener v. Crull, 19 Ill. 189; *Newland v. Marsh*, 19 Ill. 376; *McCagg v. Heacock*, 42 Ill. 153; *Brockman v. Sieverling*, 6 Ill. App. 512; *Hancock v. Franklin Ins. Co.* 114 Mass. 155; *Moses v. St. Paul*, 67 Ala. 168; *Whelan v. Kinsley*, 26 Ohio St. 131; *Waterman v. Brown*, 31 Pa. 161; *Kemp v. Westbrook*, 1 Ves. Sr. 278.

If plaintiff in error had a right of entry as against the mortgagor in 1872, when condition was broken and she made her peaceable entry, the statute of 1872, which the supreme court of Illinois says is merely a statute of limitation, cannot have destroyed or changed that right of possession without invading the Constitution; for laches will not be imputed to one in the peaceable possession of land.

Mills v. Lockwood, 42 Ill. 111; *Dorman v. Dorman*, 187 Ill. 154, 79 Am. St. Rep. 210, 58 N. E. 235; *Wilson v. Byers*, 77 Ill. 76; *Boyd v. Boyd*, 163 Ill. 611, 45 N. E. 118; *A. R. Beck Lumber Co. v. Rupp*, 188 Ill. 562, 80 Am. St. Rep. 190, 59 N. E. 429; *Parker v. Shannon*, 137 Ill. 376, 27 N. E. 525; *Bush v. Stanley*, 122 Ill. 406, 13 N. E. 249.

A constitutional statute of limitations does not run against or affect a possessor of real estate, but one out of possession. This was the law of Illinois when this mortgage deed was made.

Mills v. Lockwood, 42 Ill. 111; *Parker v. Shannon*, 137 Ill. 376, 27 N. E. 525.

By the repeated decisions of the court of last resort of Illinois it had become a fixed rule of property at and prior to the date of said mortgage, that the mortgage conveyed the fee, subject to conditional defeasance; that after condition broken the title became absolute in the mortgagee, who was entitled to recover possession of the premises; and that such legal title remained in the mortgagee, unaffected by the equitable proceedings and decree of foreclosure and sale, until by the master's deed it should pass to the purchaser at such sale. Such subsequent proceedings were in aid, and not in extinguishment, of the original title of the mortgagee.

Williams v. Brunton, 8 Ill. 600; *Kruse v. Scripps*, 11 Ill. 98; *Farrar v. Payne*, 73 Ill. 82.

Such a change in the law, as here applied, deprives plaintiff in error of the right, title, and interest vested in her under the laws of the state as they existed at the date of her mortgage and when condition was broken and when she took possession, and violates
195 U. S.

the prohibition of the 14th Amendment of the Federal Constitution.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *Scott v. McNeal*, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108; *Taylor v. Beckham*, 178 U. S. 548, 44 L. ed. 1187, 20 Sup. Ct. Rep. 890, 1009; *Tindal v. Wesley*, 167 U. S. 204, 42 L. ed. 137, 17 Sup. Ct. Rep. 770.

If the constitutional guaranties referred to protect plaintiff in error from the divestiture of her title, either by the statute of 1872 or by the decision of the supreme court of Illinois, she has such an equitable title as is contemplated by the statute of 1835; and having been in possession, by actual residence thereon by her tenants, since 1872, and paid all the taxes, and for more than seven successive years from and after the expiration of the period of redemption (when her equitable title became complete),—she is protected by said statute from the action of defendant in error.

Irving v. Brownell, 11 Ill. 402; *Collins v. Smith*, 18 Ill. 160; *Martin v. Judd*, 81 Ill. 488; *Dolton v. Cain*, 14 Wall. 472, 20 L. ed. 830; *Gregg v. Tesson*, 1 Black, 150, 17 L. ed. 74; *Dredge v. Forsyth*, 2 Black, 563, 17 L. ed. 253.

Messrs. E. A. Wallace and George W. Wall argued the cause, and, with **Mr. Lyman Lucey, Jr.**, filed a brief for defendant in error:

The Illinois statute complained of is a statute of limitation, and is held to be such by the supreme court of Illinois.

Ryhiner v. Frank, 105 Ill. 326; *Peterson v. Emmerson*, 135 Ill. 55, 25 N. E. 842; *Seiberger v. Weinberg*, 151 Ill. 369, 37 N. E. 1033; *Brown v. Ridenhower*, 161 Ill. 239, 43 N. E. 976; *Lightcap v. Bradley*, 186 Ill. 510, 58 N. E. 221; *Bradley v. Lightcap*, 201 Ill. 511, 66 N. E. 546.

The legislature of a state has the right to enact statutes of limitation; and it is no objection to their validity that they are made to apply to existing rights, provided a reasonable time be given in the future for complying with the statute.

Wheeler v. Jackson, 137 U. S. 245, 255, 34 L. ed. 659, 663, 11 Sup. Ct. Rep. 76; *Terry v. Anderson*, 95 U. S. 628, 632, 24 L. ed. 365, 366; *Koshkonong v. Burton*, 104 U. S. 668, 674, 26 L. ed. 886, 888; *Jackson ex dem. Hart v. Lamphire*, 3 Pet. 280, 290, 7 L. ed. 679, 683; *Bronson v. Kinzie*, 1 How. 311, 316, 11 L. ed. 143, 145; *Ross v. Duval*, 13 Pet. 45, 64, 10 L. ed. 51, 60; *Vance v. Vance*, 108 U. S. 514, 27 L. ed. 808, 2 Sup. Ct. Rep. 854.

In Illinois, the title to land mortgaged is not out of the mortgagor, except as between him and the mortgagee, and then only as an

incident of the mortgage debt, for the sole purpose of obtaining satisfaction. As to all other persons, and for all other purposes, the mortgagor is the legal owner of the mortgaged premises; and in the case at bar, the supreme court of Illinois merely adheres to the law of the state as it always has existed therein.

Fitch v. Pinckard, 5 Ill. 69; *Ryan v. Dunlap*, 17 Ill. 40, 63 Am. Dec. 334; *Sargent v. Howe*, 21 Ill. 149; *Vansant v. Allmon*, 23 Ill. 30; *Hall v. Lance*, 25 Ill. 280; *Harris v. Mills*, 28 Ill. 44, 81 Am. Dec. 259; *Pollock v. Maison*, 41 Ill. 516; *Emory v. Keighan*, 88 Ill. 482; *Delano v. Bennett*, 90 Ill. 533; *Barrett v. Hinckley*, 124 Ill. 32, 7 Am. St. Rep. 331, 14 N. E. 863; *Lightcap v. Bradley*, 186 Ill. 518, 58 N. E. 221; *Ware v. Schintz*, 190 Ill. 189, 60 N. E. 67; *Hughes v. Edwards*, 9 Wheat. 497, 500, 6 L. ed. 144, 145; *Hutchins v. King*, 1 Wall. 53, 17 L. ed. 544.

While the mortgage conveys to the mortgagee a legal title, it is only a limited or qualified legal title; and neither before nor after condition broken does the mortgagee have the "absolute legal title" under the law of Illinois. On the contrary, it is only a base or determinable fee. Independent of the debt which the mortgage is given to secure, he has no title whatever. When the debt is paid, released, discharged, or barred by the statute of limitations, or in any way satisfied, the mortgagee's title is extinguished by operation of law.

Barrett v. Hinckley, 124 Ill. 32, 7 Am. St. Rep. 331, 14 N. E. 863; *Delano v. Bennett*, 90 Ill. 533; *Waughop v. Bartlett*, 165 Ill. 124, 46 N. E. 197; *Speer v. Haddock*, 31 Ill. 439; *Bogardus v. Moses*, 181 Ill. 554, 54 N. E. 984; *Lightcap v. Bradley*, 186 Ill. 510, 58 N. E. 221; *Ware v. Schintz*, 190 Ill. 189, 60 N. E. 67.

The title which the mortgagee gets by the mortgage can be used by him for one, and only one, purpose, viz., as a means for the collection of the debt secured, or so much thereof as the mortgaged premises, when resorted to for that purpose, will satisfy. A valid foreclosure of the mortgage by a decree of a court of equity in a foreclosure suit, followed by a valid sale in pursuance of the decree, extinguishes the mortgage lien and satisfies the debt, so far as the mortgage and land is concerned.

Smith v. Smith, 32 Ill. 198; *Seligman v. Laubheimer*, 58 Ill. 124; *Ogle v. Koerner*, 140 Ill. 170, 29 N. E. 563; *Rains v. Mann*, 68 Ill. 264; *Robins v. Swain*, 68 Ill. 197; *Finley v. Thayer*, 42 Ill. 350; *School Trustees v. Love*, 34 Ill. App. 418; *People v. Beebe*, 1 Barb. 379.

The land, having been once applied by sale under a valid foreclosure towards satisfying

the debt which was a charge upon it, could not again be sold or applied to the payment of the same charge.

State Bank v. Wilson, 9 Ill. 57; *Whitenack v. Agartt*, 56 Ill. App. 72; *Smith v. Smith*, 32 Ill. 198; *Hughes v. Frisby*, 81 Ill. 188; *Ogle v. Koerner*, 140 Ill. 170, 29 N. E. 563; *Smith v. Vandyke*, 17 Wis. 208; *Smith v. Ludington*, 17 Wis. 335; *Warrick v. Hull*, 102 Ill. 280.

The authorities already cited show that a mortgagee, or *cestui que trust*, who becomes the purchaser at the foreclosure sale, thereafter sustains the same relation to the property that any stranger would sustain if such stranger had been purchaser.

And see *Davis v. Dale*, 150 Ill. 239, 37 N. E. 215.

In Illinois, a certificate of purchase is only a lien. No title passes to the holder of it, and there is none vested in him until the deed is made. Until the deed is made, he is not even entitled to the possession of the premises.

Bennett v. Matson, 41 Ill. 332; *O'Brian v. Fry*, 82 Ill. 274; *Rockwell v. Servant*, 63 Ill. 425; *Vaughn v. Ely*, 4 Barb. 159; *Evertson v. Sawyer*, 2 Wend. 507; *Aldrich v. Sharp*, 4 Ill. 261; *Kihlholz v. Wolff*, 8 Ill. App. 371; *Johnson v. Baker*, 38 Ill. 98, 87 Am. Dec. 293; *Hays v. Cassell*, 70 Ill. 669; *Stephens v. Illinois Mut. F. Ins. Co.* 43 Ill. 327; *Lightcap v. Bradley*, 186 Ill. 510, 58 N. E. 221; *Bowman v. People*, 82 Ill. 246, 25 Am. Rep. 316; *Roberts v. Clelland*, 82 Ill. 538; *Smith v. Colvin*, 17 Barb. 161.

The statute complained of, at most, only operates upon the remedy, and not even upon that until after all contract rights, obligations, and duties given by or growing out of the McCune trust deed had been enforced, and the trust deed itself extinguished by the foreclosure and sale. From and after the sale, all rights and interests of plaintiff in error in or to the land were measured by the certificate of purchase.

Davis v. Dale, 150 Ill. 239, 37 N. E. 215; *Ogle v. Koerner*, 140 Ill. 170, 29 N. E. 563; *Seligman v. Laubheimer*, 58 Ill. 124; *Scheberger v. Weinberg*, 151 Ill. 369, 37 N. E. 1033; *Lightcap v. Bradley*, 186 Ill. 510, 58 N. E. 221; *Peterson v. Emmerson*, 135 Ill. 55, 25 N. E. 842; *Ryhiner v. Frank*, 105 Ill. 326; *Smith v. Smith*, 32 Ill. 198; *Rains v. Mann*, 68 Ill. 264; *Wayman v. Cochrane*, 35 Ill. 152; *Leslie v. Bontel*, 130 Ill. 501, 6 L. R. A. 62, 22 N. E. 594.

A legislative act is not in conflict with the Federal Constitution, prohibiting the impairment of the obligation of a contract, unless it operates directly on the contract and impairs it.

Hanford v. Davies, 163 U. S. 273, 41 L. ed. 157, 16 Sup. Ct. Rep. 1051; *Turner v.*

Wilkes County, 173 U. S. 461, 43 L. ed. 768, 19 Sup. Ct. Rep. 464; *Central Land Co. v. Laidley*, 159 U. S. 109, 40 L. ed. 93, 16 Sup. Ct. Rep. 80; *Von Hoffman v. Quincy*, 4 Wall. 535, 18 L. ed. 403.

The conclusions of the supreme court of Illinois as to the respective rights, title, and interest of the mortgagor and mortgagee; the effect of the foreclosure proceedings and the sale of the mortgaged premises by the master in chancery; the relation which the plaintiff in error sustained to the property by bidding the same off at the sale; the rights or interest acquired by the certificate of purchase; the rights, title, and estate still remaining in the mortgagor or his grantee, Prettyman, after the sale; the necessity of a deed, after redemption expired, in order to divest the title and estate of the mortgagor or his grantee, and vest the same in the holder of the certificate,—being predicated on the general local law of the state governing the same, are not reviewable by this court on a writ of error to the supreme court of the state.

New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co. 125 U. S. 18, 31 L. ed. 607, 8 Sup. Ct. Rep. 741; *Central Land Co. v. Laidley*, 159 U. S. 109, 40 L. ed. 94, 16 Sup. Ct. Rep. 80; *Turner v. Wilkes County*, 173 U. S. 461, 43 L. ed. 768, 19 Sup. Ct. Rep. 464; *Abraham v. Casey*, 179 U. S. 210, 45 L. ed. 156, 21 Sup. Ct. Rep. 88; *Arndt v. Griggs*, 134 U. S. 316, 33 L. ed. 918, 10 Sup. Ct. Rep. 557.

A certificate of purchase is not even color of title, much less does it confer title.

Bride v. Watt, 23 Ill. 507; *Rigor v. Frye*, 62 Ill. 507; *Shackleford v. Bailey*, 35 Ill. 387; *Perry v. Burton*, 111 Ill. 138.

The title which is required by Starr & C. (Ill.) Ann. Stat. chap. 83, § 4, must be at least a prima facie good title, either in law or equity, and must continue in the party setting up the bar, for seven years,—as well as possession for seven years.

Elston v. Kennicott, 46 Ill. 207; *Moore v. Brown*, 11 How. 414, 13 L. ed. 751; *Skyles v. King*, 2 A. K. Marsh. 385.

The supreme court of Illinois has expressly decided that there is no title in the holder of the certificate of purchase, either legal or equitable, and especially after the certificate is barred by the statute.

Ryhiner v. Frank, 105 Ill. 326; *Peterson v. Emmerson*, 135 Ill. 55, 25 N. E. 842; *Seeberger v. Weinberg*, 151 Ill. 369, 37 N. E. 1033; *Brown v. Ridenhower*, 161 Ill. 239, 43 N. E. 976; *Lightcap v. Bradley*, 186 Ill. 510, 58 N. E. 221; *Bradley v. Lightcap*, 201 Ill. 511, 66 N. E. 546; *Bradley v. Lightcap*, 202 Ill. 154, 67 N. E. 45; *Heacock v. Lubuke*, 107 Ill. 396.

It is not only a statutory provision, but

an elementary rule, strictly adhered to by this court, that the construction of a state law upon questions affecting the title to real property, by the highest court of the state where the land is located, is binding upon this court, and the same is true respecting the construction of statutes of limitation.

De Vaughn v. Hutchinson, 165 U. S. 566, 41 L. ed. 827, 17 Sup. Ct. Rep. 461; *Clarke v. Clarke*, 178 U. S. 186, 44 L. ed. 1029, 20 Sup. Ct. Rep. 873; *Brine v. Hartford F. Ins. Co.* 96 U. S. 627, 24 L. ed. 858; *Clark v. Graham*, 6 Wheat. 577, 5 L. ed. 334; *Abraham v. Casey*, 179 U. S. 210, 45 L. ed. 156, 21 Sup. Ct. Rep. 88; *Williams v. Kirtland*, 13 Wall. 306, 20 L. ed. 683; *Turner v. Wilkes County*, 173 U. S. 461, 43 L. ed. 768, 19 Sup. Ct. Rep. 464; *Arndt v. Griggs*, 134 U. S. 316, 33 L. ed. 918, 10 Sup. Ct. Rep. 557; *Forsyth v. Hammond*, 166 U. S. 518, 41 L. ed. 1100, 17 Sup. Ct. Rep. 665; *Percy v. Cockrill*, 4 C. C. A. 73, 10 U. S. App. 574, 53 Fed. 872; *Brunswick Terminal Co. v. National Bank*, 48 L. R. A. 625, 40 C. C. A. 22, 99 Fed. 635; *Morley v. Lake Shore & M. S. R. Co.* 146 U. S. 162, 36 L. ed. 925, 13 Sup. Ct. Rep. 54; *Board of Liquidation v. Louisiana*, 179 U. S. 622, 45 L. ed. 347, 21 Sup. Ct. Rep. 263.

The decision of the supreme court of Illinois complained of rests on independent grounds not involving a Federal question, and broad enough to maintain its judgment, viz., the application of the doctrine of *res judicata*; and, under repeated decisions of this court, the writ of error should be dismissed or the judgment be affirmed without considering any other question.

California Powder Works v. Davis, 151 U. S. 389, 38 L. ed. 206, 14 Sup. Ct. Rep. 350; *Hale v. Akers*, 132 U. S. 554, 33 L. ed. 442, 10 Sup. Ct. Rep. 171; *Murdock v. Memphis*, 20 Wall. 590, 22 L. ed. 429; *Jenkins v. Loewenthal*, 110 U. S. 222, 28 L. ed. 129, 3 Sup. Ct. Rep. 638; *Castillo v. McConnico*, 168 U. S. 674, 42 L. ed. 622, 18 Sup. Ct. Rep. 229; *Eustis v. Bolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131.

The statute complained of is not inconsistent with the 14th Amendment of the United States Constitution, or § 1979 of the Revised Statutes.

Wheeler v. Jackson, 137 U. S. 245, 34 L. ed. 659, 11 Sup. Ct. Rep. 76; *Terry v. Anderson*, 95 U. S. 628, 24 L. ed. 365; *Saranac Land & Timber Co. v. Roberts*, 177 U. S. 318, 44 L. ed. 786, 20 Sup. Ct. Rep. 642; *Hurtado v. California*, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; *Re Brown*, 135 U. S. 705, 707, 34 L. ed. 317, 318, 10 Sup. Ct. Rep. 972.

It is well settled by the decisions of this court that the 14th Amendment was not

designed to limit, and does not limit, what is known as the police power of the states, a familiar instance of the exercise of which is the enactment of statutes of limitation, and there is no constitutional objection to their validity, provided a reasonable time, taking into consideration the nature of the case, is allowed for bringing an action or performing an act after its passage and before the bar takes effect.

Cooley, Const. Lim. 6th ed. p. 434; *Wheeler v. Jackson*, 137 U. S. 255, 34 L. ed. 663, 11 Sup. Ct. Rep. 76; *Turner v. New York*, 168 U. S. 90, 94, 42 L. ed. 392, 393, 18 Sup. Ct. Rep. 38; *Davidson v. New Orleans*, 96 U. S. 97, 102, 24 L. ed. 616, 619; *Louisville & N. R. Co. v. Schmidt*, 177 U. S. 230, 236, 44 L. ed. 747, 750, 20 Sup. Ct. Rep. 620; *Iowa C. R. Co. v. Iowa*, 160 U. S. 389, 393, 40 L. ed. 467, 469, 16 Sup. Ct. Rep. 344; *Leeper v. Texas*, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 577; *Missouri P. R. Co. v. Humes*, 115 U. S. 512, 518, 29 L. ed. 463, 465, 6 Sup. Ct. Rep. 110; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 29, 32 L. ed. 585, 586, 9 Sup. Ct. Rep. 207; *Caldwell v. Texas*, 137 U. S. 692, 697, 34 L. ed. 816, 818, 11 Sup. Ct. Rep. 224; *Munn v. Illinois*, 94 U. S. 113, 134, 24 L. ed. 77, 87; *Giozza v. Tiernan*, 148 U. S. 657, 661, 37 L. ed. 599, 601, 13 Sup. Ct. Rep. 721; *Stearns v. Gettings*, 23 Ill. 387; *Hurtado v. California*, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292.

The decision of the supreme court of Illinois which this court is asked to review proceeds not only upon the general jurisprudence of the state, but is also based upon rules of property fully established in a series of adjudications by the highest court of the state, long acquiesced in by its citizens, and firmly implanted in its jurisprudence, as is well shown by the decisions of the state supreme court hereinbefore cited. And under repeated decisions, this court will apply the rules adopted in the state to the determination of the controversy.

Suydam v. Williamson, 24 How. 427, 16 L. ed. 742; *Chicago v. Robbins*, 2 Black, 418, 17 L. ed. 298; *Gage v. Pumpelly*, 115 U. S. 454, 29 L. ed. 449, 6 Sup. Ct. Rep. 136; *Burgess v. Seligman*, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10; *Lanc v. Vick*, 3 How. 464, 11 L. ed. 681; *Green v. Neal*, 6 Pet. 291, 8 L. ed. 402.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

Among the defenses it is stated Mrs. Bradley relied on were that "under § 6 of chapter 83 of the Revised Statutes, in regard to limitations, the trust deed from McCune to Johnson, the decree of sale, and certificate of purchase constituted color of title

which, coupled with her possession and payment of taxes for seven successive years, made her the legal owner of the lands to the extent and according to the purport of her paper title;" that "under § 4 of the same act her possession and actual residence, through her tenants, for seven successive years, having a connected title in law or equity deducible of record from the United States, by virtue of the same trust deed, decree and sale, barred the action of plaintiff;" and "that she was mortgagee in possession after condition broken, and entitled to possession as such." The supreme court of Illinois overruled all these defenses, and held *that[17] when the sale was made under the decree, and the mortgagee purchased at the sale, the mortgage was satisfied as to the land, and all rights of the mortgagee were represented by the certificate of purchase; and that, by force of the act of 1872, the mortgagee having failed to take the deed within the time limited by the statute, the certificate became null and void, her title terminated as it would on redemption, and she ceased to have any interest whatever in the premises, so that the mortgagor or his grantees, without any payment of the mortgage debt, was entitled to recover the possession from the mortgagee, in ejectment, on the strength of a perfect title.

Before and when the trust deed to Johnson, which may be treated as if a mortgage to Mrs. Bradley, was given, the legal title passed to the mortgagee according to the law of Illinois in respect of mortgages.

After condition broken the mortgagee became entitled to possession of the mortgaged premises, and could maintain an action of ejectment. The mortgagor had only an equity of redemption, and, in case of sale on foreclosure, had, by statute, the right to redeem within twelve months by making full payment.

The law in general as it is to-day was thus declared in *Ware v. Schintz*, 190 Ill. 189, 193, 60 N. E. 67, 69:

"Under the repeated rulings of this court a mortgagee, as against the mortgagor, is held, as in England, in law, to be the owner of the fee, having the *jus in re* as well as *ad rem*, and entitled to all the rights and remedies which the law gives to such owner, and may, after condition broken, maintain ejectment against the mortgagor. The mortgagor or his assignee, however, is the legal owner of the mortgaged estate as against all persons, excepting the mortgagee or his assignees. *Delahay v. Clement*, 4 Ill. 201; *Vansant v. Allmon*, 23 Ill. 30; *Carroll v. Ballance*, 26 Ill. 9, 79 Am. Dec. 354; *Oldham v. Pfleger*, 84 Ill. 102; *Fountain v. Bookstaver*, 141 Ill. 461, 31 N. E. 17; *Esler v. Heffernan*, 159 Ill. 38, 41 N. E. 1113.

The fee title held by the mortgagee is in the nature of a base or determinable fee. [18] The term of its *existence is measured by that of the mortgage debt. When the latter is paid or becomes barred by the statute of limitations the mortgagee's title is extinguished by operation of law. *Pollock v. Maison*, 41 Ill. 516; *Harris v. Mills*, 28 Ill. 44, 81 Am. Dec. 259; *Gibson v. Rees*, 50 Ill. 383; *Barrett v. Hinckley*, 124 Ill. 32, 7 Am. St. Rep. 331, 14 N. E. 863; *Lightcap v. Bradley*, 186 Ill. 510, 58 N. E. 221. Until it is extinguished the legal title is in the mortgagee for the purpose of obtaining satisfaction of his debt."

The condition of the McCune mortgage was broken as soon as made by failure to pay taxes previously and then due, and again by failure to pay the notes maturing in 1869, 1870, and 1871, and Mrs. Bradley entered into peaceable possession of the tract of 680 acres before the act of 1872 took effect. If the assent of the mortgagor was necessary, which we do not hold it was, it should be implied in the circumstances. Her possession was that of mortgagee in possession, and she could defend, as against the owner of the equity of redemption, any action except for an accounting of the rents and profits, and to redeem. And, as she could pursue concurrent remedies, the character of her possession was not affected by the filing and pendency of the bill to set aside the release of the Breedlove mortgage. But that bill went to decree in 1879 of foreclosure of the McCune mortgage by sale, and sale was had. There was no independent purchaser, nor was the whole amount of the mortgage debt bid, but Mrs. Bradley, the mortgagee in possession, bid about one third of the amount due. By the statute the right of redemption of McCune and his grantee was barred and determined October 27, 1880, at the expiration of twelve months from the date of sale, and so it was by the express provision of the decree of foreclosure.

The certificate of purchase was issued to Mrs. Bradley, but it does not appear that she obtained a deed. It is assumed, and we assume, that she did not, although it is suggested that after the lapse of so many years, and under the circumstances, in an action at law by the original mortgagor [19] against the *mortgagee in possession, an irrebuttable presumption of a deed arises on grounds of public policy.

The supreme court of Illinois in the present case decides that the act of 1872 applies to mortgagees in possession, and that it operates not simply as a statute of limitations on the right to obtain a deed, but in effect as a statute forfeiting, by the nullification of the certificate, the mortgagee's

estate and right of possession by reason of *laches*, and means that if a deed be not taken out within the time specified, the mortgagee has lost his debt, and the mortgagor has been reinstated in his former title by operation of law, and without having paid anything in redemption. Accepting the construction of the act by the state court, and its conclusion that it applies to Mrs. Bradley, then the question is whether such a statute so applied does not impair the obligation of the contract previously existing between the mortgagee and the mortgagor, or deprive the mortgagee of property rights without due process. That question was raised in the supreme court of Illinois, and the court held that it did not. 201 Ill. 511, 66 N. E. 546.

Confessedly, subsequent laws which, in their operation, amount to the denial of rights accruing by a prior contract, are obnoxious to constitutional objection.

In *Bronson v. Kinzie*, 1 How. 311, 11 L. ed. 143, the statute objected to gave the mortgagor twelve months to redeem after the sale, and Mr. Chief Justice Taney said:

"It declares that, although the mortgaged premises should be sold under the decree of the court of chancery, yet that the equitable estate of the mortgagor shall not be extinguished, but shall continue for twelve months after the sale; and it moreover gives a new and like estate, which before had no existence, to the judgment creditor, to continue for fifteen months. If such rights may be added to the original contract by subsequent legislation, it would be difficult to say at what point they must stop. . . . Any such modification of a contract by subsequent legislation, against the consent of *one of the parties, unquestionably impairs [20] its obligations, and is prohibited by the Constitution."

In *Barnitz v. Beverly*, 163 U. S. 118, 41 L. ed. 93, 16 Sup. Ct. Rep. 1042, it was held that a state statute which authorized redemption of property sold in foreclosure of a mortgage, where no such right previously existed, or extended the period of redemption beyond the time previously allowed, could not apply to a sale under a mortgage executed before its passage, and Mr. Justice Shiras, referring to *Brine v. Hartford P. Ins. Co.* 96 U. S. 627, 637, 24 L. ed. 858, 862, said:

"But this court held, through Mr. Justice Miller, that all the laws of a state existing at the time a mortgage or any other contract is made, which affect the rights of the parties to the contract, enter into and become a part of it, and are obligatory on all courts which assume to give a remedy on such contracts, . . . that it is therefore said that these laws enter into and be-

come a part of the contract"—and that "the remedy subsisting in a state when and where a contract is made and is to be performed is a part of the obligation." . . .

"What we are now considering is, whether the change of remedy was detrimental to such a degree as to amount to an impairment of the plaintiff's right; and, as this record discloses that the sale left a portion of the plaintiff's judgment unpaid, it may be fairly argued that this provision of the act [which provided that the land 'shall not again be liable for sale for any balance'] does deprive the plaintiff of a right inherent in her contract.

"When we are asked to put this case within the rule of those cases in which we have held that it is competent for the states to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired, we are bound to consider the entire scheme of the new statute, and to have regard to its probable effect on the rights of the parties."

In *Hooker v. Burr*, 194 U. S. 415, 48 L. ed. 1046, 24 Sup. Ct. Rep. 706, these and many [21] other cases were considered, and the distinction was pointed out between a purchase by the mortgagee and by an independent purchaser, having no connection whatever with the original contract between the mortgagor and mortgagee, and whose contract was made under the law as then existing; as well as the distinction where the mortgagee bids the whole amount of the mortgage debt, as in *Connecticut Mut. L. Ins. Co. v. Cushman*, 108 U. S. 51, 27 L. ed. 648, 2 Sup. Ct. Rep. 236, which was cited with approval. There the company bid enough to pay the full amount of the mortgage debt, principal and interest, and on redemption contended that it was entitled to interest at the rate existing at the time of the execution of the mortgage, which had been reduced before the sale, though subsequent to the mortgage. *Barnitz v. Beverly* was distinguished. In that case the sum bid at the foreclosure sale did not equal the amount due on the mortgage, the debt of the mortgagor was not thereby paid, and it was the mortgagee's rights under her contract as contained in the mortgage, and not her rights as a purchaser, that were in controversy. In the *Cushman Case*, on the contrary, the amount bid at the foreclosure sale paid the mortgage debt, and the subsequent position of the mortgagee was as a purchaser only.

And we said: "If the mortgage had been foreclosed, and the mortgagee had thereby realized his debt, principal and interest in full, upon the sale, there can be no doubt that he would not have been heard to assert the invalidity of the subsequent legislation,

nor would an independent purchaser at the sale have been heard to make the same complaint. Of course, this does not include the case of a mortgagee who purchases at the foreclosure sale, and bids a price sufficient to pay his mortgage debt in full with interest, and an action thereafter commenced against him to set aside the sale because it was made in violation of legislation subsequent to the mortgage. In such case we suppose there can be no doubt of the right of the mortgagee to assert, as a defense to the action, the unconstitutionality of the subsequent legislation "as an impairment of [22] his contract contained in the mortgage."

In Illinois the legal title vests in the mortgagee; but in equity that title is regarded as a trust estate to secure the payment of the money; and where the mortgaged premises are bid off by the mortgagee, at foreclosure sale, for the full amount of the decree, interest and costs, the mortgage may be held to have expended its force; but where the bid is for less than the full amount, a different rule would be applicable. *Bogardus v. Moses*, 181 Ill. 554, 559, 560, 54 N. E. 984.

Entitled to pursue different remedies to collect the mortgage debt or to free the mortgaged premises of the right of redemption, foreclosure and sale, purchase and deed are in aid of the original title, and not inconsistent with it. *Williams v. Brunton*, 8 Ill. 600. If the right of redemption is determined by the efflux of time, which must be before a deed can issue, failure to take out the deed either has no effect, so far as the mortgagor is concerned, because he is not injured, or the right of redemption still remains, and all the mortgagor can claim is that the relation between the parties is unchanged.

In the present case there was no independent purchaser; the bid of the mortgagee was less than one third of the amount found due; there was no redemption, and the right of redemption was cut off; the mortgagee was in possession before and at the time of foreclosure and sale, and when ejectment was brought, sixteen years thereafter; and the mortgage debt had never in fact been paid; so that the original mortgagor as plaintiff in ejectment could not recover, unless, by the subsequent law, the mortgagee had been subjected to the loss of all her rights, as against him, by *laches* in obtaining a deed, although, as a general rule, *laches* are not imputable to a party in possession to the loss of the right thereto.

And if the operation of the subsequent law is to impair the obligation of Mrs. Bradley's mortgage contract, or to deprive her of rights protected by the Constitution, we cannot decline jurisdiction because of a

construction that we deem untenable. [23] **Louisville Gas Co. v. Citizens' Gaslight Co.* 115 U. S. 683, 697, 29 L. ed. 510, 515, 6 Sup. Ct. Rep. 265; *Terre Haute & I. R. Co. v. Indiana ex rel. Ketchum*, 194 U. S. 579, 48 L. ed. 1124, 24 Sup. Ct. Rep. 767.

By the judgment in this case Lightcap had been held clothed with the legal title and the immediate right of possession. And this on the ground that the certificate of purchase discharged the McCune mortgage, and that the act of 1872 nullified the certificate after the lapse of five years. This gave to the limitation of time for taking out the deed the effect of destroying the right of possession taken under the mortgage, wiping out the mortgage with the certificate, and allowing the mortgagor to assert the legal title and right of possession as against the mortgagee as a wrongdoer. That is to say, though Mrs. Bradley was rightfully in possession, and though the mortgage debt had not in fact been paid, the bar of the statute as to the deed is held to be efficacious in turning Mrs. Bradley into a trespasser as respects the mortgagor, who, not having in fact paid anything, is treated as having made payment by the mortgagee's bid, and being at the same time entitled to assert the failure of the purchase by reason of *laches* in taking out the deed.

And yet, because a statute may take away the sword which a deed would give a mortgagee out of possession, it does not follow that it can lawfully operate on prior transactions so as to take away the shield afforded by possession. Rightful possession is a defense in ejectment (*Sands v. Wacaser*, 149 Ill. 530, 533, 36 N. E. 960, and cases cited), and Mrs. Bradley's possession could only be treated as wrongful as against the original mortgagor by the application of the subsequent law.

As we have said, when Mrs. Bradley took this mortgage there was no statutory limitation as to the time within which a master's deed must be taken out, and no loss of right by reason of failure to do so was prescribed. After she had filed her bill, and while she was in possession, the act of 1872 went into effect, and, it may be conceded, limited Mrs. Bradley's right to obtain a deed on foreclosure sale, and so far affected *any remedy through a deed she might have had. But, reading the act, as the view of the supreme court compels us to do, as taking away her right to maintain her possession, we are of opinion that it materially impairs the obligation of her contract, and deprives her of property without due process.

Judgment reversed, and cause remanded for further proceedings not inconsistent with this opinion.

195 U. S.

Leave to file a petition for rehearing denied on October 17, 1904.

LYDIA BRADLEY, *Plff. in Err.*,
v.

H. W. LIGHTCAP.

(See S. C. Reporter's ed. 24, 25.)

Constitutional law—impairment of contract obligations—due process of law—destruction of rights of mortgagee in possession.

This case is governed by the decision in *Bradley v. Lightcap*, ante, 65.

[No. 306.]

Argued April 21, 1904. Decided May 31, 1904.

IN ERROR to the Supreme Court of Illinois to review an affirmance of the dismissal of a bill to quiet title. *Reversed*.

See same case below, 202 Ill. 154, 67 N. E. 45.

Mr. John S. Miller argued the cause, and, with Messrs. Merritt Starr and W. W. Hammond, filed a brief for plaintiff in error.

Messrs. E. A. Wallace and George W. Wall argued the cause, and, with Mr. Lyman Lacey, Jr., filed a brief for defendant in error.

For contentions of counsel see their briefs as reported in *Bradley v. Lightcap*, ante 65.

Mr. Chief Justice Fuller delivered the opinion of the court:

After the decision reported 186 Ill. 510, 58 N. E. 221, Mrs. Bradley filed her bill in equity in the circuit court of Fulton county, Illinois, to quiet her title to the land in controversy in the action in ejectment, and for appropriate relief. The bill was dismissed on demurrer, and Mrs. Bradley carried the case to the supreme court of Illinois, which affirmed the decree below. **Bradley v. Light-* [25] *cap*, 202 Ill. 154, 67 N. E. 45, April 24, 1903. Three of the members of the court dissented. The opinion of the supreme court proceeded on the strength of the decisions in 186 Ill. 510, 58 N. E. 221, and 201 Ill. 511, 66 N. E. 546.

As we have reversed the judgment in the prior case, this case must take the same course.

Decree reversed, and cause remanded for further proceedings not inconsistent with our opinion in No. 243.

Leave to file a petition for rehearing denied on October 17, 1904.

LYDIA BRADLEY, *Appt.*,

v.

H. W. LIGHTCAP.

(See S. C. Reporter's ed. 25, 26.)

*Appeal—dismissal for want of jurisdiction
—when affirmed on appeal.*

A decree of a Federal circuit court, dismissing, for want of jurisdiction, a bill to quiet title, on the theory that either complainant's rights as mortgagee in possession had not been held by a decision of the highest state court, in a prior ejectment suit between the same parties, to have been destroyed by a subsequent state statute, and hence no constitutional question was involved, or that, if the state court so held, the remedy was by writ of error from the Federal Supreme Court will be affirmed on appeal, where the judgment of the state court, on a second appeal in the ejectment suit, and in a subsequent suit to quiet title, has been reversed by the Federal Supreme Court for error in deciding the Federal questions involved.

[No. 343.]

Argued April 21, 1904. Decided May 31, 1904.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois to review a decree dismissing, for want of jurisdiction, a bill to quiet title. *Affirmed.*

The facts are stated in the opinion.

Mr. John S. Miller argued the cause, and, with Messrs. Merritt Starr and W. W. Hammond, filed a brief for appellant:

This suit seeks to establish and protect appellant's contract rights and her estate in land acquired thereunder, and her possession and right of possession of such land against impairment and deprivation by force of a statute of a state in violation of the Federal Constitution. It therefore arises under the Constitution.

City R. Co. v. Citizens' Street R. Co. 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653; *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; *Yazoo & M. Valley R. Co. v. Adams*, 180 U. S. 1, 26, 45 L. ed. 395, 408, 21 Sup. Ct. Rep. 240, 282; *Illinois C. R. Co. v. Adams*, 180 U. S. 28, 45 L. ed. 410, 21 Sup. Ct. Rep. 251; *Vicksburg Waterworks Co. v. Vicksburg*, 185 U. S. 65, 46 L. ed. 808, 22 Sup. Ct. Rep. 585.

A case calling for the exercise of such jurisdiction is one arising under the Constitution and laws of the United States.

Burgess v. Seligman, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10; *Buncombe County v. Tommey*, 115 U. S. 122, 127, 29 L. ed. 305, 306, 5 Sup. Ct. Rep. 626, 1186; *Pana v. Bowler*, 107 U. S. 541, 27 L. ed.

429, 2 Sup. Ct. Rep. 704; *Johnson County v. Thayer*, 94 U. S. 631, 642, 24 L. ed. 133, 135; *Clark v. Bever*, 139 U. S. 96, 117, 35 L. ed. 88, 97, 11 Sup. Ct. Rep. 468; *Folsom v. Township Ninety Six*, 159 U. S. 611, 625, 40 L. ed. 278, 283, 16 Sup. Ct. Rep. 174; *Illinois C. R. Co. v. Adams*, 180 U. S. 28, 35, 36, 45 L. ed. 410, 413, 21 Sup. Ct. Rep. 251; *Rowan v. Runnels*, 5 How. 134, 12 L. ed. 85; *Piqua Branch of State Bank v. Knoop*, 16 How. 369, 14 L. ed. 977; *Ohio Life Ins. & T. Co. v. Debolt*, 16 How. 416, 432, 14 L. ed. 997, 1003; *Pease v. Peck*, 18 How. 595, 15 L. ed. 518; *Jefferson Branch Bank v. Skelly*, 1 Black, 436, 17 L. ed. 173.

This jurisdiction distinguishes this bill from that filed in the state court.

Central Land Co. v. Laidley, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80.

Diversity of citizenship is not necessary to confer Federal jurisdiction, where the bill shows that, by legislation and judicial decision of the state subsequent to the vesting of complainant's contract rights, such contract rights will be divested or impaired, in breach of the Federal Constitution.

City R. Co. v. Citizens' Street R. Co. 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653; *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; *Yazoo & M. Valley R. Co. v. Adams*, 180 U. S. 1, 26, 45 L. ed. 395, 408, 21 Sup. Ct. Rep. 240, 282; *Illinois C. R. Co. v. Adams*, 180 U. S. 28, 45 L. ed. 410, 21 Sup. Ct. Rep. 251; *Vicksburg Waterworks Co. v. Vicksburg*, 185 U. S. 65, 46 L. ed. 808, 22 Sup. Ct. Rep. 585; *Smyth v. Ames*, 169 U. S. 466, 516, 42 L. ed. 819, 838, 18 Sup. Ct. Rep. 418; *Riverside & A. R. Co. v. Riverside*, 118 Fed. 736.

The jurisdiction vested upon this ground extended to every question in the case.

Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204; *Nashville v. Cooper*, 6 Wall. 247, 18 L. ed. 851; *Tennessee v. Davis*, 100 U. S. 257, 25 L. ed. 648; *Penn Mut. L. Ins. Co. v. Austin*, 168 U. S. 685, 42 L. ed. 626, 18 Sup. Ct. Rep. 223; *Gregory v. Van Ee*, 160 U. S. 643, 646, 40 L. ed. 566, 567, 16 Sup. Ct. Rep. 431; *New Orleans, M. & T. R. Co. v. Mississippi*, 102 U. S. 135, 140, 141, 26 L. ed. 96, 98.

The Federal jurisdiction of a bill to remove a cloud, to quiet the title, and to compel a conveyance, is indisputable.

Alexander v. Pendleton, 8 Cranch, 462, 3 L. ed. 624; *Ruckman v. Cory*, 129 U. S. 387, 32 L. ed. 728, 9 Sup. Ct. Rep. 316; *Mills v. Lockwood*, 42 Ill. 111; *Wilson v. Byers*, 77 Ill. 76; *Wehrman v. Conklin*, 155 U. S. 314, 39 L. ed. 167, 15 Sup. Ct. Rep. 129; *Clark v. Smith*, 13 Pet. 195, 10 L. ed. 123; *Holland v. Challen*, 110 U. S. 15, 28 L. ed. 52, 3 Sup. Ct. Rep. 495; *Reynolds v. First*

195 U. S.

Nat. Bank, 112 U. S. 405, 28 L. ed. 733, 5 Sup. Ct. Rep. 213; *Chapman v. Brewer*, 114 U. S. 158, 29 L. ed. 83, 5 Sup. Ct. Rep. 799; *Gormley v. Clark*, 134 U. S. 338, 33 L. ed. 909, 10 Sup. Ct. Rep. 554; *Sharon v. Tucker*, 144 U. S. 533, 36 L. ed. 532, 12 Sup. Ct. Rep. 720; *Roberts v. Northern P. R. Co.* 158 U. S. 1, 39 L. ed. 873, 15 Sup. Ct. Rep. 756.

If appellant has an equitable title, a court of equity will enjoin proceedings at law, and direct the cause to proceed in equity for settlement of the title.

Ruckman v. Cory, 129 U. S. 387, 32 L. ed. 728, 9 Sup. Ct. Rep. 316; *Mills v. Lockwood*, 42 Ill. 111; *Wilson v. Byers*, 77 Ill. 76; *Smith v. Spencer*, 73 Ala. 299; *McKibbin v. Bristol*, 50 Mich. 319, 15 N. W. 491; *Pollock v. Gilbert*, 16 Ga. 398, 60 Am. Dec. 732; *Pierson v. Ryerson*, 5 N. J. Eq. 196; *Carpentier v. Montgomery*, 13 Wall. 480, 20 L. ed. 698; *Barnett v. Cline*, 60 Ill. 205; *Reed v. Reber*, 62 Ill. 240.

Messrs. **E. A. Wallace** and **George W. Wall** argued the cause, and, with **Mr. Lyman Lacey, Jr.**, filed a brief for appellee.

The Federal circuit court in which the bill in this case was filed had no right, power, or authority to enjoin the proceedings in the ejectment suit of *Lightcap v. Bradley*, then pending for trial in the state court.

Haines v. Carpenter, 91 U. S. 254, 256, 23 L. ed. 345, 346; *Peck v. Jenness*, 7 How. 612, 624, 12 L. ed. 841, 846; *Dial v. Reynolds*, 96 U. S. 340, 24 L. ed. 644; *United States v. Parkhurst-Davis Mercantile Co.* 176 U. S. 317, 320, 44 L. ed. 485, 20 Sup. Ct. Rep. 423; *Sargent v. Helton*, 115 U. S. 348, 29 L. ed. 412, 6 Sup. Ct. Rep. 78; *Harkrader v. Wadley*, 172 U. S. 148, 164, 43 L. ed. 399, 404, 19 Sup. Ct. Rep. 119.

Independent of the statutory prohibition upon the Federal courts from enjoining proceedings in a state court, it is a settled rule that, between courts of concurrent jurisdiction, the court first acquiring jurisdiction will retain it, and will not be interfered with by another court.

Central Nat. Bank v. Stevens, 169 U. S. 432, 459, 460, 42 L. ed. 807, 817, 18 Sup. Ct. Rep. 403; *Ward v. Todd*, 103 U. S. 327, 26 L. ed. 339; *Porter v. Sabin*, 149 U. S. 473, 480, 37 L. ed. 815, 818, 13 Sup. Ct. Rep. 1008; 2 Story, Eq. Jur. § 900.

The presumption is that the cause is without the jurisdiction of the Federal circuit court unless the contrary affirmatively appears, and the facts alleged must compel the legal inference that the complainant's cause arises under the Constitution, or under a law or treaty of the United States.

Grace v. American Cent. Ins. Co. 109 U. S. 278, 283, 27 L. ed. 932, 934, 3 Sup. Ct. Rep. 207; *Ex parte Smith*, 94 U. S. 455, 195 U. S.

24 L. ed. 165; *Peper v. Fordyce*, 119 U. S. 469, 30 L. ed. 435, 7 Sup. Ct. Rep. 287.

A Federal circuit court cannot reverse or set aside a judgment or decree of a state court which had complete jurisdiction over the parties and subject-matter; neither has it jurisdiction to entertain a bill seeking the rehearing of a cause in a state court, or to correct supposed errors in the proceedings in a state court.

Nougue v. Clapp, 101 U. S. 551, 554, 25 L. ed. 1026, 1027; *Forsyth v. Hammond*, 166 U. S. 506, 516, 518, 41 L. ed. 1095, 1099, 1100, 17 Sup. Ct. Rep. 665; *Peck v. Jenness*, 7 How. 612, 624, 12 L. ed. 841, 846; *Graver v. Faurot*, 64 Fed. 241.

The bill shows on its face that complainant had an adequate remedy at law. If the statute referred to in the bill is unconstitutional, or if it is rendered unconstitutional by the construction which the supreme court of the state gave it, or if complainant by this statute or court, or by both combined, has been deprived of property or rights in the proceedings in the ejectment suit in the state courts, in violation of the Constitution or laws of the United States, she has a plain, adequate and complete remedy by writ of error from this court to the supreme court of Illinois.

If the statute violates the Federal Constitution, the state court, in the ejectment suit, had as perfect and full authority to so declare as a court of equity, and it is the duty of a court of law to so declare. While, on the other hand, if the statute is valid, it is as binding on a court of equity as on a court of law.

Baker v. Cummings, 169 U. S. 189, 206, 42 L. ed. 711, 718, 18 Sup. Ct. Rep. 367; *Balkman v. Woodstock Iron Co.* 154 U. S. 177, 188, 38 L. ed. 953, 957, 14 Sup. Ct. Rep. 1010; *Metropolitan Nat. Bank v. St. Louis Despatch Co.* 149 U. S. 436, 448, 37 L. ed. 799, 803, 13 Sup. Ct. Rep. 944; *Harding v. Durand*, 138 Ill. 515, 516, 28 N. E. 948; *Quayle v. Guild*, 91 Ill. 378; *Hancock v. Harper*, 86 Ill. 445; *Bradley v. Lightcap*, 202 Ill. 154, 67 N. E. 45.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

This was a bill filed by Mrs. Bradley, to quiet her title to the premises in controversy in No. 243, and for appropriate relief, in the circuit court of the United States for the northern district of Illinois, and was dismissed for want of jurisdiction, May 22, 1902.

*The circuit court, Grosscup, J., was of [26] opinion that the statute of 1872 was not one of limitation in the same sense as a statute limiting the time within which foreclosure proceedings must be brought; that

the failure to take out the deed within five years raised no presumption that the mortgage debt had been paid; and that the act was, in effect, simply a limitation on the time within which the foreclosure decree could be availed of, and did not operate to forfeit the mortgagee's title to the mortgagor if the deed were not taken out. But he thought that Mrs. Bradley's title by possession as mortgagee had not been held by the state court to have been cut off by the statute of 1872, as the record in that court stood, as reported in 186 Ill. 510, 58 N. E. 221, and that, therefore, the constitutional question did not arise. If, however, the supreme court had ruled that her title as mortgagee in possession had been so destroyed, the remedy was by writ of error from the Supreme Court of the United States. The decision in 201 Ill. 511, 66 N. E. 546, was rendered February 18, 1903. Taking into view the controversy as presented in the two other cases, and that the judgments in those cases are now directed to be reversed, and bearing in mind that a case does not necessarily arise under the Constitution or laws of the United States every time a writ of error would lie to the judgment of the state court, *the decree of the Circuit Court will be affirmed.*

[27] *LEO W. McCRAY, *Plff. in Err.*,

v.

UNITED STATES.

(See S. C. Reporter's ed. 27-64.)

Excises—tax on artificially colored oleomargarine—constitutionality of tax—motive or purpose as test of validity of statute—validity as affected by oppressive effect—due process of law—destruction of fundamental rights.

1. Oleomargarine whose yellow color is produced by the employment, as an ingredient, of butter which itself is artificially colored, is not "free from artificial coloration" within the meaning of the proviso to the act of August 2, 1886 (24 Stat. at L. 209, chap. 840, U. S. Comp. Stat. 1901, p. 2228), § 8, as amended by the act of May 9, 1902 (32 Stat. at L. 193, chap. 784), § 3, prescribing a lower rate of taxation for oleomargarine not so colored, although the statute treats butter, whether artificially colored or not, as an authorized ingredient of oleomargarine.
2. Artificially colored oleomargarine, whose color is imparted in its manufacture by the

use of an artificially colored and authorized ingredient, is not within the proviso to the act of August 2, 1886 (24 Stat. at L. 209, chap. 840, U. S. Comp. Stat. 1901, p. 2228), § 8, as amended by the act of May 9, 1902 (32 Stat. at L. 193, chap. 784), § 3, imposing, instead of the general tax on oleomargarine prescribed by that section, a lower rate when "free from artificial coloration," because of the provision of § 2 of the amendatory act that persons adding to, or mixing with, oleomargarine any artificial coloration shall be held to be manufacturers of oleomargarine.

3. The motives or purposes of Congress in enacting the tax imposed by the act of August 2, 1886 (24 Stat. at L. 209, chap. 840, U. S. Comp. Stat. 1901, p. 2228), § 8, as amended by the act of May 9, 1902 (32 Stat. at L. 193, chap. 784), § 3, on artificially colored oleomargarine, are not open to judicial inquiry in considering the power of that body to enact such legislation.
4. The congressional power to levy excises was not exceeded by the enactment of the act of August 2, 1886 (24 Stat. at L. 209, chap. 840, U. S. Comp. Stat. 1901, p. 2228), § 8, as amended by the act of May 9, 1902 (32 Stat. at L. 193, chap. 784), § 3, imposing a tax on artificially colored oleomargarine, because the enforcement of such tax will destroy or restrict the manufacture of that article.
5. An excise which does not conflict with any express limitation of the Federal Constitution cannot be held invalid because the court may deem the rate of taxation too high.
6. Due process of law is not denied by the enactment by Congress of the act of August 2, 1886 (24 Stat. at L. 209, chap. 840, U. S. Comp. Stat. 1901, p. 2228), § 8, as amended by the act of May 9, 1902 (32 Stat. at L. 193, chap. 784), § 3, imposing an excise on artificially colored oleomargarine, because that body has not chosen to tax natural butter artificially colored.
7. Any implied constitutional prohibition which may prevent the destruction by Congress of fundamental rights which it is the duty of every free government to safeguard cannot be invoked to invalidate the excise imposed on artificially colored oleomargarine by the act of August 2, 1886 (24 Stat. at L. 209, chap. 840, U. S. Comp. Stat. 1901, p. 2228), § 8, as amended by the act of May 9, 1902 (32 Stat. at L. 193, chap. 784), § 3, because the effect of the tax may be to suppress the manufacture of the article.
8. The excise on artificially colored oleomargarine, imposed by the act of August 2, 1886 (24 Stat. at L. 209, chap. 840, U. S. Comp. Stat. 1901, p. 2228), § 8, as amended by the act of May 9, 1902 (32 Stat. at L. 193, chap. 784), § 3, does not infringe the constitutional guaranty of due process of law because the effect of the tax may be to suppress the manufacture of that article.

[No. 301.]

NOTE.—On regulation of traffic in oleomargarine—see notes to *State v. Marshall*, 1 L. R. A. 52; *Com. v. Miller*, 6 L. R. A. 633; *Com. v. Weiss*, 11 L. R. A. 532.

As to constitutionality of statutes restricting contracts and business—see note to *State v. Loomis*, 21 L. R. A. 789.

As to what constitutes due process of law—

see *Kuntz v. Sumption*, 2 L. R. A. 655, and note; *Re Gannon*, 5 L. R. A. 359, and note; *Ulman v. Baltimore*, 11 L. R. A. 224, and note; *Gilman v. Tucker*, 13 L. R. A. 304, and note. And see notes to *People v. O'Brien*, 2 L. R. A. 255; *Pearson v. Yewdall*, 24 L. ed. U. S. 436; *Wilson v. North Carolina*, 42 L. ed. U. S. 865.

Argued December 2, 1903. Decided May 31, 1904.

IN ERROR to the District Court of the United States for the Southern District of Ohio to review a judgment in favor of the United States in an action to recover the statutory penalty for purchasing for resale oleomargarine alleged to have been artificially colored in its manufacture, upon which there had only been paid the excise imposed when oleomargarine is free from artificial coloration. *Affirmed.*

Statement by Mr. Justice **White**:

The United States sued McCray for a statutory penalty of \$50, alleging that, being a licensed retail dealer in oleomargarine, he had, in violation of the acts of Congress, knowingly purchased for resale a fifty-pound package of oleomargarine, artificially colored to look like butter, to which there was affixed internal revenue stamps at the rate of $\frac{1}{4}$ of a cent a pound, upon which the law required stamps at the rate of 10 cents per pound. The answer of McCray, whilst admitting the purchase of the package stamped as alleged, set up two defenses.

First. It was averred that the oleomargarine in question was made by a duly licensed manufacturer, the Ohio Butterine Company, from a formula used by it in making a high grade oleomargarine composed of "the following ingredients and none other, in these proportions; oleo oil, 20 pounds; natural lard, 30 pounds; creamery butter, 50 pounds; milk and cream, 30 pounds; common salt, 7 pounds." It was asserted that whilst it was true that the oleomargarine made from the ingredients in question was of a yellow color, that this result was not caused by artificial coloration, but was solely occasioned by the fact that the butter, which was bought in open market, and used in making the oleomargarine, had a deep yellow color imparted to it (the butter) by a substance known as Wells-Richardson's improved butter color. This preparation, it was averred, was not injurious to health, and was constantly used in the United States in the manufacture of butter made from pure milk or cream, for the purpose of imparting to it a deep yellow color. Averring that a yellow color produced in oleomargarine by the employment of butter, as an ingredient, which was artificially colored, did not amount to an artificial coloration of the oleomargarine within the meaning of the statute, it was asserted that the tax of $\frac{1}{4}$ of a cent per pound was a compliance with the law.

[29] *Second. If the act of Congress imposing the tax, when rightly construed, required

stamps at the rate of 10 cents per pound upon oleomargarine, colored as described in the first defense, the act levying such tax was charged to be repugnant to the Constitution of the United States. As a foundation for this defense the answer contained the following averments:

Whilst butter made from pure milk and cream in the spring season was of a deep yellow color, such butter when made at all other seasons was of a pale yellow; that the taste of consumers of butter in the United States required all butter to possess the deep color naturally belonging to butter made in the spring season, and hence it had come to pass that substantially all butter manufactured for sale in the United States, not made in the spring season, and not naturally of a deep yellow, was colored artificially so as to cause it to have the deep yellow of spring butter. It was alleged that this deep yellow coloration of natural butter was universally produced by the use of either Wells-Richardson's compound or some other coloring ingredient, which did not change the taste of the butter, none of which were injurious to health. Oleomargarine, it was alleged, derived its chief value as an article of food as a substitute for butter, and that growing out of the taste of the consumers, unless the oleomargarine which was naturally white could be colored yellow, to present the appearance of butter artificially colored, there was no demand for it, and its manufacture and sale would be commercially impossible. It was then averred that to impose upon the colored oleomargarine a tax of 10 cents per pound would burden it with such a charge as to render it impossible to make and sell it in competition with butter, and therefore the result of imposing a tax of 10 cents a pound on oleomargarine when artificially colored would destroy the oleomargarine industry. From these averments it was charged that if the law imposed the tax of 10 cents upon the oleomargarine in question, the statute was repugnant *to the Constitution, because [30] it deprived the defendant of his property without due process of law; because the levy of such a burden was beyond the constitutional power of Congress, since it was an unwarranted interference by Congress "with the police powers reserved to the several states and to the people of the United States by the Constitution of the United States;" and further, that said acts of Congress were repugnant to the Constitution, since they finally lodged in an executive officer the power to determine what constituted artificial coloration of oleomargarine, and therefore invested such officer with judicial authority; and, finally, because the attempt by Congress to levy a tax

at the rate of 10 cents a pound arbitrarily discriminated against oleomargarine in favor of butter, to the extent of destroying the oleomargarine industry for the benefit of the butter industry, and was, therefore, violative of "those fundamental principles of equality and justice which are inherent in the Constitution of the United States."

The government demurred to the answer on the ground that it stated no defense. The demurrer was sustained, and McCray electing to plead no further, the court found the facts alleged in the petition to be true, and adjudged that the government recover "the sum of \$50 as a penalty and costs." Because of the questions arising under the Constitution, the case was then brought directly to this court.

Mr. Miller Outcalt argued the cause, and, with **Mr. Charles E. Prior**, filed a brief for plaintiff in error:

In the construction of the statutory or local laws of a state, it is frequently necessary to recur to the history and situation of the country in order to ascertain the reason, as well as the meaning, of many of the provisions in them, to enable a court to apply, with propriety, the different rules for construing statutes.

Preston v. Browder, 1 Wheat. 121, 4 L. ed. 51.

We must gather the intention from the language used, comparing it, when any ambiguity exists, with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it was passed.

Aldridge v. Williams, 3 How. 24, 11 L. ed. 475.

In construing an act of Congress, the court may recur to the history of the time when it was passed, in order to ascertain the reason for, as well as the meaning of, particular provisions in it; but the views of individual members in debate, or the motives which induced them to vote for or against its passage, cannot be considered.

United States v. Union P. R. Co. 91 U. S. 72, 23 L. ed. 224.

In endeavoring to ascertain what Congress intended, we must, as far as possible, place ourselves in the light that Congress enjoyed, look at things as they appeared to it, and discover its purpose from the language used, in connection with the attending circumstances.

Platt v. Union P. R. Co. 99 U. S. 48, 64, 25 L. ed. 424, 429; *Smith v. Townsend*, 148 U. S. 494, 495, 37 L. ed. 533, 535, 13 Sup. Ct. Rep. 634; *Mobile & O. R. Co. v. Tennessee*, 153 U. S. 502, 38 L. ed. 799, 14 Sup. Ct. Rep. 968.

Even in construing the terms of a statute,

courts must take notice of the history of legislation, and out of different possible constructions select and apply the one that best comports with the genius of our institutions, and therefore is most likely to have been the construction intended by the law-making power.

Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 218, 40 L. ed. 947, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666.

The only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed.

United States v. Trans-Missouri Freight Assn. 166 U. S. 318, 41 L. ed. 1019, 17 Sup. Ct. Rep. 540.

When, therefore, Congress undertakes to enact a law which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the law, or from its essential nature, that it is a regulation of commerce with foreign nations, or among the several states, or with the Indian tribes. If not so limited, it is in excess of the power of Congress.

Trade-Mark Cases (United States v. Steffens) -100 U. S. 82, 96, 25 L. ed. 550, 552.

The presumption that a statute was enacted in good faith, for the purpose expressed in the title, cannot control the determination of the question whether it is or is not repugnant to the Constitution of the United States.

Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862.

It is not out of place to advert to an overflowing treasury, and the expediency which this same Congress felt in reducing the revenue derived, under the Spanish War acts, in this same year, by an amount equal to seventy millions of dollars. The law was avowedly not a revenue measure, but a police regulation.

Congressional Record, 57th Cong. 1st Sess.: Senator Dolliver, pp. 3273-3277; Senator Spooner, pp. 3505, 3506, 3560, 3563, 3601, 3606; Senator Hoar, pp. 3280, 3281.

It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed; for, while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the states, as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne than the risk to be run, in an effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutional-ity.

United States v. E. C. Knight Co. 156 U. S. 1, 12, 39 L. ed. 325, 329, 15 Sup. Ct. Rep. 249.

The power of a state to protect the lives, health, and property of its citizens, and to preserve good order and the public morals; the power to govern men and things within the limit of its dominion,—is a power originally and always belonging to the states, not surrendered to the general government, nor directly restrained by the Constitution of the United States, and is essentially exclusive.

Patterson v. Kentucky, 97 U. S. 503, 24 L. ed. 1116; *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23; *License Cases (Thurlow v. Massachusetts)* 5 How. 504, 12 L. ed. 256; *Gilman v. Philadelphia*, 3 Wall. 713, 18 L. ed. 96; *Henderson v. New York (Henderson v. Wickham)* 92 U. S. 259, 23 L. ed. 543; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989.

The tax upon oleomargarine is distinctly within the definition of the term "excise."

Pacific Ins. Co. v. Soule, 7 Wall. 433, 440, 19 L. ed. 95, 97; *Veazie Bank v. Fenno*, 8 Wall. 533, 19 L. ed. 482; *Scholey v. Rew*, 23 Wall. 331, 23 L. ed. 99; *Springer v. United States*, 102 U. S. 586, 26 L. ed. 253.

The words of the clause of the Constitution, "to pay the debts and provide for the common defense and general welfare of the United States," declare only the object of the taxing power preceeding.

Story, Const. §§ 907, 908, 926.

Congress is not empowered to tax for any purposes which are within the exclusive province of the states.

Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23.

If the Constitution in its grant of powers is to be so construed as to carry into full effect the powers granted, it is equally imperative that, where prohibition or limitation is placed upon the power of Congress, that prohibition or limitation should be enforced in its spirit and to its entirety.

Fairbank v. United States, 181 U. S. 312, 45 L. ed. 874, 21 Sup. Ct. Rep. 648.

A power granted as a means of raising revenue cannot lawfully be diverted from its legitimate purpose by the indirect use of it to do what Congress has no power to do by direction. The end is not legitimate.

McCulloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579.

It is true that, where the law merely imposes the tax without disclosing the indirect purpose of its imposition, the courts might hesitate to declare the law unconstitutional; but we insist that, by equal authority, if the

purpose be disclosed on the face of the act, the courts should not hesitate to do so.

Cooley, Const. pp. 56-60; *Citizens' Sav. & L. Asso. v. Topeka*, 20 Wall. 655, 22 L. ed. 455; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257.

It would seem to follow, as a natural and reasonable argument, that Congress is not empowered to tax so as to suppress that which is within the exclusive province of the states. If fraud exists, the remedy is with the states themselves. If, upon the face of this act, it is manifest that the taxing power of the United States is sought to accomplish that which is clearly within the police power of the states to regulate by appropriate state legislation, and is without the power of Congress to so regulate, it becomes at once, under every rule of construction, interpretation, and intendment, an invalid and unconstitutional law.

It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power. And if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation?

Fletcher v. Peck, 6 Cranch, 135, 3 L. ed. 177.

And if the property of an individual cannot be transferred to the public, how much less to another individual.

Legal Tender Cases (Knox v. Lee) 12 Wall. 581, 20 L. ed. 322.

To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms.

Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 22 L. ed. 455.

Butter has always been a proper ingredient in the manufacture of oleomargarine, adding; as it does, to the quality and flavor of the product.

Congress having recognized colored butter as a legitimate ingredient, we claim that it clearly comes within the class of other proper products used in the manufacture of oleomargarine, and that it is not in any sense an additional substance used for the purpose of artificially changing or altering the character of the finished product.

Messrs. William D. Guthrie, Miller Outcalt, Charles E. Prior, Francis J. Kearful, Delavan B. Cole, and Charles C. Carnahan, also filed a brief for plaintiff in error:

The supposed exigencies which led to the passage of the act, and the reasons for fixing the duty at this amount, may be ascertained by examining the congressional debates.

American Net & Twine Co. v. Worthington, 141 U. S. 468, 474, 35 L. ed. 821, 824, 12 Sup. Ct. Rep. 55; *Aldridge v. Williams*, 3 How. 9, 24, 11 L. ed. 469, 475; *Jennison v. Kirk*, 98 U. S. 453, 459, 25 L. ed. 240, 243; *Platt v. Union P. R. Co.* 99 U. S. 48, 64, 25 L. ed. 424, 429. See also *Church of Holy Trinity v. United States*, 143 U. S. 457, 463, 36 L. ed. 226, 229, 12 Sup. Ct. Rep. 511; *The Delaware*, 161 U. S. 459, 472, 40 L. ed. 771, 776, 16 Sup. Ct. Rep. 516; *Dunlap v. United States*, 173 U. S. 65, 75, 43 L. ed. 616, 620, 19 Sup. Ct. Rep. 319; *United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 318, 360, 41 L. ed. 1007, 1019, 1034, 17 Sup. Ct. Rep. 540.

If the court shall reach the conclusion that it will consult these evidences of legislative intent and purpose, the following references may be of convenience:

§ 35 Congressional Record, 57th Cong. 1st Sess. pt. 2, pp. 1251 *et seq.*; pt. 3, pp. 3192 *et seq.*

It was particularly objected by the opponents of the Constitution that Congress was given power to pass any law which it thought necessary and proper in aid of the powers granted to it. The answer of Hamilton, in *The Federalist*, was that Congress could not, by its mere declaration, make necessary and proper to the execution of its powers that which, in its essence, was not necessary and proper.

The Federalist, No. 78, Ford's ed. p. 521.

Notwithstanding this assurance, destined as it was to become an elemental feature of our constitutional jurisprudence, it is well known that the consent of the people in the necessary number of states was secured only upon the pledge that Amendments recognizing the reserved powers of the states, and protecting the individual against the abuse of the powers granted to the national government, would be forthwith submitted.

Barron v. Baltimore, 7 Pet. 243, 250, 8 L. ed. 672, 675; *Marbury v. Madison*, 1 Cranch, 137, 176-179, 2 L. ed. 60, 73, 74; *McCulloch v. Maryland*, 4 Wheat. 316, 421, 423, 4 L. ed. 579, 605; *Hepburn v. Griswold*, 8 Wall. 603, 614, 615, 19 L. ed. 513, 523, 524; *Smyth v. Ames*, 169 U. S. 466, 527, 42 L. ed. 819, 842, 18 Sup. Ct. Rep. 418; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636.

These Amendments are clearly to be regarded of equal force and validity with the provisions of the Constitution itself.

Prout v. Starr, 188 U. S. 537, 543, 544, 47 L. ed. 584, 587, 588, 23 Sup. Ct. Rep. 398.

Although the Constitution has been in operation for one hundred and fourteen

years, this court has not yet adjudged whether there are any qualifications of the power of Congress to levy taxes, other than the rules of apportionment and geographical uniformity, except in so far as the instrumentalities of the state governments are concerned.

The Collector v. Day (*Buffington v. Day*) 11 Wall. 113, 124, 20 L. ed. 122, 126; *United States v. Baltimore & O. R. Co.* 17 Wall. 322, 327, 21 L. ed. 597, 599; *Van Brocklin v. Tennessee* (*Van Brocklin v. Anderson*) 117 U. S. 151, 178, 29 L. ed. 845, 854, 6 Sup. Ct. Rep. 670; *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 162, 30 L. ed. 895, 904, 7 Sup. Ct. Rep. 826; *Income Tax Cases* (*Pollock v. Farmers' Loan & T. Co.*) 157 U. S. 429, 584, 39 L. ed. 759, 820, 15 Sup. Ct. Rep. 673; *Plummer v. Coler*, 178 U. S. 115, 117, 44 L. ed. 998, 1001, 20 Sup. Ct. Rep. 829; *Ambrosini v. United States*, 187 U. S. 1, 7, 47 L. ed. 49, 52, 23 Sup. Ct. Rep. 1; *Snyder v. Bettman*, 190 U. S. 249, 253, 47 L. ed. 1035, 1037, 23 Sup. Ct. Rep. 803.

Congress was not delegated any power whatever to regulate the internal commerce of the states; the regulation of such commerce was expressly reserved to the states by the 10th Amendment.

Gibbons v. Ogden, 9 Wheat. 1, 194, 203, 6 L. ed. 23, 69, 71; *License Cases* (*Thurlow v. Massachusetts*) 5 How. 504, 574, 599, 12 L. ed. 256, 287, 299; *Passenger Cases* (*Smith v. Turner*) 7 How. 283, 400, 12 L. ed. 702, 751; *License Tax Cases*, 5 Wall. 462, 470, 471, 18 L. ed. 497, 500, 501; *United States v. Dewitt*, 9 Wall. 41, 44, 19 L. ed. 593, 594; *Trade-Mark Cases* (*United States v. Steffens*) 100 U. S. 82, 96, 97, 25 L. ed. 550, 552, 553; *United States v. E. C. Knight Co.* 156 U. S. 1, 12, 13, 39 L. ed. 325, 329, 15 Sup. Ct. Rep. 249.

The police power never was surrendered by the states.

New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 661, 29 L. ed. 516, 521, 6 Sup. Ct. Rep. 252; *Re Kahrer* (*Wilkerson v. Kahrer*) 140 U. S. 545, 554, 556, 35 L. ed. 572, 574, 575, 11 Sup. Ct. Rep. 865; *Plumley v. Massachusetts*, 155 U. S. 461, 472, 39 L. ed. 223, 227, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; *United States v. E. C. Knight Co.* 156 U. S. 1, 11, 13, 39 L. ed. 325, 328, 329, 15 Sup. Ct. Rep. 249; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 558, 46 L. ed. 679, 689, 22 Sup. Ct. Rep. 431.

The act now before the court, if grounded upon the attempt to regulate the manufacture of dairy products and oleomargarine, and their sale in the internal commerce of the states, would be clearly beyond the powers of Congress, and unconstitutional.

United States v. Dewitt, 9 Wall. 41, 45,

19 L. ed. 593, 594; *United States v. Fox*, 94 U. S. 315, 320, 24 L. ed. 192, 193; *Trade-Mark Cases* (*United States v. Steffens*) 100 U. S. 82, 96, 25 L. ed. 550, 553; *Covington & C. Bridge Co. v. Kentucky*, 154 U. S. 204, 210, 38 L. ed. 962, 965, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; *United States v. E. C. Knight Co.* 156 U. S. 1, 12, 13, 39 L. ed. 325, 328, 329, 15 Sup. Ct. Rep. 249; *United States v. Boyer*, 85 Fed. 425.

The power of Congress to regulate commerce among the states, although plenary, cannot be deemed arbitrary, since it is subject to such limitations or restrictions as are prescribed by the Constitution. This power, therefore, may not be exercised so as to infringe rights secured or protected by that instrument. It would not be difficult to imagine legislation that would be justly liable to such an objection as that stated, and hostile to the objects for the accomplishment of which Congress was invested with the general power to regulate commerce among the several states.

Lottery Case (*Champion v. Ames*) 188 U. S. 362, 363, 47 L. ed. 504, 23 Sup. Ct. Rep. 321.

The grant of a power to tax does not authorize the imposition of a burden in its nature and purpose prohibitory.

Cooley, Taxn. pp. 11-13.

In the cases at bar the court is called upon to consider what purports on its face to be a tax law, but which, it is contended, constitutes the imposition of a burden in its nature and purpose prohibitory of the internal commerce of the states in a recognized article of commerce.

Schollenberger v. Pennsylvania, 171 U. S. 1, 8, 43 L. ed. 49, 52, 18 Sup. Ct. Rep. 757.

There can be no reasonable doubt that any statute of Congress which purported on its face to prohibit internal commerce in oleomargarine would be declared by this court to be unconstitutional and void on the ground that it sought to accomplish an object not intrusted to Congress, and invaded the powers reserved to the states.

United States v. Dewitt, 9 Wall. 41, 43-45, 19 L. ed. 593, 594; *Trade-Mark Cases* (*United States v. Steffens*) 100 U. S. 82, 96, 25 L. ed. 550, 552; *United States v. E. C. Knight Co.* 156 U. S. 1, 11-13, 39 L. ed. 325, 328, 329, 15 Sup. Ct. Rep. 249.

If the object of the act be legitimate taxation, the excise in question is concededly within the constitutional powers of Congress; but if, under the pretext of laying an excise on manufactures, the object sought to be accomplished is to prohibit or destroy the manufactures and internal commerce of the states, then it is submitted that the legislation is not a legitimate taxation at all, and is beyond the authority delegated

to Congress, and conflicts with the powers expressly reserved to the states.

M'Culloch v. Maryland, 4 Wheat. 316, 421, 423, 4 L. ed. 579, 605.

Whatever may be the motive or pretext or guise of a statute, or in whatever language it may have been framed, its purpose and its validity must be determined by its natural and reasonable effect, to be ascertained from the practical operation of its provisions.

Henderson v. New York (*Henderson v. Wickham*) 92 U. S. 259, 268, 23 L. ed. 543, 547; *Morgan's, L. & T. R. & S. S. Co. v. Bd. of Health*, 118 U. S. 455, 462, 30 L. ed. 237, 241, 6 Sup. Ct. Rep. 1114; *Collins v. New Hampshire*, 171 U. S. 30, 33, 34, 43 L. ed. 60, 61, 62, 18 Sup. Ct. Rep. 768; *Mugler v. Kansas*, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; *Fairbank v. United States*, 181 U. S. 283, 294, 295, 300, 45 L. ed. 862, 867, 868, 869, 21 Sup. Ct. Rep. 648; *Postal Teleg. Cable Co. v. Adams*, 155 U. S. 688, 698, 39 L. ed. 311, 316, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360; *Income Tax Cases* (*Pollock v. Farmers' Loan & T. Co.*) 157 U. S. 429, 581, 39 L. ed. 759, 819, 15 Sup. Ct. Rep. 673; *Thomas v. Gay*, 169 U. S. 264, 283, 42 L. ed. 740, 747, 18 Sup. Ct. Rep. 340; *Smith v. St. Louis & S. W. R. Co.* 181 U. S. 248, 257, 45 L. ed. 847, 850, 21 Sup. Ct. Rep. 603.

The amount of a tax or license fee, or regulation of rates, frequently forms the basis of judicial action and determines the validity of legislation. The court has found no insuperable difficulty in determining the difference between a tax and a reasonable fee covering expenses to protect the government against fraud (*Pace v. Burgess*, 92 U. S. 372, 374, 375, 23 L. ed. 657, 658, 659); between a tax on exports and a mere stamp duty on a document (*Fairbank v. United States*, 181 U. S. 283, 290, 45 L. ed. 862, 865, 21 Sup. Ct. Rep. 648); between a tax and a penalty (*Helwig v. United States*, 188 U. S. 605, 611, 47 L. ed. 614, 616, 23 Sup. Ct. Rep. 427); between a tax and a covert regulation of interstate commerce (*Atlantic & P. Teleg. Co. v. Philadelphia*, 190 U. S. 160, 162, 47 L. ed. 995, 999, 23 Sup. Ct. Rep. 817); between a legitimate regulation of rates and a regulation which is confiscatory (*Smyth v. Ames*, 169 U. S. 466, 527, 42 L. ed. 819, 842, 18 Sup. Ct. Rep. 418).

The instance of a license tax upon persons or corporations engaged in foreign or interstate commerce is a common one. In such a case the only object which may constitutionally be accomplished by a state is compensation for reasonable governmental inspection or supervision. If the amount of the tax be materially in excess of what is necessary for that object, there is an indi-

cation of a purpose to regulate foreign or interstate commerce, and it is therefore necessary for the court to draw the line in each case according to the amount, and adjudge what amount will constitute taxation for a proper purpose, and what amount will constitute a regulation of commerce.

Atlantic & P. Teleg. Co. v. Philadelphia, 190 U. S. 160, 164, 47 L. ed. 995, 1000, 23 Sup. Ct. Rep. 817.

While a state may impose a license fee upon foreign corporations engaged in interstate commerce, and indirectly tax their franchises (*Maine v. Grand Trunk R. Co.* 142 U. S. 217, 228, 35 L. ed. 994, 995, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163; *Fieklen v. Shelby County Taxing Dist.* 145 U. S. 1, 23, 36 L. ed. 601, 607, 4 Inters. Com. Rep. 79, 12 Sup. Ct. Rep. 810; *Postal Teleg. Cable Co. v. Adams*, 155 U. S. 688, 697, 39 L. ed. 311, 316, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360), it cannot for a moment be doubted that if the state should impose a prohibitory tax it would be unconstitutional, and that the question of constitutionality in such a case would depend entirely upon degree.

If, for example, a state should impose a property tax upon an express company (*Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 220, 41 L. ed. 683, 695, 17 Sup. Ct. Rep. 305; *Adams Exp. Co. v. Kentucky*, 166 U. S. 171, 180, 41 L. ed. 960, 963, 17 Sup. Ct. Rep. 527; *Adams Exp. Co. v. Ohio State Auditor*, 166 U. S. 185, 221, 41 L. ed. 965, 977, 17 Sup. Ct. Rep. 604), the effect of which was practical prohibition, no doubt the court would hold that it was not a legitimate tax at all, but a roundabout way of prohibiting indirectly what the state could not prohibit directly, namely, interstate commerce.

So, whenever it is claimed that the amount of a state inspection charge upon articles of foreign or interstate commerce is so much in excess of what is reasonably necessary to accomplish that object as to evince a purpose to interfere by taxation with foreign or interstate commerce, the court must decide when the amount in the particular case becomes unconstitutional.

Patapseo Guano Co. v. Board of Agriculture, 171 U. S. 345, 351, 43 L. ed. 191, 193, 18 Sup. Ct. Rep. 862 *et seq.*

The same principle applies in those cases where the amount of compensation for the use of property affected by a public interest is drawn in question as being confiscation in the guise of police regulation.

Chesapeake & P. Teleph. Co. v. Manning, 186 U. S. 238, 250, 46 L. ed. 1144, 1149, 22 Sup. Ct. Rep. 881; *Cotting v. Kansas City Stock Yards Co.* (*Cotting v. Godard*) 183

U. S. 79, 85, 46 L. ed. 92, 99, 22 Sup. Ct. Rep. 30.

At the last term, in *Helwig v. United States*, 188 U. S. 605, 611, 47 L. ed. 614, 23 Sup. Ct. Rep. 427, Mr. Justice Peckham said: "Whether called a 'further sum' or an 'additional duty,' or by some other name, the amount imposed was so large in proportion to the value of the merchandise imported as to show beyond doubt that it was a sum imposed not in fact as a duty upon an imported article, but as a penalty, and nothing else."

So, with regard to the tax in question, the amount of the tax is so large in proportion to the value of the merchandise as to show beyond doubt that it was a sum imposed not in fact as an excise for revenue, but as a prohibition, and nothing else.

Let us take, for the purpose of concrete illustration, the case of oleomargarine. It has been held that a state, under the power to regulate its internal commerce, could prohibit the manufacture and sale of oleomargarine (*Powell v. Pennsylvania*, 127 U. S. 678, 686, 32 L. ed. 253, 257, 8 Sup. Ct. Rep. 992, 1257; *Plumley v. Massachusetts*, 155 U. S. 461, 467, 39 L. ed. 223, 225, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154, and *Capital City Dairy Co. v. Ohio*, 183 U. S. 238, 246, 46 L. ed. 171, 175, 22 Sup. Ct. Rep. 120), but that it could not prohibit the sale of oleomargarine manufactured in other states, and offered for sale in the course of interstate commerce.

Schollenberger v. Pennsylvania, 171 U. S. 1, 21, 25, 43 L. ed. 49, 56, 58, 18 Sup. Ct. Rep. 757.

Is it conceivable that, nevertheless, a state could indirectly do what this court has said it could not directly do, that is, practically prohibit interstate commerce in oleomargarine by taxing it to death. Surely this court would not entertain an argument attempting to uphold such legislation upon the ground that on its face it was impartial and applied alike to internal and interstate commerce, and that the power to tax involved the power to destroy.

Woodruff v. Parham, 8 Wall. 123, 131, 140, 19 L. ed. 382, 384, 387; *Brown v. Houston*, 114 U. S. 622, 634, 29 L. ed. 257, 261, 5 Sup. Ct. Rep. 1091; *Cooley*, Taxn. pp. 27, 28.

If a state should impose a tax upon a commercial commodity as property (*Woodruff v. Parham*, 8 Wall. 123, 131, 140, 19 L. ed. 382, 384, 387; *Hinson v. Lott*, 8 Wall. 148, 152, 19 L. ed. 387, 388; *Brown v. Houston*, 114 U. S. 622, 632, 634, 29 L. ed. 257, 260, 261, 5 Sup. Ct. Rep. 1091; *Postal Teleg. Cable Co. v. Adams*, 155 U. S. 688, 697, 39 L. ed. 311, 316, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360. *American Refrig-*

erator Transit Co. v. Hall, 174 U. S. 70, 74, 43 L. ed. 899, 901, 19 Sup. Ct. Rep. 599; *Reymann Brewing Co. v. Brister*, 179 U. S. 445, 453, 45 L. ed. 269, 273, 21 Sup. Ct. Rep. 201), and the effect of such a tax as to articles brought from other states was to destroy all opportunity to sell the commodity, it cannot be doubted that the law would be declared unconstitutional as interfering with interstate commerce, even though the same amount of tax should be laid on domestic manufactures as property, and even though such a tax would only apply after the original package of importation had been broken and the contents exposed for sale.

May v. New Orleans, 178 U. S. 496, 508, 44 L. ed. 1165, 1169, 20 Sup. Ct. Rep. 976.

There would be prima facie no discrimination in the law; on its face it would apply impartially to home and foreign manufactures alike. Nevertheless such a tax law would be held unconstitutional; for, if allowed to operate, it could as effectually bar the products and manufactures of other states as if the law directly enacted that such articles should not be sold.

Leloup v. Mobile, 127 U. S. 640, 647, 32 L. ed. 311, 314, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; *Brennan v. Titusville*, 153 U. S. 289, 303, 38 L. ed. 719, 723, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829.

The products of one or more states could thus, by taxation, be excluded from any state. Fortunately, such efforts have been heretofore rendered fruitless by the supervising action of this court.

Caldwell v. North Carolina, 187 U. S. 622, 633, 47 L. ed. 336, 341, 23 Sup. Ct. Rep. 229.

In the supposed case it would undoubtedly be held that, in whatever language the statute was framed, its purpose might be determined from its natural and reasonable effect. The court would brush aside the form and the pretext, and hold that the tax in its practical effect was prohibitory, that the purpose of the legislation was legally to be determined by such prohibitory effect, and that prohibition was beyond the constitutional power of a state.

American Fertilizing Co. v. Board of Agriculture, 11 L. R. A. 179, 3 Inters. Com. Rep. 532, 43 Fed. 609.

If the tax was not prohibitive, but a proportional and reasonable charge for the maintenance of the state government, levied upon all similar property, entirely different considerations would be presented, and it would then be for the courts to determine whether such a law was in its purpose, operation, or effect a proper and reasonable tax law, which did not unduly interfere

195 U. S.

with the power of Congress to regulate interstate commerce.

Postal Teleg. Cable Co. v. Adams, 155 U. S. 683, 697, 39 L. ed. 311, 316, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268.

In such a case, too, would it not be relevant to show that the amount of the tax was such as not to operate as a practical prohibition of sales in competition with the products of the taxing state? Or, if it were in the guise of an inspection or license fee, would it not be relevant to show that it was not large enough to operate as a prohibition or penalty?

Ward v. Maryland, 12 Wall. 418, 425, 429, 20 L. ed. 449, 451, 452; *Welton v. Missouri*, 91 U. S. 275, 278, 23 L. ed. 347, 348; *New York v. Compagnie Generale Transatlantique*, 107 U. S. 59, 60, 27 L. ed. 383, 384, 2 Sup. Ct. Rep. 87; *Moran v. New Orleans*, 112 U. S. 69, 73, 28 L. ed. 653, 655, 5 Sup. Ct. Rep. 38; *Walling v. Michigan*, 116 U. S. 446, 461, 29 L. ed. 691, 696, 6 Sup. Ct. Rep. 454; *Emert v. Missouri*, 156 U. S. 296, 311, 39 L. ed. 430, 434, 15 Sup. Ct. Rep. 367.

Are not these all cases of degree, and does not the extent and effect of the tax determine its constitutionality?

The fact that the act of Congress applies also to interstate commerce does not affect the question, for it is the settled law of this court that the power of Congress to regulate interstate commerce does not uphold any act which operates directly upon internal commerce and invades the domain of the states.

Trade-Mark Cases (United States v. Steffens) 100 U. S. 82, 95, 96, 25 L. ed. 550, 552, 553.

Though the destruction of the oleomargarine industry by a repressive state tax might be supported under the police power by all those familiar arguments which have been advanced in this court during the past sixteen years (*Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; *Capital City Dairy Co. v. Ohio*, 183 U. S. 238, 46 L. ed. 171, 22 Sup. Ct. Rep. 120), a similar repressive tax by Congress must be supported, if at all, on other grounds.

Cooley, Taxn. pp. 12, 13.

Congress has no power to tax the instrumentalities of a state (*Snyder v. Bettman*, 190 U. S. 249, 253, 47 L. ed. 1035, 1037, 23 Sup. Ct. Rep. 803), unless it be necessary and proper to carry into execution some power given to Congress, other than the power of taxation.

Veazie Bank v. Fenno, 8 Wall. 533, 19 L. ed. 482, is not authority for an unlimited and arbitrary power to tax.

Hepburn v. Griswold, 8 Wall. 603, 636, 19 L. ed. 513, 530; *Merchants' Nat. Bank v.*

United States, 101 U. S. 1, 25 L. ed. 979; *Head Money Cases* (*Edye v. Robertson*) 112 U. S. 580, 596, 28 L. ed. 798, 803, 5 Sup. Ct. Rep. 247.

The *ratio decidendi* of the cases upon this point is summed up by Mr. Justice Miller in *Citizens' Sav. L. Asso. v. Topeka*, 20 Wall. 655, 663, 22 L. ed. 455, 461; namely, given a purpose or object for which taxation may be lawfully used, and the extent of its exercise is, in its very nature, unlimited. And the tax involved in that case was condemned because the object of the statute was found to be the encouragement and benefit of certain private industries.

To the same effect see *Parkersburg v. Brown*, 106 U. S. 487, 500, 27 L. ed. 238, 243, 1 Sup. Ct. Rep. 442; *Cole v. La Grange*, 113 U. S. 1, 6, 28 L. ed. 896, 897, 5 Sup. Ct. Rep. 416; *State ex rel. Griffith v. Osawkee Twp.* 14 Kan. 418, 19 Am. Rep. 99; *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39; *Mead v. Acton*, 139 Mass. 341, 1 N. E. 413; *Allen v. Jay*, 60 Me. 124, 11 Am. Rep. 185; *Michigan Sugar Co. v. Auditor General* (*Michigan Sugar Co. v. Dix*) 124 Mich. 674, 56 L. R. A. 329, 83 Am. St. Rep. 354, 83 N. W. 625; *State ex rel. Wheeler v. Foley*, 30 Minn. 350, 15 N. W. 375; *Weismer v. Douglas*, 64 N. Y. 91, 21 Am. Rep. 586; *Bertholf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323; *Sharpless v. Philadelphia*, 21 Pa. 147, 59 Am. Dec. 759; *Burroughs*, Taxn. pp. 6, 506.

If, therefore, the courts, looking beyond form and considering substance in the cases at bar, shall be persuaded that the purpose and necessary operation of this legislation be to accomplish an end or object not intrusted to this government, the legislation may and should be declared unconstitutional.

M'Culloch v. Maryland, 4 Wheat. 316, 423, 4 L. ed. 579, 605.

The argument that the prohibitive tax of 10 cents per pound was laid to facilitate the collection of the tax of $\frac{1}{4}$ cent on other colors of oleomargarine cannot uphold the law. Such a purpose is too remote and uncertain.

United States v. Dewitt, 9 Wall. 41, 44, 19 L. ed. 593, 594.

Even if the abuse of the taxing power was not in the minds of the people at the time the first Amendments to the Constitution were adopted, and the framers perceived and apprehended no danger from the abuse of that power, this fact would not tend to limit the scope of the Amendments, if the case now presented be fairly within their spirit and letter.

Dartmouth College v. Woodward, 4 Wheat. 518, 644, 4 L. ed. 629, 661. See also *Slaughter-House Cases*, 16 Wall. 36, 72, 21

L. ed. 394, 407; *Ex parte Virginia*, 100 U. S. 339, 347, 361, 25 L. ed. 676, 679, 684; *Holden v. Hardy*, 169 U. S. 366, 382, 385, 42 L. ed. 780, 787, 788, 18 Sup. Ct. Rep. 383; *United States v. Wong Kim Ark*, 169 U. S. 649, 676, 42 L. ed. 890, 900, 18 Sup. Ct. Rep. 456.

If it be now held that the requirement of due process of law, in the Constitution of the United States, imposes no prohibition or limitation upon the taxing power of Congress, then the result must be that the 5th Amendment, intended to constitute part of a bill of rights protecting the people in their individual liberties as against the majority wielding the power of government, must now be construed as if it read "No person shall be . . . deprived of life, liberty, or property without due process of law, except it be in the form of taxation; nor shall private property be taken for public use without just compensation, except in cases of taxation."

Santa Clara County v. Southern P. R. Co. 18 Fed. 385, Affirmed in 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132.

The phrase "due process of law" has and imports exactly the same meaning as the words "the law of the land," in Magna Charta.

Hurtado v. California, 110 U. S. 516, 521, 527, 543, 28 L. ed. 232, 234, 235, 241, 4 Sup. Ct. Rep. 111, 292.

No statement of the general meaning of these equivalent phrases is more often quoted than that from Mr. Webster's argument in the famous *Dartmouth College Case*, 4 Wheat. 581, 4 L. ed. 645, *viz.*: The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land.

"Due process of law" in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one being dealt with belongs.

Story, Const. 5th ed. § 1945.

While every man has a right to require that his own controversies shall be judged by the same rules which are applied in the controversies of his neighbors, the whole community is also entitled at all times to demand the protection of the ancient principles which shield private right against arbitrary interference, even though such interference may be under a rule impartial in its operation. It is not the partial na-

ture of the rule, so much as its arbitrary and unusual character, that condemns it as unknown to the law of the land.

Cooley, Const. Lim. 6th ed. p. 433.

The first exposition of these phrases by this court will be found in the case of *Bank of Columbia v. Okely*, 4 Wheat. 235, 244, 4 L. ed. 559, 561, where Mr. Justice Johnson, among other things, said: "As to the words from Magna Charta, incorporated into the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: That they were intended to secure the individual from the arbitrary exercise of the powers of government unrestrained by the established principles of private rights and distributive justice."

This statement as to the meaning and scope of the famous phrase has been repeatedly quoted with approval by this court.

United States v. Craikshank, 92 U. S. 542, 554, 23 L. ed. 588, 592; *Hurtado v. California*, 110 U. S. 516, 527, 28 L. ed. 232, 235, 4 Sup. Ct. Rep. 111, 292; *Caldwell v. Texas*, 137 U. S. 692, 697, 34 L. ed. 816, 818, 11 Sup. Ct. Rep. 224; *Scott v. McNeal*, 154 U. S. 34, 45; 38 L. ed. 896, 901, 14 Sup. Ct. Rep. 1108; *Taylor v. Beckham*, 178 U. S. 548, 592, 44 L. ed. 1187, 1206, 20 Sup. Ct. Rep. 890, 1009.

Due process of law is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government.

Giozza v. Tiernan, 148 U. S. 657, 662, 37 L. ed. 599, 601, 13 Sup. Ct. Rep. 721. See also *Duncan v. Missouri*, 152 U. S. 377, 382, 38 L. ed. 485, 487, 14 Sup. Ct. Rep. 570; *Thomas v. Gay*, 169 U. S. 264, 283, 42 L. ed. 740, 747, 18 Sup. Ct. Rep. 340; *Norwood v. Baker*, 172 U. S. 269, 279, 43 L. ed. 443, 447, 19 Sup. Ct. Rep. 187.

This court has never attempted to define with precision the words "due process of law," nor is it necessary to do so in this case. It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government, which no member of the Union may disregard.

Holden v. Hardy, 169 U. S. 366, 389, 42 L. ed. 780, 790, 18 Sup. Ct. Rep. 383.

No reason can be perceived why the very same provision in the Constitution should have one meaning when applied to the state governments, and a narrower meaning and more limited scope when applied to the national government.

Sinking Fund Cases (Union P. R. Co. v. United States) 99 U. S. 700, 718, 25 L. ed. 496, 501.

Logically, if there could be, in reason
195 U. S.

and justice, any difference, it should be against the national government, which is indisputably one of limited and enumerated powers.

Cooley, Taxn. p. 12.

The only sound principle must be that the provision is the same in both cases.

French v. Barber Asphalt Paving Co. 181 U. S. 324, 355, 45 L. ed. 879, 894, 21 Sup. Ct. Rep. 625.

A statute under the police power, which prevented all sales in a legitimate article of commerce, would not be valid.

Powell v. Pennsylvania, 127 U. S. 678, 685, 32 L. ed. 253, 256, 8 Sup. Ct. Rep. 992, 1257; *Plumley v. Massachusetts*, 155 U. S. 461, 467, 39 L. ed. 223, 225, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154.

In the exercise of the power to regulate commerce among the several states, Congress could not act arbitrarily, but was subject to the limitations imposed by the Constitution upon the exercise of the powers granted.

Lottery Case (Champion v. Ames) 188 U. S. 363, 47 L. ed. 504, 23 Sup. Ct. Rep. 321.

The power given to Congress to regulate interstate commerce does not carry with it any power to destroy or impair those limitations.

Interstate Commerce Commission v. Brimson, 154 U. S. 447, 479, 38 L. ed. 1047, 1058, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125.

Assuming that the restrictive clause of the 5th Amendment applies to the exercise of the taxing power, then its prohibition or limitation should be enforced in its spirit and to its entirety, as fully as if it were part of the very article conferring the taxing power.

Prout v. Starr, 188 U. S. 537, 543, 47 L. ed. 584, 23 Sup. Ct. Rep. 398; *Fairbank v. United States*, 181 U. S. 283, 288, 45 L. ed. 862, 865, 21 Sup. Ct. Rep. 648.

The act of Congress of May 9, 1902, purports to levy what is strictly and technically an excise upon the manufacture and sale of an article of food.

Patton v. Brady, 184 U. S. 608, 618, 46 L. ed. 713, 718, 22 Sup. Ct. Rep. 493.

An excise is generally included in the term "tax," which, in its most enlarged sense, embraces all the regular impositions made by government upon the person, property, privileges, occupations, and enjoyments of the people, for the purpose of raising public revenue. Taxes are distinguished from arbitrary levies in that they are laid according to some rule, which apportions the burden between the subjects thereof. An exaction which is made without regard to any rule of apportionment is therefore not

a tax, and is not within the constitutional authority of the government.

Cooley, Principles of Const. Law, 3d ed. p. 56.

Chief Justice Marshall defined taxation to be the simple operation of taking small proportions from a perpetually accumulating mass susceptible of almost infinite division.

Gibbons v. Ogden, 9 Wheat. 1, 199, 6 L. ed. 23, 70.

What would he have said of an alleged tax which took all?

There is undoubtedly a difference between a land or property tax, and an excise upon a business, or upon the manufacture and sale of a commodity. An excise may be upon the article, or its value, or its quality, or its quantity, or its weight; but, however the amount be determined, whether by specific or ad valorem taxes or duties, or both methods, although it need not be inherently equal, it must operate alike on all persons within the class selected, or who exercise the same privilege.

Oliver v. Washington Mills, 11 Allen, 268; 15 Ops. Atty. Gen. 219.

No power to suppress the oleomargarine industry for the benefit of the butter industry was intrusted to Congress by the Constitution. It is not legitimate classification, but mere arbitrary selection, which deprives of liberty and property one body of individuals for the benefit of another.

Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 563, 46 L. ed. 679, 691, 22 Sup. Ct. Rep. 431; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 154, 41 L. ed. 666, 667, 17 Sup. Ct. Rep. 255; *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 356.

The right to earn one's livelihood by any lawful calling constitutes the liberty and property of the individual, and one of the inalienable privileges and immunities of every citizen of the United States, which are secured by the Constitution.

Butchers' Union, S. H. & L. S. L. Co. v. Crescent City, L. S. L. & S. H. Co. 111 U. S. 746, 757, 764, 28 L. ed. 585, 589, 591, 4 Sup. Ct. Rep. 652; *Powell v. Pennsylvania*, 127 U. S. 678, 684, 32 L. ed. 253, 256, 8 Sup. Ct. Rep. 992, 1257; *Allgeyer v. Louisiana*, 165 U. S. 578, 589, 41 L. ed. 832, 835, 17 Sup. Ct. Rep. 427; *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343.

The act in question is subject to the additional objection that the power to decide finally what articles are to be taxed cannot be conferred upon the commissioner of internal revenue, who is only an administrative officer.

United States v. Eaton, 144 U. S. 677,

688, 36 L. ed. 591, 594, 12 Sup. Ct. Rep. 764; *United States v. Maid*, 116 Fed. 650; *United States v. Blasingame*, 116 Fed. 654.

The intention to tax in a particular manner must be expressed in clear and unambiguous language, else it cannot be enforced; and words of exception are to receive a liberal, rather than a restricted, construction, to the end that the burdens imposed upon individuals may be confined, rather than extended.

Adams v. Baneroff, 3 Sumn. 384, Fed. Cas. No. 44; *Eidman v. Martinez*, 184 U. S. 578, 583, 46 L. ed. 697, 701, 22 Sup. Ct. Rep. 515; *Schoenemann v. United States*, 56 C. C. A. 104, 119 Fed. 584; *Re Southern P. Co.* 82 Fed. 311; *Wise v. Southern P. Co.* 31 C. C. A. 263, 59 U. S. App. 496, 87 Fed. 863; *Matheson v. United States*, 18 C. C. A. 143, 38 U. S. App. 25, 71 Fed. 394; *Rice v. United States*, 4 C. C. A. 104, 10 U. S. App. 670, 53 Fed. 910; *Dean v. Charlton*, 27 Wis. 522.

Although an unconstitutional statute cannot, by mere implication alone, operate to repeal a prior enactment, still, an expression of such an intention may as well be contained in an unconstitutional statute as any other.

Tims v. State, 26 Ala. 165; *Orange County v. Harris*, 97 Cal. 600, 32 Pac. 594; *People ex rel. Kellogg v. Fleming*, 7 Colo. 230, 3 Pac. 70; *Meshmeier v. State*, 11 Ind. 482; *Childs v. Shower*, 18 Iowa, 261; *Ely v. Thompson*, 3 A. K. Marsh. 70; *Sullivan v. Adams*, 3 Gray, 476; *Campau v. Detroit*, 14 Mich. 276; *Devoy v. New York*, 35 Barb. 264, 36 N. Y. 449; *Portland v. Schmidt*, 13 Or. 17, 6 Pac. 221; *Shepardson v. Milwaukee & B. R. Co.* 6 Wis. 605; *State ex rel. Rogers v. Burton*, 11 Wis. 51.

And a declaration that a prior statute is amended so as to read in the language of the amendatory statute amounts to an unequivocal expression of an intention to repeal the original act, so far as concerns any vital distinction from the amendatory act.

People v. Wilmerding, 136 N. Y. 363, 32 N. E. 1099; *Re Prime*, 136 N. Y. 347, 18 L. R. A. 713, 32 N. E. 1091; *Goodno v. Oshkosh*, 31 Wis. 127.

Congress cannot be held to have intended to prohibit oleomargarine, provided the Constitution will permit it to do so, and by the same act to tax it in case the prohibition were held unconstitutional. To so hold would be judicial legislation.

Sprague v. Thompson, 118 U. S. 90, 94, 30 L. ed. 115, 116, 6 Sup. Ct. Rep. 988; *James v. Bowman*, 190 U. S. 127, 141, 47 L. ed. 979, 983, 23 Sup. Ct. Rep. 678.

Solicitor General Hoyt argued the cause and filed a brief for defendant in error:

The tax is an excise.

Patton v. Brady, 184 U. S. 619, 46 L. ed. 719, 22 Sup. Ct. Rep. 493.

And the act is to be deemed a revenue measure.

Re Kollock, 165 U. S. 536, 41 L. ed. 816, 17 Sup. Ct. Rep. 444.

In imposing the tax in question, Congress has not encroached upon, or in any manner interfered with, the power of the states to regulate the manufacture and sale of oleo-margarine.

Nicol v. Amcs, 173 U. S. 509, 43 L. ed. 786, 19 Sup. Ct. Rep. 522; *Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747.

The tax imposed by this law is not open to the objection that it is not uniform in its operation.

Head Money Cases (Edye v. Robertson) 112 U. S. 594, 28 L. ed. 802, 5 Sup. Ct. Rep. 247.

Congress in imposing taxes may classify property for taxation.

Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Nicol v. Ames*, 173 U. S. 509, 43 L. ed. 786, 19 Sup. Ct. Rep. 522.

The constitutional prohibition against taking private property for public use without just compensation refers only to a direct appropriation of property for public purposes, and not to a so-called "taking" as the effect of taxation, or under the prohibitive result of state police laws.

Legal Tender Cases (Knox v. Lee) 12 Wall. 551, 20 L. ed. 312; *Northern Transp. Co. v. Chicago*, 99 U. S. 642, 25 L. ed. 338; *Mugler v. Kansas*, 123 U. S. 668, 31 L. ed. 212, 8 Sup. Ct. Rep. 273.

Due notice is given by the law itself as to the liability to the tax; an appeal is provided from the decision of the collector to the commissioner in case of a dispute respecting the taxability of the article; and a further appeal is allowed from the decision of the commissioner where the article is claimed to be deleterious to health. So here is due notice, an opportunity for hearing, and for an appeal,—in short, due process. The court has, in a recent case, broadly sustained executive proceedings as due process.

The Japanese Immigrant Case (Yamatoya v. Fisher) 189 U. S. 86, 47 L. ed. 721, 23 Sup. Ct. Rep. 611.

The power to tax is the power to destroy.

McCulloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579.

This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges

no limitations other than are prescribed in the Constitution.

Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23.

If the power be exercised oppressively, the appeal lies alone to the people, and not to the courts.

License Tax Cases, 5 Wall. 462, 18 L. ed. 497; *Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; *Dooley v. United States*, 183 U. S. 151, 166, 46 L. ed. 128, 135, 22 Sup. Ct. Rep. 62; *Pacific Ins. Co. v. Soule*, 7 Wall. 433, 19 L. ed. 95; *Austin v. Boston*, 7 Wall. 694, 19 L. ed. 224; *Veazie Bank v. Fenno*, 8 Wall. 533, 19 L. ed. 482; *Spencer v. Merchant*, 125 U. S. 355, 31 L. ed. 767, 8 Sup. Ct. Rep. 921.

Congress, having acted clearly within the scope of its undoubted power in imposing this excise, this court is not invested with authority to review the discretion reposed in that body by the people, and to declare the tax invalid if perchance, in its opinion, the tax may seem to be oppressive.

Hayburn's Case, 2 Dall. 410, 1 L. ed. 436; *Calder v. Bull*, 3 Dall. 386, 1 L. ed. 648; *Hepburn v. Griswold*, 8 Wall. 603, 19 L. ed. 513; *Legal Tender Cases (Knox v. Lee)* 12 Wall. 457, 20 L. ed. 287; *Kilbourn v. Thompson*, 103 U. S. 168, 190, 26 L. ed. 377, 386; *Treat v. White*, 181 U. S. 264, 45 L. ed. 853, 21 Sup. Ct. Rep. 611; *Patton v. Brady*, 184 U. S. 608, 46 L. ed. 713, 22 Sup. Ct. Rep. 493; *Lottery Case (Champion v. Ames)* 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321.

The statute is not invalid as an attempt to confer judicial power upon the commissioner of internal revenue.

Martin v. Mott, 12 Wheat. 19, 29, 31, 6 L. ed. 537, 540, 541; *Philadelphia & T. R. Co. v. Stimpson*, 14 Pet. 448, 458, 10 L. ed. 535, 540; *Den ex dem. Murray v. Hoboken Land & Improv Co.* 18 How. 272, 15 L. ed. 372; *Craig v. Leicensdorfer (Downs v. Hubbard)* 123 U. S. 189, 31 L. ed. 114, 8 Sup. Ct. Rep. 85; *Bushnell v. Leland*, 164 U. S. 684, 41 L. ed. 598, 17 Sup. Ct. Rep. 209; *Kennedy v. Gibson*, 8 Wall. 498, 19 L. ed. 476; *United States v. Knox*, 102 U. S. 422, 26 L. ed. 216; *Fong Yue Ting v. United States*, 149 U. S. 698, 714, 37 L. ed. 905, 913, 13 Sup. Ct. Rep. 1016; *Lem Moon Sing v. United States*, 158 U. S. 538, 544, 39 L. ed. 1082, 1084, 15 Sup. Ct. Rep. 967; *Nishimura Ekiu v. United States*, 142 U. S. 651, 660, 35 L. ed. 1146, 1149, 12 Sup. Ct. Rep. 336; *Chin Bak Kan v. United States*, 186 U. S. 193, 46 L. ed. 1121, 22 Sup. Ct. Rep. 891; *United States v. Moline*, 82 Fed. 592; *E. A. Chatfield Co. v. New Haven*, 110 Fed. 788; *Grady v. United States*, 39 C. C. A. 42, 98 Fed. 238; *Dastervignes v. United States*, 58 C. C. A. 346, 122 Fed. 30; *Weimer v. Bunbury*, 30 Mich. 201; *State v. Harmon*, 31 Ohio St.

250; *Musser v. Adair*, 55 Ohio St. 466, 45 N. E. 903; *State ex rel. Anderson v. Timme*, 60 Wis. 344, 18 N. W. 837; *Donahue v. Will County*, 100 Ill. 107; *Casey v. Galli*, 94 U. S. 673, 24 L. ed. 168.

Extracts from congressional debates, which show only the views of those quoted as to the purpose of the tax, this court will not consider.

United States v. Union P. R. Co. 91 U. S. 79, 23 L. ed. 228; *Soon Hing v. Crowley*, 113 U. S. 703, 710, 28 L. ed. 1145, 1147, 5 Sup. Ct. Rep. 730; *Powell v. Pennsylvania*, 127 U. S. 685, 686, 32 L. ed. 256, 257, 8 Sup. Ct. Rep. 992, 1257; *United States v. Trans-Missouri Freight Asso.* 166 U. S. 318, 41 L. ed. 1019, 17 Sup. Ct. Rep. 540; *Camfield v. United States*, 167 U. S. 523, 42 L. ed. 261, 17 Sup. Ct. Rep. 864; *Dunlap v. United States*, 173 U. S. 75, 43 L. ed. 619, 19 Sup. Ct. Rep. 319; *Maxwell v. Dow*, 176 U. S. 601, 44 L. ed. 604, 20 Sup. Ct. Rep. 448, 494; *Knowlton v. Moore*, 178 U. S. 72, 44 L. ed. 982, 20 Sup. Ct. Rep. 747; *Dobbins v. Los Angeles*, 139 Cal. 179, 96 Am. St. Rep. 95, 72 Pac. 971; *Cooley*, Const. Lim. 6th ed. p. 231.

The court will, however, notice well-known facts and situations in the life and business of the times.

Brown v. Piper, 91 U. S. 42, 43, 23 L. ed. 201, 202; *Brown v. Spilman*, 155 U. S. 670, 39 L. ed. 305, 15 Sup. Ct. Rep. 245; *Mills v. Green*, 159 U. S. 657, 40 L. ed. 295, 16 Sup. Ct. Rep. 132; *Nicol v. Ames*, 173 U. S. 517, 43 L. ed. 792, 19 Sup. Ct. Rep. 522; *Bank of Kentucky v. Adams Exp. Co.* 93 U. S. 185, 23 L. ed. 876; *The Delaware*, 161 U. S. 472, 40 L. ed. 776, 16 Sup. Ct. Rep. 516; *United States v. Rio Grande Dam & Irrig. Co.* 174 U. S. 698, 43 L. ed. 1139, 19 Sup. Ct. Rep. 770; *Bank of Augusta v. Earle*, 13 Pet. 590, 591, 10 L. ed. 308, 309; *New York Indians v. United States*, 170 U. S. 32, 42 L. ed. 938, 18 Sup. Ct. Rep. 531; 1 Greenl. Ev. §§ 5, 6.

Congress, in imposing the different rates of tax, does not arbitrarily create the classification; it finds it already existing, created by the states, and recognized by the courts, and lays the tax accordingly.

Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; *Plumley v. Massachusetts*, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; *Collins v. New Hampshire*, 171 U. S. 30, 43 L. ed. 60, 18 Sup. Ct. Rep. 768; *Capital City Dairy Co. v. Ohio*, 183 U. S. 238, 46 L. ed. 171, 22 Sup. Ct. Rep. 120; *Re Kollock*, 165 U. S. 526, 41 L. ed. 813, 17 Sup. Ct. Rep. 444; *Wilkins v. United States*, 37 C. C. A. 588, 96 Fed. 837; *United States*

v. Dougherty, 101 Fed. 439; *Dougherty v. United States*, 47 C. C. A. 195, 108 Fed. 56.

It is within the power of Congress to say what regulations are necessary or proper for the purpose of preventing frauds upon any branch of its revenue.

United States v. 132 Packages of Spirituous Liquors & Wines, 22 C. C. A. 228, 40 U. S. App. 333, 76 Fed. 364; *Nicol v. Ames*, 173 U. S. 517, 43 L. ed. 792, 19 Sup. Ct. Rep. 522; *Felsenheld v. United States*, 186 U. S. 126, 46 L. ed. 1085, 22 Sup. Ct. Rep. 740; *United States v. Singer*, 15 Wall. 111, 21 L. ed. 49; *United States v. Three Packages of Distilled Spirits*, 125 Fed. 52.

May not the government legislate to this end by the amount of a certain tax, as well as by prescribing certain incidental regulations?

The tax is not prohibitive of the manufacture and sale of colored oleomargarine.

State ex rel. Atty. Gen. v. Capital City Dairy Co. 62 Ohio St. 350, 57 L. R. A. 181, 57 N. E. 62, 183 U. S. 238, 46 L. ed. 171, 22 Sup. Ct. Rep. 120.

Legislation may affect commerce in many ways without constituting a regulation of it within the meaning of the Constitution, when the legislation is not directed against commerce, and only indirectly and remotely affects it.

Plumley v. Massachusetts, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; *Sherlock v. Alling*, 93 U. S. 99, 103, 23 L. ed. 819, 820; *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714; *United States v. E. C. Knight Co.* 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249.

Mr. Justice **White**, after making the foregoing statement, delivered the opinion of the court:

As the controversy in every aspect involves the acts of Congress concerning the taxation of oleomargarine, a summary of those acts becomes essential.

The original act was passed in 1886. (24 Stat. at L. 209, chap. 840, U. S. Comp. Stat. 1901, p. 2228.) The 1st section provided:

"That for the purposes of this act the word 'butter' shall be understood to mean the food product usually known as butter, and which is made exclusively from milk or cream, or both, with or without common salt, and with or without additional coloring matter."

The 2d thus defined oleomargarine:

"That for the purposes of this act certain manufactured substances, certain extracts, and certain mixtures and compounds, including such mixtures and compounds with butter, shall be known and designated as 'oleomargarine,' namely: All substances

heretofore known as oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine, and neutral; all mixtures and compounds of oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine, and neutral; all lard extracts and tallow extracts; and all mixtures and compounds of tallow, beef fat, suet, lard, lard oil, vegetable oil, and annatto, and other coloring matter; intestinal fat and offal fat made in imitation or semblance of butter, or, when so made, calculated or intended to be sold as butter or for butter."

[44] The 3d, 4th, 5th, 6th, and 7th sections imposed *a license on manufacturers and dealers in oleomargarine, and contained many requirements controlling the packing, marketing, and supervision of the manufacture and sale of the taxed article. The 8th section provided as follows:

"That upon oleomargarine which shall be manufactured and sold, or removed for consumption or use, there shall be assessed and collected a tax of two cents per pound, to be paid by the manufacturer thereof; . . . The tax levied by this section shall be represented by coupon stamps, and the provisions of existing laws governing the engraving, issue, sale, accountability, effacement, and destruction of stamps relating to tobacco and snuff, as far as applicable, are hereby made to apply to stamps provided for by this section."

The other provisions of the statute, not necessary to be noticed, contained many regulations looking to the enforcement and collection of the licenses and taxes which the act imposed. In 1902 further provisions were made on the subject, and the act of 1886 was, in many respects, expressly amended. (32 Stat. at L. 193, chap. 784.) The title of the act is—

"An Act to Make Oleomargarine and Other Imitation Dairy Products Subject to the Laws of Any State or Territory or the District of Columbia into Which They Are Transported, and to Change the Tax on Oleomargarine, and to Impose a Tax, Provide for the Inspection, and Regulate the Manufacture and Sale of Certain Dairy Products, and to Amend an Act Entitled 'An Act Defining Butter, Also Imposing a Tax Upon and Regulating the Manufacture, Sale, Importation, and Exportation of Oleomargarine,' Approved August 2, 1886."

The 1st section provides that all—"oleomargarine, butterine, imitation, process, renovated, or adulterated butter, or imitation cheese, or any substance in the semblance of butter or cheese, not the usual product of the dairy, and not made exclusively of pure and unadulterated milk or cream, transported into any state or ter-

ritory *or the District of Columbia, and re-[45] maining therein for use, consumption, sale, or storage therein, shall, upon the arrival within the limits of such state or territory or the District of Columbia, be subject to the operation and effect of the laws of such state or territory or the District of Columbia . . . to the same extent and in the same manner as though such article or substances had been produced in such state or territory or the District of Columbia, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

Section 2 amends § 3 of the act of 1886 in particulars not necessary for the purposes of this case to be considered. Section 3 amends § 8 of the act of 1886 by increasing the tax on oleomargarine from two (2) to ten (10) cents per pound, with this proviso: "Provided, When oleomargarine is free from artificial coloration that causes it to look like butter of any shade of yellow, said tax shall be one fourth of one cent per pound. The tax levied by this section shall be represented by coupon stamps; and the provisions of existing laws governing the engraving, issue, sale, accountability, effacement, and destruction of stamps relating to tobacco and snuff, as far as applicable, are hereby made to apply to stamps provided for in this section."

Section 4 reiterates the definition of butter contained in the 1st section of the act of 1886, and besides gives a definition of "adulterated butter," "process butter," or "renovated butter," and imposes taxes upon the manufacture and sale of these articles, the tax upon adulterated butter being at the rate of 10 cents a pound.

The section in question, as well as those following it, contains many administrative provisions for the enforcement of the taxes levied by the act, and concerning interstate and foreign commerce in the articles referred to. Bearing, then, the statutes in mind, we come to consider the assignments of error, which are as follows:

*"The district court erred in sustaining [46] the demurrer of the United States to the answer of plaintiff in error (defendant below).

"The district court erred in refusing to hold that the act of Congress approved August 2, 1886, as amended by the act of Congress approved May 9, 1902, is in contravention of the Constitution of the United States of America, and of the amendments thereto, and is illegal and void, for the reasons:

"(a) The act deprives the defendant of his property without due process of law.

"(b) The act is an unwarranted encroachment upon, and an interference with, the

police powers reserved to the several states and to the people of the United States.

"(c) The act so arbitrarily discriminates against oleomargarine in favor of butter as to destroy the oleomargarine industry for the benefit of the butter industry of the United States, and is thus repugnant to those fundamental principles which are inherent in the Constitution of the United States.

"The district court erred in holding, if said act be not in contravention of the Constitution of the United States, that oleomargarine, which contains no artificial coloration than that imparted to it by the use of butter which itself contains coloring matter, and which therefore causes said oleomargarine to look like butter of a shade of yellow, is subject to a tax of 10 cents per pound instead of a tax of $\frac{1}{4}$ of 1 cent per pound."

It is to be observed that in the errors thus assigned no reference is made to the contention in the answer that the acts of Congress were void because conferring upon administrative officers the power to finally decide what constituted artificial coloration; such contention, therefore, may be put out of view. The errors relied upon embrace not only the contention that the act of Congress imposing the tax is repugnant to the Constitution, but also that the penalty was wrongfully enforced, because the one quarter of a cent per pound which [47] had been *paid on the oleomargarine was the only tax to which it was liable under the act of Congress when rightly construed. As the presence of the constitutional question imposes upon us the duty of considering also the construction of the statute, we shall invert the order in which the errors have been assigned, and come to consider, first, whether the act of Congress, as properly construed, required on the oleomargarine in question a tax of 10 cents a pound; and, second, if it did, whether such act is repugnant to the Constitution of the United States.

1st. The construction of the statute.

Leaving out of view the proviso to the 8th section of the act of 1886 as amended and re-enacted by the 3d section of the act of 1902, it is beyond question that a tax of 10 cents a pound is imposed upon oleomargarine. As the product was admitted by the answer to be oleomargarine, it follows that it was subject to the tax of 10 cents a pound, unless, by the proviso, the oleomargarine was of such a character as to entitle it to the benefits of a lower rate of taxation. Now the proviso reads: "*Provided*, When oleomargarine is free from artificial coloration that causes it to look like butter of any shade of yellow, said

tax shall be one-fourth of one cent per pound." As it was admitted that the oleomargarine was of a shade of yellow causing it to look like butter, and as it was also admitted that this shade of yellow had been imparted by an artificial coloring matter used to color the butter which formed one of the ingredients from which the oleomargarine was manufactured, it results, if the text of the statute be applied, that the oleomargarine was not within the proviso, because it was not free from artificial coloring matter causing it to look like butter. This necessarily follows, since the right to enjoy the lower rate of tax is made by the proviso to depend upon whether, as a matter of fact, the oleomargarine was free from artificial coloring matter, and not upon the mere method adopted for imparting the artificial color. As the oleomargarine in question was in fact not free from artificial coloration, *we think that a con-[48] struction which would take it out of the general rule imposing the 10 cent tax upon all oleomargarine, and bring it within the exception embracing only oleomargarine free from artificial coloration, would be not an interpretation of the statute, but a disregard of its unambiguous provisions.

But it is contended that, as § 2 of the act of 1886 defined oleomargarine, for the purposes of that act, to be "certain manufactured substances, certain extracts, and certain mixtures and compounds, including such mixtures and compounds with butter," and as not only the act of 1886, but the act of 1902, defined butter, for the purposes of those acts, to mean "the food product usually known as butter, and which is made exclusively from milk or cream, or both, with or without common salt, and with or without additional coloring matter," therefore colored oleomargarine produced by using, as one of the ingredients of its manufacture, butter artificially colored, must be treated as free from artificial coloration within the meaning of the act of 1902, and the deduction made is that, as the statute treats butter, both with or without artificial coloration, as a legitimate ingredient of oleomargarine, the use of an authorized ingredient did not cause the manufactured product to be other than oleomargarine within the statute. But the proposition goes further, and asserts that because butter, whether artificially colored or not, was an authorized ingredient of oleomargarine, therefore the finished product, in which either of these ingredients was used, was not only oleomargarine, but necessarily also was oleomargarine free from artificial coloration. This is an obvious *non sequitur*. As the benefit of the lower tax depended upon the absence from the manufactured product of

artificial coloration, it follows that if, in the manufacture, an authorized ingredient, which was artificially colored, was used so as to artificially color the product, whilst that product would be oleomargarine, it could not be oleomargarine free from artificial coloration within the intendment of the proviso. Nor is there force in the contention that the *plain meaning of the statute is overcome by an amendment to which it was subjected. Before the amendment relied on, the proviso read as follows: "*Provided*, When oleomargarine is free from coloration or ingredient that causes it to look like butter of any shade of yellow, said tax shall be one fourth of one cent per pound." By the amendment the word ingredient was stricken out, thus leaving the proviso in the form in which it was enacted. The proposition is that the elimination of the word "ingredient" compels to the conclusion that wherever artificial coloration in the finished product of oleomargarine was produced by artificial coloration used in an authorized ingredient, that such coloration was not artificial within the statute. But this disregards the fact that butter, both when artificially colored and when not so colored, was made an authorized ingredient of oleomargarine. If, then, the word "ingredient" had not been stricken out, it might have given rise to the contention that the imparting of a yellow color to the finished product of oleomargarine by the use in its manufacture of spring butter of a natural yellow color would have caused the product oleomargarine to be artificially colored within the statute. As the manufacturer of oleomargarine was permitted to use either butter not artificially colored or butter so colored, the effect of striking out the word "ingredient" operated simply to render it certain that the finished product, even although of a yellow color, would be within the proviso where the color was imparted by an authorized ingredient not artificially colored. This overthrows the contention that the finished product, when not free from artificial coloration, must be treated as free from such coloration, because the color was derived from an artificially colored, though authorized, ingredient. We think, whilst the statute recognized the right of a manufacturer to use any or all of the authorized ingredients so as to make oleomargarine, and also authorized, as one of the ingredients, butter artificially colored, if the manufacturer elected to use such ingredient last mentioned, and thereby gave to *his manufactured product artificial coloration, such product so colored, although being oleomargarine, was not within the exception created by the proviso, and therefore

[49]

[50]

195 U. S.

came under the general rule subjecting oleomargarine to the tax of 10 cents a pound.

Nor do the other provisions of the act of 1902, as it is asserted, sustain the contention that artificially colored oleomargarine is to be treated as free from such coloration, because such color was imparted in its manufacture by the use of an artificially colored and authorized ingredient. The provision principally depended upon is § 2 of the act of 1902, which provides that any person who "sells, vends, or furnishes oleomargarine for the use and consumption of others, except to his own family table, without compensation, who shall add to or mix with such oleomargarine any artificial coloration, . . . shall also be held to be a manufacturer of oleomargarine . . ." But this section relates only to the adding to or mixing artificial coloration with oleomargarine after its manufacture, and therefore does not even remotely support the proposition that where, in the process of manufacture, oleomargarine becomes artificially colored, it must be held not to be what it in fact is,—that is, must be treated as free from artificial coloration, although such in fact is not the case.

Indeed, the context of the statutes, particularly the provisions as to adulterated and renovated butter in the act of 1902, harmonize with and thus add cogency to the construction which we have given to the provision concerning artificial coloration.

2d. Did Congress, in passing the acts which are assailed, exert a power not conferred by the Constitution?

That the acts in question on their face impose excise taxes which Congress had the power to levy is so completely established as to require only statement. *Patton v. Brady*, 184 U. S. 619, 46 L. ed. 719, 22 Sup. Ct. Rep. 493; *Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; *Nicol v. Ames*, 173 U. S. 509, 43 L. ed. 786, 19 Sup. Ct. Rep. 522; *Re Kollock*, 165 U. S. 536, 41 L. ed. 816, 17 Sup. Ct. Rep. 444.

*The last case referred to (*Re Kollock*) [51] involved the act of 1886, and the court, speaking through Mr. Chief Justice Fuller, said (p. 536, L. ed. p. 816, Sup. Ct. Rep. p. 447): "The act before us is, on its face, an act for levying taxes, and although it may operate in so doing to prevent deception in the sale of oleomargarine as and for butter, its primary object must be assumed to be the raising of revenue."

We might rest the answer to the contention as to the want of power in Congress to enact the laws in question upon the foregoing cases. But in view of the earnestness with which the validity of the acts are assailed in argument, and the assertion that the necessary effect of the amendment to the

act of 1886 by the act of 1902 is to make both of the laws in question so peculiar as to cause them to be beyond the reach of the previous rulings of this court, we propose to review and dispose of the propositions pressed upon us at bar as indubitably demonstrating that the acts in question were beyond the power of Congress to adopt.

The summary which follows embodies the propositions contained in the assignments of error, and the substance of the elaborate argument by which those assignments are deemed to be sustained. Not denying the general power of Congress to impose excise taxes, and conceding that the acts in question, on their face, purport to levy taxes of that character, the propositions are these:

(a) That the power of internal taxation which the Constitution confers on Congress is given to that body for the purpose of raising revenue, and that the tax on artificially colored oleomargarine is void because it is of such an onerous character as to make it manifest that the purpose of Congress in levying it was not to raise revenue, but to suppress the manufacture of the taxed article.

(b) The power to regulate the manufacture and sale of oleomargarine being solely reserved to the several states, it follows that the acts in question, enacted by Congress for the purpose of suppressing the manufacture and sale of oleomargarine, [52]*when artificially colored, are void, because usurping the reserved power of the states, and therefore exerting an authority not delegated to Congress by the Constitution.

(c) Whilst it is true—so the argument proceeds—that Congress, in exerting the taxing power conferred upon it, may use all means appropriate to the exercise of such power, a tax which is fixed at such a high rate as to suppress the production of the article taxed is not a legitimate means to the lawful end, and is therefore beyond the scope of the taxing power.

(d) As the tax levied by the acts which are assailed discriminates against oleomargarine artificially colored, and in favor of butter so colored, and creates an unwarranted and unreasonable distinction between the oleomargarine which is artificially colored and that which is not, and as the necessary operation and effect of the tax is to suppress the manufacture of artificially colored oleomargarine, and to aid the butter industry, therefore the acts are void. And with this proposition in mind it is insisted that wherever the judiciary is called upon to determine whether a power which Congress has exerted is within the authority conferred by the Constitution, the duty is to test the validity of the act, not merely by

its face, or, to use the words of the argument, “by the label placed upon it by Congress,” but by the necessary scope and effect of the assailed enactment.

(e) Admitting that the power to tax, as delegated to Congress by the Constitution as originally adopted, was subject to no limitation except as expressed in that instrument, the amendments to the Constitution, it is urged, have imposed limitations on the taxing power not expressed in the original Constitution. Under this assumption it is insisted that the acts in question are void, because the burdens which they impose are repugnant to both the 5th and 10th Amendments. To the 5th Amendment, because the amount of the tax is so out of proportion to the value of the property taxed as to destroy that property, and thus amount to a taking *thereof without due process of law. [53] To the 10th Amendment, because the necessary operation and effect of the acts is to destroy the oleomargarine industry, and thus exert a power not delegated to Congress, but reserved to the several states.

(f) Although, as a general rule, it be true that the power of Congress to tax, conferred by the Constitution, is unlimited, except as otherwise expressed in that instrument, and conceding, for the sake of the argument, that there is no express limitation either in the original Constitution or in the amendments thereto, by which the acts may be decided to be unconstitutional, nevertheless, it is urged that, as the burdens which the acts impose are so onerous and so unjust as to be confiscatory, the acts are void, because they amount to a violation of those fundamental rights which it is the duty of every free government to protect.

It is clear that these propositions in many respects not only reiterate in different forms of expression the same contention, but that they also so intermingle *considerations which require separate analysis as to cause it to be difficult to precisely determine their import. For instance, all of the propositions obviously rest not only on inferences drawn from the face of the acts, but also on deductions made from what it is assumed must have been the motives or purposes of Congress in passing them. To avoid confusion and repetition we shall consider these distinct contentions separately, and we hence come, first, to ascertain how far, if at all, the motives or purposes of Congress are open to judicial inquiry in considering the power of that body to enact the laws in question. Having determined the question of our right to consider motive or purpose, we shall then approach the propositions relied on by the light of the correct rule on the subject of purpose or motive.

Whilst, as a result of our written Consti-

tution, it is axiomatic that the judicial department of the government is charged with the solemn duty of enforcing the Constitution, *and therefore, in cases properly presented, of determining whether a given manifestation of authority has exceeded the power conferred by that instrument, no instance is afforded from the foundation of the government where an act which was within a power conferred, was declared to be repugnant to the Constitution, because it appeared to the judicial mind that the particular exertion of constitutional power was either unwise or unjust. To announce such a principle would amount to declaring that, in our constitutional system, the judiciary was not only charged with the duty of upholding the Constitution, but also with the responsibility of correcting every possible abuse arising from the exercise by the other departments of their conceded authority. So to hold would be to overthrow the entire distinction between the legislative, judicial, and executive departments of the government, upon which our system is founded, and would be a mere act of judicial usurpation.

It is, however, argued, if a lawful power may be exerted for an unlawful purpose, and thus, by abusing the power, it may be made to accomplish a result not intended by the Constitution, all limitations of power must disappear, and the grave function lodged in the judiciary, to confine all the departments within the authority conferred by the Constitution, will be of no avail. This, when reduced to its last analysis, comes to this: that, because a particular department of the government may exert its lawful powers with the object or motive of reaching an end not justified, therefore it becomes the duty of the judiciary to restrain the exercise of a lawful power wherever it seems to the judicial mind that such lawful power has been abused. But this reduces itself to the contention that, under our constitutional system, the abuse by one department of the government of its lawful powers is to be corrected by the abuse of its powers by another department.

The proposition, if sustained, would destroy all distinction between the powers of the respective departments of the government, *would put an end to that confidence and respect for each other which it was the purpose of the Constitution to uphold, and would thus be full of danger to the permanence of our institutions. As aptly said by the court, speaking through Mr. Justice Miller, in *Kilborn v. Thompson*, 103 U. S. 168, 190, 26 L. ed. 377, 386:

"It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers intrust-

ed to governments, whether state or national, are divided into the three grand departments,—the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall, by the law of its creation, be limited to the exercise of the powers appropriate to its own department, and no other."

It is, of course, true, as suggested, that if there be no authority in the judiciary to restrain a lawful exercise of power by another department of the government, where a wrong motive or purpose has impelled to the exertion of the power, that abuses of a power conferred may be temporarily effectual. The remedy for this, however, lies, not in the abuse by the judicial authority of its functions, but in the people, upon whom, after all, under our institutions, reliance must be placed for the correction of abuses committed in the exercise of a lawful power. This was aptly pointed out in *Champion v. Ames*, 186 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321, where, speaking through Mr. Justice Harlan, it was said (p. 363, L. ed. p. 504, Sup. Ct. Rep. p. 329):

"But if what Congress does is within the limits of its power, and is simply unwise or injurious, the remedy is that suggested by Chief Justice Marshall in *Gibbons v. Ogden* [9 Wheat. 1, 6 L. ed. 23], when *he said: [56] "The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.'"

The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted. As we have previously said: from the beginning no case can be found announcing such a doctrine, and, on the contrary, the doctrine of a number of cases is inconsistent with its existence. As quite recently pointed out by this court in *Knowlton v. Moore*, 178 U. S. 41, 60, 44 L. ed. 969, 977, 20 Sup. Ct. Rep. 747,

the often quoted statement of Chief Justice Marshall in *M'Culloch v. Maryland* [4 Wheat. 316, 4 L. ed. 579], that the power to tax is the power to destroy, affords no support whatever to the proposition that where there is a lawful power to impose a tax its imposition may be treated as without the power because of the destructive effect of the exertion of the authority. And this view was clearly pointed out by Mr. Chief Justice Marshall in the passage from *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23, which was repeated in the passage from the opinion in *Champion v. Ames*, previously cited.

And the same doctrine has been again and again expounded. In the *License Tax Cases*, 5 Wall. 463, 18 L. ed. 497, referring to the extensive power of taxation possessed by Congress, and the express limitations found in the Constitution, it was said (p. 471, L. ed. p. 500):

"It is true that the power of Congress to tax is a very extensive power. It is given in the Constitution, with only one exception, and only two qualifications. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject, and may be exercised at discretion."

[57] *In *Pacific Ins. Co. v. Soule*, 7 Wall. 433, 19 L. ed. 95, referring to the unlimited nature of the power of taxation conferred upon Congress, it was observed (p. 443, L. ed. p. 98):

"Congress may prescribe the basis, fix the rates, and require payment as it may deem proper. Within the limits of the Constitution it is supreme in its action. No power of supervision or control is lodged in either of the other departments of the government."

And after referring to the express limitations as to uniformity and articles exported from any state, it was remarked (p. 446, L. ed. p. 98):

"With these exceptions, the exercise of the power is, in all respects, unfettered."

In *Austin v. Boston*, 7 Wall. 694, 19 L. ed. 224, it was again declared (p. 699, L. ed. p. 226) "that the right of taxation, where it exists, is necessarily unlimited in its nature. It carries with it inherently the power to embarrass and destroy."

Yet again, in *Veazie Bank v. Fenno*, 8 Wall. 533, 19 L. ed. 482, where a tax levied by Congress on the circulating notes of state banks was assailed on the ground that the tax was intended to destroy the circulation of such notes, and was, besides, the exercise of a power to tax a subject not conferred

upon Congress, it was said, as to the first contention (p. 548, L. ed. p. 487):

"It is insisted, however, that the tax in the case before us is excessive, and so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the bank, and is, therefore, beyond the constitutional power of Congress."

"The first answer to this is that the judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected. So, if a particular tax bears heavily upon a corporation, or a class of corporations, it cannot, for that reason only, be pronounced contrary to the Constitution."

"True it is, as argued, that the opinion in [58] that case rested the conclusion not alone upon the doctrine just quoted, but also upon the principle that Congress possessed the power to suppress the circulation of the notes of state banks as an incident to the authority concerning the currency delegated to Congress by the Constitution. But whilst this argument may weaken the authoritative force of the statement made in the case in question as to the want of power in the judiciary to examine into motive, it does not affect the persuasive and inherent force of the reasoning by which that view was sustained. Besides, the doctrine has since been affirmed."

In *Spencer v. Merchant*, 125 U. S. 355, 31 L. ed. 767, 8 Sup. Ct. Rep. 926, speaking through Mr. Justice Gray, it was said:

"In the words of Chief Justice Chase, condensing what had been said long before by Chief Justice Marshall, 'The judicial department cannot prescribe to the legislative department limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons; but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected.'"

In *Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747, the cases which have been referred to were approvingly cited, and the doctrine which they expressed was restated.

In *Treat v. White*, 181 U. S. 264, 45 L. ed. 853, 21 Sup. Ct. Rep. 611, referring to a stamp duty levied by Congress, it was observed (p. 268, L. ed. p. 855, Sup. Ct. Rep. p. 613):

"The power of Congress in this direction is unlimited. It does not come within the province of this court to consider why agreements to sell shall be subject to the stamp duty, and agreements to buy not. It is

enough that Congress, in this legislation, has imposed a stamp duty upon the one, and not upon the other."

In *Patton v. Brady*, 184 U. S. 608, 46 L. ed. 713, 22 Sup. Ct. Rep. 493, considering another stamp duty levied by Congress, it was again said (p. 623, L. ed. p. 720, Sup. Ct. Rep. p. 499):

"That it is no part of the function of a court to inquire into the reasonableness of the excise, either as respects the amount, or the property upon which it is imposed."

[59] *It being thus demonstrated that the motive or purpose of Congress in adopting the acts in question may not be inquired into, we are brought to consider the contention's relied upon to show that the acts assailed were beyond the power of Congress, putting entirely out of view all considerations based upon purpose or motive.

1. Undoubtedly, in determining whether a particular act is within a granted power, its scope and effect is to be considered. Applying this rule to the acts assailed, it is self-evident that on their face they levy an excise tax. That being their necessary scope and operation, it follows that the acts are within the grant of power. The argument to the contrary rests on the proposition that, although the tax be within the power, as enforcing it will destroy or restrict the manufacture of artificially colored oleomargarine, therefore the power to levy the tax did not obtain. This, however, is but to say that the question of power depends, not upon the authority conferred by the Constitution, but upon what may be the consequence arising from the exercise of the lawful authority.

Since, as pointed out in all the decisions referred to, the taxing power conferred by the Constitution knows no limits except those expressly stated in that instrument, it must follow, if a tax be within the lawful power, the exertion of that power may not be judicially restrained because of the results to arise from its exercise. The proposition now relied upon was urged in *Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747, and was overruled. In that case it was insisted that, although death duties were within the power to levy excise taxation, as the effect of their extreme enforcement would involve the power to destroy the right to the passage or receipt of property on the occasion of death, —a subject within the exclusive control of the states,—therefore death duties, when imposed by Congress, must be held to be unconstitutional. In considering this contention, after referring to the statement of Mr. Chief Justice Marshall, in *McCulloch v. Maryland*, that the power to tax involves

the power to destroy, it was observed (p. 60, L. ed. p. 977, Sup. Ct. Rep. p. 755):

"This principle is pertinent only when [60] there is no power to tax a particular subject, and has no relation to a case where such right exists. In other words, the power to destroy, which may be the consequence of taxation, is a reason why the right to tax should be confined to subjects which may be lawfully embraced therein, even although it happens that in some particular instance no great harm may be caused by the exercise of the taxing authority as to a subject which is beyond its scope. But this reasoning has no application to a lawful tax, for if it had there would be an end of all taxation; that is to say, if a lawful tax can be defeated because the power which is manifested by its imposition may, when further exercised, be destructive, it would follow that every lawful tax would become unlawful, and therefore no taxation whatever could be levied."

Of course, where a state law is assailed as repugnant to the Constitution of the United States, and on its face such act was seemingly within the power of the state to adopt, but its necessary effect and operation is to usurp a power granted by the Constitution to the government of the United States, it must follow, from the paramount nature of the Constitution of the United States, that the act is void. In such a case the result of the test of necessary operation and effect is to demonstrate the want of power, because of the controlling nature of the limitations imposed by the Constitution of the United States on the states.

And without attempting to review the numerous authorities cited in the argument, it suffices to say that we think it is apparent that they fall within one or the other of the categories just previously stated.

2. The proposition that where a tax is imposed which is within the grant of powers, and which does not conflict with any express constitutional limitation, the courts may hold the tax to be void because it is deemed that the tax is too high, is absolutely disposed of by the opinions in the cases hitherto cited, and which expressly hold, to repeat again the language *of one of the cases [61] (*Spencer v. Merchant*) that "The judicial department cannot prescribe to the legislative department limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons; but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected."

3. Whilst undoubtedly both the 5th and 10th Amendments qualify, in so far as they are applicable, all the provisions of the Con-

stitution, nothing in those amendments operates to take away the grant of power to tax conferred by the Constitution upon Congress. The contention on this subject rests upon the theory that the purpose and motive of Congress in exercising its undoubted powers may be inquired into by the courts, and the proposition is therefore disposed of by what has been said on that subject.

The right of Congress to tax within its delegated power being unrestrained, except as limited by the Constitution, it was within the authority conferred on Congress to select the objects upon which an excise should be laid. It therefore follows that, in exerting its power, no want of due process of law could possibly result, because that body chose to impose an excise on artificially colored oleomargarine, and not upon natural butter artificially colored. The judicial power may not usurp the functions of the legislative in order to control that branch of the government in the performance of its lawful duties. This was aptly pointed out in the extract heretofore made from the opinion in *Treat v. White*, 181 U. S. 264, 45 L. ed. 853, 21 Sup. Ct. Rep. 611.

But it is urged that artificially colored oleomargarine and artificially colored natural butter are in substance and in effect one and the same thing, and from this it is deduced that to lay an excise tax only on oleomargarine artificially colored, and not on butter so colored, is violative of the due process clause of the 5th Amendment, because, as there is no possible distinction between the two, the act of Congress was a mere arbitrary imposition of an excise on the one article, and not on the other, although essentially of the same class. Conceding, merely for *the sake of argument, that the due process clause of the 5th Amendment would avoid an exertion of the taxing power which, without any basis for classification, arbitrarily taxed one article and excluded an article of the same class, such concession would be wholly inapposite to the case in hand. The distinction between natural butter artificially colored, and oleomargarine artificially colored so as to cause it to look like butter, has been pointed out in previous adjudications of this court. *Capital City Dairy Co. v. Ohio*, 183 U. S. 238, 46 L. ed. 171, 22 Sup. Ct. Rep. 120, and authorities there cited. Indeed, in the cases referred to, the distinction between the two products was held to be so marked, and the aptitude of oleomargarine when artificially colored, to deceive the public into believing it to be butter, was decided to be so great, that it was held no violation of the due process clause of the 14th Amendment was occasioned by state legislation absolutely for-

bidding the manufacture, within the state, of oleomargarine artificially colored. As it has been thus decided that the distinction between the two products is so great as to justify the absolute prohibition of the manufacture of oleomargarine artificially colored, there is no foundation for the proposition that the difference between the two was not sufficient, under the extremest view, to justify a classification distinguishing between them.

4. Lastly we come to consider the argument that, even though as a general rule a tax of the nature of the one in question would be within the power of Congress, in this case the tax should be held not to be within such power, because of its effect. This is based on the contention that, as the tax is so large as to destroy the business of manufacturing oleomargarine artificially colored to look like butter, it thus deprives the manufacturers of that article of their freedom to engage in a lawful pursuit, and hence, irrespective of the distribution of powers made by the Constitution, the taxing laws are void, because they violate those fundamental rights which it is the duty of every free government to safeguard, and which, therefore, should be held to be embraced by implied, *though none the less potential, guaranties, or, in any event, to be within the protection of the due process clause of the 5th Amendment. [63]

Let us concede, for the sake of argument only, the premise of fact upon which the proposition is based. Moreover, concede, for the sake of argument only, that even although a particular exertion of power by Congress was not restrained by any express limitation of the Constitution, if, by the perverted exercise of such power, so great an abuse was manifested as to destroy fundamental rights which no free government could consistently violate, that it would be the duty of the judiciary to hold such acts to be void upon the assumption that the Constitution, by necessary implication, forbade them.

Such concession, however, is not controlling in this case. This follows when the nature of oleomargarine, artificially colored to look like butter, is recalled. As we have said, it has been conclusively settled by this court that the tendency of that article to deceive the public into buying it for butter is such that the states may, in the exertion of their police powers, without violating the due process clause of the 14th Amendment, absolutely prohibit the manufacture of the article. It hence results, that, even although it be true that the effect of the tax in question is to repress the manufacture of artificially colored oleomargarine, it cannot be said that such repression destroys rights

which no free government could destroy, and, therefore, no ground exists to sustain the proposition that the judiciary may invoke an implied prohibition, upon the theory that to do so is essential to save such rights from destruction. And the same considerations dispose of the contention based upon the due process clause of the 5th Amendment. That provision, as we have previously said, does not withdraw or expressly limit the grant of power to tax conferred upon Congress by the Constitution. From this it follows, as we have also previously declared, that the judiciary is without authority to avoid an act of Congress exerting the taxing power, even in a case [64] where, to the judicial mind, *it seems that Congress had, in putting such power in motion, abused its lawful authority by levying a tax which was unwise or oppressive, or the result of the enforcement of which might be to indirectly affect subjects not within the powers delegated to Congress.

Let us concede that if a case was presented where the abuse of the taxing power was so extreme as to be beyond the principles which we have previously stated, and where it was plain to the judicial mind that the power had been called into play, not for revenue, but solely for the purpose of destroying rights which could not be rightfully destroyed consistently with the principles of freedom and justice upon which the Constitution rests, that it would be the duty of the courts to say that such an arbitrary act was not merely an abuse of a delegated power, but was the exercise of an authority not conferred. This concession, however, like the one previously made, must be without influence upon the decision of this cause for the reasons previously stated; that is, that the manufacture of artificially colored oleomargarine may be prohibited by a free government without a violation of fundamental rights.

Affirmed.

The CHIEF JUSTICE, Mr. Justice **Brown**, and Mr. Justice **Peckham** dissent.

[65] *FREDERICK J. SCHICK, *Plff. in Err.*,
v.

UNITED STATES. (No. 222.)

WILLIAM BROADWELL, *Plff. in Err.*,
v.

UNITED STATES. (No. 223.)

(See S. C. Reporter's ed. 65-100.)

Waiver—of jury trial for petty offense.

Persons prosecuted by information in a Fed-

NOTE.—On the right to waive jury trial—see note to *King v. State*, 3 L. R. A. 210.

195 U. S.

eral district court, under the act of August 2, 1886 (24 Stat. at L. 209, chap. 840, U. S. Comp. Stat. 1901, p. 2228), § 11, imposing a penalty of \$50 for the knowing purchase or receipt for sale of oleomargarine which has not been branded or stamped according to law, may waive the jury to which they are entitled by U. S. Const. Amend. VI., since the mandate of art. 3, § 2, cl. 3, that "the trial of all crimes, except in cases of impeachment, shall be by jury," does not include such petty offenses, and there is no congressional legislation or rule of public policy requiring a jury in such cases.

[Nos. 222, 223.]

Argued December 2, 1903. Decided May 31, 1904.

IN ERROR to the District Court of the United States for the Northern District of Illinois, to review judgments in favor of the United States in prosecutions by information, under a statute imposing a penalty for the knowing purchase or receipt for sale of oleomargarine which has not been branded or stamped according to law. *Affirmed.*

The facts are stated in the opinion.

Mr. **William D. Guthrie** argued the cause, and, with Mr. **Francis J. Kearful**, filed a brief for plaintiff in error:

Re Henderson's Distilled Spirits (United States v. 100 Barrels Distilled Spirits) 14 Wall. 44, 53, 20 L. ed. 815, 816, was the case of an information to enforce a forfeiture, and it was held that the defendant could waive a jury and agree to a trial before the judge upon an agreed statement of facts, irrespective of any legislative provision upon the subject.

In *Re Bonner*, 151 U. S. 242, 258, 38 L. ed. 149, 152, 14 Sup. Ct. Rep. 323, in speaking of the necessity of a trial by jury of an indictment or information, the court clearly has reference to that class of serious offenses involving, or which may involve, the liberty of the citizen, as defined in *Callan v. Wilson*, 127 U. S. 540, 549, 552-555, 32 L. ed. 223, 226-228, 8 Sup. Ct. Rep. 1301; and in *Thompson v. Utah*, 170 U. S. 343, 353, 42 L. ed. 1061, 1067, 18 Sup. Ct. Rep. 620, Mr. Justice Harlan emphasized the fact that the case was one of felony.

On the other hand, in *Capital Traction Co. v. Hof*, 174 U. S. 1, 43 L. ed. 873, 19 Sup. Ct. Rep. 580, this court recognized that there have always been trials without juries, in prosecutions for petty offenses and actions to recover small amounts, without impairing the constitutional right of trial by jury.

See also *Natal v. Louisiana*, 139 U. S. 621, 624, 35 L. ed. 288, 289, 11 Sup. Ct. Rep. 636; 4 Bl. Com. 280; 1 Stephen, History of Crim. Law, Eng. p. 123; *Williams*

v. Augusta, 4 Ga. 509; *Byers v. Com.* 42 Pa. 89; *People ex rel. Booth v. Fisher*, 20 Barb. 652; *Brewster v. People*, 183 Ill. 143, 55 N. E. 640.

If the court be satisfied that tax legislation is colorable merely, and is not in its nature strictly a tax law, there is no reason why the court should decline to adjudge according to the truth.

Fairbank v. United States, 181 U. S. 283, 294, 295, 300, 45 L. ed. 862, 867, 868, 870, 21 Sup. Ct. Rep. 648; *M'Culloch v. Maryland*, 4 Wheat. 316, 423, 4 L. ed. 579, 605; *Norwood v. Baker*, 172 U. S. 269, 278, 43 L. ed. 443, 447, 19 Sup. Ct. Rep. 187; *Cooley*, Const. Lim. 7th ed. pp. 695, 705; *Patton v. Brady*, 184 U. S. 608, 621, 46 L. ed. 713, 719, 22 Sup. Ct. Rep. 493.

The courts are at liberty—indeed, are under a solemn duty—to look at the substance of things whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority.

Mugler v. Kansas, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273.

Since *Marbury v. Madison*, 1 Cranch, 137, 178, 2 L. ed. 60, 73, it has been undisputed that this is of the very essence of judicial duty.

The Constitution of the United States protects the individual against the irresponsible or arbitrary exercise of power by any branch of the national government, and Congress is not above the law, or supreme in the exercise of any power.

Kilbourn v. Thompson, 103 U. S. 168, 199, 26 L. ed. 377, 389; *United States v. Lee*, 106 U. S. 196, 220, 27 L. ed. 171, 181, 1 Sup. Ct. Rep. 240; *Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard)* 183 U. S. 79, 84, 46 L. ed. 92, 99, 22 Sup. Ct. Rep. 30.

Messrs. William D. Guthrie, Miller Outcalt, Charles E. Prior, Francis J. Kearful, Delavan B. Cole, and Charles C. Carnahan also filed a brief for plaintiff in error.

For their contentions see their brief as reported in *McCray v. United States*, ante, 78.

Solicitor General Hoyt argued the cause and filed a brief for defendant in error:

A penal action is defined to be the civil suit brought for the recovery of a statutory forfeiture when inflicted as a penalty for an offense against the public.

16 Enc. Pl. & Pr. 231.

In *Atheson v. Everitt*, 1 Cowp. 382, Lord Mansfield said: There is no distinction better known than the distinction between civil and criminal law; between criminal prosecutions and civil actions. Mr. Justice Blackstone and all modern and ancient writers upon the subject distinguished between them. Penal actions were never yet put

under the head of criminal law or crimes. . . . It is as much a civil action as an action for money had and received.

Informations to recover penalties and forfeitures seem to have been recognized as civil proceedings by this court, although in *Ex parte Wilson*, 114 U. S. 417, 29 L. ed. 89, 5 Sup. Ct. Rep. 935, the fact was noted that, in recent years, prosecutions by information have greatly increased.

In *Clifton v. United States*, 4 How. 242, 11 L. ed. 957, the court said that an information for a forfeiture is in the nature of a criminal proceeding, and for that reason held that one good count was sufficient to support a verdict and judgment upon all the counts, though some were bad.

In *Snyder v. United States*, 112 U. S. 216, 28 L. ed. 697, 5 Sup. Ct. Rep. 118, it was held that while informations under the revenue laws are not strictly criminal cases, but are civil actions, yet they are so in the nature of criminal proceedings as to come within the rule that a general verdict upon several counts seeking in different forms one object must be upheld if one count be good.

See also *Clifton v. United States*, 4 How. 242, 250, 11 L. ed. 957, 961.

A distinction is thus indicated between such informations and those for the recovery of a penalty; in the one case the proceeding being *in rem*, and in the other *in personam*.

If an information to recover a penalty be a civil action, trial by jury in these cases could have been waived; but in the absence of an agreed statement of facts, how far are the judgments therein open to review?

Re Henderson's Distilled Spirits (United States v. 100 Barrels Distilled Spirits) 14 Wall. 53, 20 L. ed. 815.

Those misdemeanors of a serious character which were triable by jury at common law, and which involve a deprivation of the liberty of the citizen, must, as a matter of constitutional right, be tried by jury in courts of the United States.

Callan v. Wilson, 127 U. S. 540, 32 L. ed. 223, 8 Sup. Ct. Rep. 1301.

It is doubtless proper to observe that the practice in the district courts of the United States has been to try all criminal cases, whether felonies or misdemeanors, by jury.

It is also to be observed that Mr. Justice Story, in *United States v. Gibert*, 2 Sumn. 19, Fed. Cas. No. 15,204, was of the opinion that in the case of a misdemeanor there never could be any other trial than by jury. The charge in that case was robbery on the high seas.

In *Re Bonner*, 151 U. S. 242, 33 L. ed. 149, 14 Sup. Ct. Rep. 323, the view was expressed that the trial of a criminal case in

a Federal court could be in no other way than by jury. The charge in that case was larceny.

It has been held that the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, guaranteed by the 6th Amendment, cannot be waived.

United States v. Shaw, 59 Fed. 110, distinctly asserts the right of an accused person to waive trial by jury.

The inference from *Thompson v. Utah*, 170 U. S. 343, 42 L. ed. 1061, 18 Sup. Ct. Rep. 620, is that, in cases of felony, trial by jury cannot be waived.

Is it not permissible, in dealing with a minor offense, as here, to waive the right, without contravening the general and imperative provision of the Constitution itself as to serious crimes?

Bank of Columbia v. Okely, 4 Wheat. 244, 4 L. ed. 561.

Mr. Justice **Brewer** delivered the opinion of the court:

The constitutionality of the oleomargarine legislation having *been settled in *McCray v. United States* (just decided), 195 U. S. 27, ante, 78, 24 Sup. Ct. Rep. 769, there is in these two cases only a single question. The plaintiffs in error were severally prosecuted by information in the district court of the United States for the northern district of Illinois, under § 11 of the act of August 2, 1886 (24 Stat. at L. 209, chap. 840, U. S. Comp. Stat. 1901, p. 2228), which reads: "That every person who knowingly purchases or receives for sale any oleomargarine which has not been branded or stamped according to law shall be liable to a penalty of fifty dollars for each such offense."

In each case the parties in writing waived a jury, and agreed to submit the issues to the court. Judgments were entered in favor of the United States, and their collection ordered by only the civil process of execution. That the defendants had failed to comply with the section was proved. Indeed, it was not seriously disputed; the defense resting only on the alleged unconstitutionality of the act. The waiver of a jury was not assigned as error, nor referred to by counsel at the hearing before us, either in brief or argument. The question of its effect upon the judgment was suggested by this court, and briefs were called for from the respective parties. Such briefs have been filed, and both agree that the waiver of a jury did not invalidate the proceedings. Notwithstanding this, the fact of the waiver appears in the record.

We entertain no doubt that the parties could rightfully make such a waiver and
195 U. S.

that the judgments are in no way invalidated thereby. It will be noticed that the section characterizes the act prohibited as an offense, and subjects the party to a penalty of \$50. So small a penalty for violating a revenue statute indicates only a petty offense. It is not one necessarily involving any moral delinquency. The violation may have been the result of ignorance or thoughtlessness, and must be classed with such illegal acts as acting as an auctioneer or peddler without a license, or making a deed without affixing the proper stamp. That by other sections of this statute more serious offenses are described, and more grave punishments provided does not lift this one to the *dignity of a crime. Not infrequently a [68] single statute in its several sections provides for offenses of different grades, subject to different punishments, and to prosecution in different ways. In some states, in the same act are gathered all the various offenses against the person, ranging from simple assault to murder, and imposing punishments, from a mere fine to death. This very statute furnishes an illustration. By one clause the knowingly selling of adulterated butter in any other than the prescribed form subjects the party convicted thereof to a fine of not more than \$1,000 and imprisonment for not more than two years. An officer of customs, violating certain provisions of the act, is declared guilty of a misdemeanor, and subject to a fine of not less than \$1,000 nor more than \$5,000, and imprisonment for not less than six months nor more than three years. Obviously, these violations of certain provisions of the statute must be classed among serious criminal offenses, and can be prosecuted only by indictment, while the violations of the statute in the cases before us were prosecuted by information. The truth is, the nature of the offense, and the amount of punishment prescribed, rather than its place in the statutes, determine whether it is to be classed among serious or petty offenses,—whether among crimes or misdemeanors. Clearly, both indicate that this particular violation of the statute is only a petty offense.

In such a case there is no constitutional requirement of a jury. In the 3d clause of § 2, article 3, of the Constitution, it is provided that "the trial of all crimes, except in cases of impeachment, shall be by jury;" and in article 6 of the Amendments, that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed." If there be any conflict between these two provisions, the one found in the Amendments must control, under the well-understood rule that the last

expression of the will of the lawmaker prevails over an earlier *one. But that in the body of the Constitution does not include a petty offense like the present. It must be read in the light of the common law. "That," said Mr. Justice Bradley, in *Moore v. United States*, 91 U. S. 270, 274, 23 L. ed. 346, 347, referring to the common law, "is the system from which our judicial ideas and legal definitions are derived. The language of the Constitution and of many acts of Congress could not be understood without reference to the common law." Again, in *Smith v. Alabama*, 124 U. S. 465, 478, 31 L. ed. 508, 512, 1 Inters. Com. Rep. 804, 809, 8 Sup. Ct. Rep. 564, 569, is this declaration by Mr. Justice Matthews: "The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history." In *United States v. Wong Kim Ark*, 169 U. S. 649, 654, 42 L. ed. 890, 892, 18 Sup. Ct. Rep. 456, 459, Mr. Justice Gray used this language:

"In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution. *Minor v. Happersett*, 21 Wall. 162, 22 L. ed. 627; *Ex parte Wilson*, 114 U. S. 417, 422, 29 L. ed. 89, 91, 5 Sup. Ct. Rep. 935; *Boyd v. United States*, 116 U. S. 616, 624, 625, 29 L. ed. 746, 748, 749, 6 Sup. Ct. Rep. 524; *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564." See also *Kepner v. United States*, 195 U. S. 100, *post*, 114, 24 Sup. Ct. Rep. 797; 1 Kent Com. 336.

Blackstone's Commentaries are accepted as the most satisfactory exposition of the common law of England. At the time of the adoption of the Federal Constitution, it had been published about twenty years, and it has been said that more copies of the work had been sold in this country than in England; so that undoubtedly, the framers of the Constitution were familiar with it. In this treatise, vol. 4, p. 5, is given a definition of the word "crimes:"

"A crime, or misdemeanor, is an act committed, or omitted, in violation of a public law either forbidding or commanding it. This general definition comprehends both crimes and misdemeanors; which, properly speaking, are mere synonymous terms; though in common usage the word 'crimes' is made to denote such offenses as are of a [70] deeper and more atrocious *dye; while smaller faults and omissions of less consequence are comprised under the gentler name of 'misdemeanors' only."

In the light of this definition we can ap-

preciate the action of the convention which framed the Constitution. In the draft of that instrument, as reported by the committee of five, the language was "the trial of all criminal offenses . . . shall be by jury," but by unanimous vote it was amended so as to read "the trial of all crimes." The significance of this change cannot be misunderstood. If the language had remained "criminal offenses," it might have been contended that it meant all offenses of a criminal nature, petty as well as serious; but when the change was made from "criminal offenses" to "crimes," and made in the light of the popular understanding of the meaning of the word "crimes," as stated by Blackstone, it is obvious that the intent was to exclude from the constitutional requirement of a jury the trial of petty criminal offenses. But we need not go beyond the express rulings of this court. In *Callan v. Wilson*, 127 U. S. 540, 32 L. ed. 223, 8 Sup. Ct. Rep. 1301, reference was made to many decisions of state courts, holding that the trial of petty offenses was not within any constitutional provision requiring a jury in the trial of crimes, and on page 557, L. ed. p. 228, Sup. Ct. Rep. p. 1307, it was said:

"Except in that class or grade of offenses called petty offenses, which, according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose, the guaranty of an impartial jury to the accused in a criminal prosecution, conducted either in the name, or by or under the authority, of the United States, secures to him the right to enjoy that mode of trial from the first moment, and in whatever court, he is put on trial for the offense charged."

By § 563, Rev. Stat. (U. S. Comp. Stat. 1901, p. 455) the district courts are given jurisdiction "of all crimes and offenses cognizable under the authority of the United States, committed within their respective districts, or upon the high seas, the punishment of which is not capital." There is no act of Congress requiring that *the trial [71] of all offenses shall be by jury, and a court is fully organized and competent for the transaction of business without the presence of a jury. There is no public policy which forbids the waiver of a jury in the trial of petty offenses. On the contrary, by § 44 of the Code of Law for the District of Columbia, Congress provided, in respect to the police court, that—

"In all prosecutions within the jurisdiction of said court, in which, according to the Constitution of the United States, the accused would be entitled to a jury trial, the trial shall be by jury, unless the accused shall, in open court, expressly waive

such trial by jury, and request to be tried by the judge, in which case the trial shall be by such judge, and the judgment and sentence shall have the same force and effect in all respects as if the same had been entered and pronounced upon the verdict of a jury. In all cases where the accused would not, by force of the Constitution of the United States, be entitled to trial by jury, the trial shall be by the court without a jury, unless in such of said last-named cases wherein the fine or penalty may be \$50 or more, or imprisonment as punishment for the offense may be thirty days or more, the accused shall demand a trial by jury, in which case the trial shall be by jury."

And it is a well-known fact that in many territories organized by act of Congress the legislature has authorized the prosecution of petty offenses in the police courts of cities, without a jury.

But if there be no constitutional or statutory provision or public policy requiring a jury in the trial of petty offenses, upon what ground can it be contended that a defendant therein may not voluntarily waive a jury? Can it be that a defendant can plead guilty of the most serious, even a capital, offense, and thus dispense with all inquiry by a jury, and cannot, when informed against for a petty offense, waive a trial by jury? Article 6 of the Amendments, as we have seen, gives the accused a right to a trial by jury. But the same article [72] gives *him the further right "to be confronted with the witnesses against him . . . and to have the assistance of counsel." Is it possible that an accused cannot admit, and be bound by the admission, that a witness not present would testify to certain facts? Can it be that if he does not wish the assistance of counsel, and waives it, the trial is invalid? It seems only necessary to ask these questions to answer them. When there is no constitutional or statutory mandate, and no public policy prohibiting, an accused may waive any privilege which he is given the right to enjoy. Authorities in the state courts are in harmony with this thought. In *Com. v. Dailey*, 12 Cush. 80, the defendant in a misdemeanor case waived his right to a full panel, and consented to be tried by eleven jurors; and this action was sustained by the supreme court of Massachusetts. Chief Justice Shaw, delivering the opinion of the court, said (p. 83): "He may waive any matter of form or substance, excepting only what may relate to the jurisdiction of the court." The same doctrine was laid down in *Murphy v. Com.* 1 Met. (Ky.) 365; *Tyra v. Com.* 2 Met. (Ky.) 1, and in *State v. Kaufman*, 51 Iowa, 578, 33 Am. Rep. 148, 2 N. W. 275. In *Connelly v. State*, 60 Ala. 89, 31 Am. Rep. 195 U. S.

34, a statute authorizing the waiver of a jury was sustained. The same rule was made in *State v. Worden*, 46 Conn. 349, 33 Am. Rep. 27, which was a case of a felony. See also *People v. Rathbun*, 21 Wend. 509, 542.

We are of opinion that the waiver of a jury by the defendants in these cases, and the consent to trial by the court, was not in conflict with law, and *the judgments are, therefore, affirmed.*

The CHIEF JUSTICE, Mr. Justice **Brown**, and Mr. Justice **Peckham** concur in the views expressed in this opinion, although they dissent from the judgments on the ground of their dissent in No. 301.

Mr. Justice **Harlan** dissenting:

These are criminal prosecutions based on the act of Congress *of August 2d, 1886, en-[73] titled "An Act Defining Butter, Also Imposing a Tax Upon and Regulating the Manufacture, Sale, Importation, and Exportation of Oleomargarine," supplemented by the act of October 1st, 1890, and amended by the act of May 9th, 1902. 24 Stat. at L. 209, chap. 840, (U. S. Comp. Stat. 1901, p. 2228); 26 Stat. at L. 621, chap. 1244, § 41 (U. S. Comp. Stat. 1901, p. 2235); 32 Stat. at L. 193, chap. 784.

The informations against Schick and Broadwell were substantially of the same character. Each charged that the defendant, a retail dealer in oleomargarine, unlawfully and knowingly purchased and received for sale certain oleomargarine which had not been stamped according to law.

The parties, in writing, waived a jury, and agreed to submit the issues to the court. The accused, in each case, pleaded not guilty. Evidence having been introduced, the defendant in each case moved the court to render a verdict and judgment of not guilty, and that he be discharged, upon the ground that the above act of Congress, as amended, was in contravention of the Constitution of the United States in that it deprived the defendant and the oleomargarine manufacturers and dealers in the United States of their liberty and property without due process of law; was an unwarranted encroachment upon, and interference with, the police powers reserved to the several states and to the people of the United States; invested an inferior executive officer with the power finally and arbitrarily to determine judicial questions concerning property rights; and so arbitrarily discriminated against oleomargarine in favor of butter as to be repugnant to the fundamental principles of equality and justice that were inherent in the Constitution.

In each case the motion was overruled, the defendant excepting. Motions for a new trial and in arrest of judgment having been severally overruled, the court, *no jury having been impaneled*, found the defendant, in each case, guilty, and adjudged that he pay a fine of \$50 and costs, and that execution issue therefor. From those judgments the present writs of error were prosecuted.

[74] *The assignments of error here present the same questions of constitutional law that were raised on the motion to render judgment for the defendant; and, in addition, they question the action of the trial court in striking out and refusing to consider certain evidence.

Upon the face of the record the question arises whether the court below, without the aid of a jury, had jurisdiction to ascertain the facts, and, finding the defendants severally guilty of the offense charged, to impose upon each the fine prescribed by the statute.

I. That this is a criminal prosecution, and that the mode of procedure must be determined by the established rules governing the conduct of trials in criminal cases, is, in my judgment, not to be doubted. The record itself describes the information as a *criminal* information, and the case was tried as if it were a criminal prosecution. It never occurred to the trial court that it was a prosecution of any other kind. It is true that the act provides that all fines, penalties, and forfeitures imposed by it may be recovered in any court of competent jurisdiction. § 19. But it is evident from the entire act that it makes all the violations of the provisions imposing a fine, or fine and imprisonment, or fine or imprisonment, criminal offenses, to be punished in such mode as was appropriate or allowable by the law of criminal procedure. Throughout the act, when a fine is imposed, the doing of the thing forbidden is described as an "offense." If a person carries on the business of a manufacturer of oleomargarine, without having paid the special tax, he is subject, besides being liable to pay the special tax, to be fined not less than \$1,000, and not more than \$5,000; if he carries on the business of a wholesale dealer in oleomargarine without having paid the special tax therefor he is subject, besides being liable for the special tax, to be fined not less than \$500, nor more than \$2,000; and if he carries on the business of a retail dealer in oleomargarine, without having paid the special tax, he may be fined not less than \$50, nor more than \$500 for each and every

[75] *offense. § 4. Every person who knowingly sells or offers for sale, or delivers or offers to deliver, any oleomargarine in any other form than in new wooden or paper packages,

as described, or who packs in any package any oleomargarine in a manner contrary to law, or who falsely brands any package or affixes any stamp on any package denoting a less amount of tax than that required by law, "may be fined for each offense not more than \$1,000, and be imprisoned not more than two years." § 6. Every manufacturer of oleomargarine who neglects to affix the required label to a package containing oleomargarine made by him, or sold or offered for sale by or for him, and every person who removes any label so affixed may be "fined \$50 for each package in respect to which such offense is committed." § 7. Every officer of customs who permits imported oleomargarine "to pass out of his custody or control without compliance by the owner or importer thereof with the provisions of this section relating thereto, shall be guilty of a *misdemeanor*, and shall be fined not less than \$1,000, nor more than \$5,000, and imprisoned not less than six months, nor more than two years." § 10. Any person who wilfully neglects or refuses, when emptying a stamped package containing oleomargarine, to utterly destroy such stamps, "shall for each such offense, be fined, not exceeding \$50, and imprisoned not less than ten days, nor more than six months. And any person who fraudulently gives away or accepts from another, or who sells, buys, or uses for packing oleomargarine any such stamped package, shall, for each such offense, be fined not exceeding \$100, and be imprisoned not more than one year." § 13. Any person who wilfully removes or defaces the stamps, marks, or brands on packages containing oleomargarine taxed as provided, is guilty "of a *misdemeanor*, and shall be punished by a fine of not less than one hundred dollars, nor more than two thousand dollars, and by imprisonment for not less than thirty days, nor more than six months." § 15. Whenever any person engaged in carrying on the business of manufacturing oleomargarine, defrauds, or attempts to defraud, *the United States of the [76] tax on oleomargarine produced by him, or any part thereof, he forfeits the factory and manufacturing apparatus used by him, and all oleomargarine and all raw material for the production of oleomargarine found in the factory and on the factory premises, and "shall be fined not less than five hundred dollars nor more than five thousand dollars, and be imprisoned not less than six months, nor more than three years." § 17.

These sections are to be looked at in connection with § 11, on which this prosecution is based. That section provides: "That every person who knowingly purchases or receives for sale any oleomargarine which has not been branded or stamped according

to law, shall be liable to a penalty of fifty dollars for each such offense."

It is true that the word "penalty" is used in several sections of this act. But it is not to be conclusively inferred therefrom that the offense described was not a crime, within the strictest meaning of that word. Referring to the words "penalty," "liability," and "forfeiture," this court has said: "These words have been used by the great masters of Crown law and the elementary writers as synonymous with the word 'punishment,' in connection with crimes of the highest grade. Thus, Blackstone speaks of criminal law as that 'branch of jurisprudence which teaches of the nature, extent, and degrees of every crime, and adjusts to it its adequate and necessary penalty.' Alluding to the importance of this department of legal science, he says: 'The enacting of penalties to which a whole nation shall be subject should be calmly and maturely considered.' Referring to the unwise policy of inflicting capital punishment for certain comparatively slight offenses, he speaks of them as 'these outrageous penalties,' and frequently refers to laws that inflict the 'penalty of death.'" *United States v. Reisinger*, 128 U. S. 398, 402, 32 L. ed. 480, 481, 9 Sup. Ct. Rep. 99, 101. So, in *Huntington v. Attrill*, 146 U. S. 657, 667, 36 L. ed. 1123, 1127, 13 Sup. Ct. Rep. 224, 227, after referring to the maxim of international law (*The Antelope*, 10 Wheat. 66, 123, 6 L. ed. 268, 282), that "the courts of no country execute the penal laws of another" and ob-

[77]serving "that there was great danger, when interpreting that maxim, of being misled by the different shades of meaning allowed to the word "penal" in our language, this court said: "In the municipal law of England and America the words 'penal' and 'penalty' have been used in various senses. Strictly and primarily, they denote punishment, whether corporal or pecuniary, imposed and enforced by the state for a crime or offense against its laws. . . . Penal laws, strictly and properly, are those imposing punishment for an offense committed against the state, and which, by the English and American Constitutions, the executive of the state has the power to pardon." Besides, the act throughout uses the words "fine," and "fined,"—words which, in their primary sense, import the punishment of a person convicted of crime.

I cannot doubt, after a scrutiny of the entire act, that every offense prescribed by it, and for which a fine is imposed, was intended to be made and is a criminal offense,—a crime against the United States,—to be punished as such. Certainly the offenses prescribed in §§ 4, 6, 7, 10, 13, 15, and 17 are crimes against the United States.

195 U. S.

If that be so, surely the offense prescribed in § 11 is a crime, and not a mere penalty, recoverable only by some form of proceeding of a civil nature. This view is substantially conceded by the Solicitor General when he says that "in view of the word 'offense' in § 11 of the oleomargarine act, there is ground for saying that the penalty which it provides was imposed as a fine for the violation of what is made a misdemeanor." If the United States could have proceeded in some form of civil action to recover the fine imposed by that section, it has not done so. It chose to proceed by criminal information, and the accused pleaded not guilty of the crime charged.

II. So far it has been my object only to show that the offense charged was a crime against the United States. I now inquire as to the mode in which it may be legally ascertained whether an accused, pleading *not guilty*, has committed the crime charged against him? Has the law [78] designated any particular tribunal, or prescribed any special mode, for trying the issue as to his guilt? The words of the Constitution upon this subject are clear and explicit. They leave no room for interpretation. Its express mandate is that "the trial of all crimes, except in cases of impeachment, shall be by jury." Const. art. 3. When the Constitution was placed before the people for adoption or rejection, many deemed those words, explicit as they were, inadequate to secure all the benefits of a jury trial as it existed at common law.

It is suggested that if any conflict exists between the absolute requirement in the original Constitution (art. 3, § 2), that the "trial of all crimes, except in cases of impeachment, shall be by jury," and the provision in the 6th Amendment, that the accused, in every criminal prosecution, "shall enjoy the right to a speedy and public trial, by an impartial jury," etc., the latter, having been last adopted, must control. But there is no such conflict. Those who opposed the acceptance of the Constitution said, among other things, that the words of that instrument, strictly construed (art. 3, § 2), admitted of a secret trial, or of one that might be indefinitely postponed to suit the purposes of the government, or of one taking place in a state or district other than that in which the crime was committed. The framers of the Constitution disclaimed any such evil purposes; but in order to meet the objections of its opponents, and to remove all possible ground of uneasiness on the subject, the 6th Amendment was adopted, in which the essential features of the trial required by § 2 of article 3 are set forth. In other words, the trial required by that section is the trial referred to in

the 6th Amendment. And the jury referred to in both the original Constitution and in the Amendments was, the authorities all agree, the historical jury of the common law, consisting of twelve persons, no more and no less, whose unanimous verdict was necessary to conviction. *Thompson v. Utah*, 170 U. S. 343, 349, 42 L. ed. 1061, 1066, 18 Sup. Ct. Rep. 620; 2 Hale P. C. part 2, [79] 161; 1 Chitty Crim. *Law, 505; *King v. St. Michael*, 2 W. Bl. 719; *Olyncard's Case*, Cro. Eliz. part 2, p. 654. Mr. Justice Story said: "The Constitution of the United States has exhibited great solicitude on the subject of the trial of crimes and has declared that the trial of all crimes, except in cases of impeachment, shall be by the jury; and has, in some cases, prescribed, and in others required Congress to prescribe, the place of trial. And certain amendments of the Constitution, in the nature of a Bill of Rights, have been adopted, which fortify and guard this inestimable right of trial by jury." *United States v. Gibert*, 2 Sumn. 19, 37, Fed. Cas. No. 15,204. See also *Capital Traction Co. v. Hof*, 174 U. S. 1, 43 L. ed. 873, 19 Sup. Ct. Rep. 580; *Natal v. Louisiana*, 139 U. S. 621, 624, 35 L. ed. 288, 289, 11 Sup. Ct. Rep. 636; 4 Bl. Com. 280; 1 Stephen's History of the Criminal Law, 123.

The contention in the present prosecutions is that, although the positive constitutional injunction that the trial of all crimes shall be by jury furnishes an inflexible rule that may not be ignored in cases of felony, that rule, even where the accused pleads not guilty, may be disregarded altogether in a trial for a misdemeanor, provided he consents to be tried by the court without a jury. Plainly, such an exception is unauthorized by the Constitution if its words be interpreted according to their ordinary meaning. Nor, in my opinion, is it consistent with the fundamental rules of criminal procedure, as established and enforced at common law. In determining the meaning and scope of the words "due process of law," as used in the Constitution, the established rule is that "we must examine the Constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country." *Den ex dem. Murray v. Hoboken Land & Improv. Co.* 18 How. 272, 277, 15 L. ed. 372, 374. So, in ascertaining whether, under any circum-

stances, a criminal case may be tried in a Federal court *without a jury,—the accused [80] pleading not guilty,—we must inquire whether the Constitution forbids such an exercise of authority by the court, without a jury. If it does, that is the end of the matter; if it does not, then, and then only, may we look to such usages and modes of proceeding as existed at the common law for the trial of crimes before the adoption of the Constitution.

Proceeding on that basis, we have seen that the Constitution expressly requires that the trial of all crimes, except impeachment, shall be by jury; and I assert, with confidence, that no precedent can be found at common law for the trial by the court, without a jury, of any crimes except those described in adjudged cases and by elementary authorities as minor or petty offenses involved in the internal police of the state, and those could be tried summarily by some court or officer, without the intervention of a jury, only when thereunto authorized by an act of Parliament. Except in cases of contempt, the common law, Blackstone says, was a stranger to the summary proceedings authorized by acts of Parliament. Book 4, chap. 20, p. 280. I am not aware of, nor has there been cited, any case in England in which, after *Magna Charta*, and prior to the adoption of our Constitution, a court, tribunal, officer, or commissioner has, without a jury, even in the case of a petty offense, determined the question of crime or no crime, when the defendant pleaded not guilty, unless the authority to do so was expressly conferred by an act of Parliament. The exceptions to the rule at common law that all crimes must be tried by a jury were in the mind of this court when, in *Callan v. Wilson*, 127 U. S. 540, 557, 32 L. ed. 223, 228, 8 Sup. Ct. Rep. 1301, 1307, it said: "Except in that class or grade of offenses called petty offenses, which, according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose, the guaranty of an impartial jury to the accused in a criminal prosecution, conducted either in the name, or by or under the authority of the United States, secures to him the right to enjoy that mode of trial from the first moment, and in whatever *court, he [81] is put on trial for the offense charged. In such cases a judgment of conviction, not based upon a verdict of guilty by a jury, is void."

If, in analogy to the powers exercised by the Parliament of England prior to the adoption of our Constitution, it should be held that Congress could treat the particular crime here in question as a petty offense, triable by the court, without a jury, or with

a jury of less than twelve persons, it is sufficient to say that Congress has not legislated to that effect in respect of the offense charged against these defendants, or of any other offense defined in the acts relating to oleomargarine. If it has the power to do so, Congress has not assumed, directly or indirectly, to withdraw such offenses from the operation of the constitutional provision that the trial of all crimes, except in cases of impeachment, *shall be* by jury. And the question is whether, in the face of that explicit provision, and in the absence of any statute authorizing it to be done, the court, a jury being waived, has *jurisdiction* to try the accused for the crime charged.

In this connection we are confronted with the broad statement, found in some adjudged cases as well as in elementary treatises, to the effect that a person is entitled to waive *any* constitutional right, of whatever nature, that he possesses, and thereby preclude himself from invoking the authority of the Constitution for the protection or enforcement of that right. It is suggested that even when charged with murder he may plead guilty, and that the court thereupon, without the intervention of a jury, may pronounce such judgment as the law permits or authorizes. And it is confidently asked by those who make that suggestion, Why may not one charged with a misdemeanor, and pleading not guilty, waive a jury altogether, and consent to be tried by the court? This argument will not stand the test of reason. It proceeds upon the ground that jurisdiction to try a criminal case may be given by consent of the accused and the prosecutor. But such consent could have no legal efficacy. Undoubtedly one accused of *murder may plead guilty. But in doing so he renders a trial unnecessary. The Constitution does not prohibit an accused from pleading guilty. His right to do so was recognized long before the adoption of that instrument; and it was never supposed that such a plea impaired the force of the requirement that a trial for crime, under a plea of not guilty, shall be by jury. It is not to be assumed that the Constitution intended, when preserving the right of trial by jury, to change any essential rule of criminal practice established at the common law, before the adoption of that instrument. When the accused pleads guilty before a lawful tribunal he admits every material fact well averred in the indictment or information, and there is no issue to be tried; no facts are to be found; no trial occurs. After such a plea nothing remains to be done except that the court shall pronounce judgment upon the facts voluntarily confessed by the accused. What the Constitution requires is that the

[82]

195 U. S.

trial of a crime shall be by jury. If the accused pleads not guilty, there must, of necessity, be a trial; for by that plea he puts "himself on his country, which country the jury are;" he contests, by that plea, every fact necessary to establish his guilt; he is presumed to be innocent; nothing is confessed; and the facts necessary to show guilt must be judicially ascertained, in the mode prescribed by law, before any judgment can be rendered. But the vital inquiry is, In what way, when the defendant pleads not guilty, are the facts to be ascertained, and the plea of not guilty overcome? Under the express words of the Constitution the answer must be: By trial before a jury of twelve persons, organized to determine whether the charge of guilt be true; the function of the court being simply to conduct the trial, and render a judgment in accordance with the verdict of the jury as to the facts. The court and the jury, not separately, but *together*, constitute the appointed tribunal which alone, under the law, can *try* the question of crime, the commission of which by the accused is put in issue by a plea of not guilty.

There are some things so vital in their character that they *may not be legally done[83] or legally omitted in a criminal prosecution, even with the consent of the accused. This is abundantly established by authority. The grounds upon which the decisions rest are, upon principle, applicable alike in cases of felonies and misdemeanors, although the consequences to the accused may be more evident as well as more serious in the former than in the latter cases. Certain it is, that felonies and misdemeanors are equally crimes within the meaning of the constitutional provision that the trial of all crimes shall be by jury, and there is no warrant to construe that provision as if it read, "the trial of all crimes, except in cases of impeachment *and in misdemeanors*, shall be by jury."

Let us look at some of the authorities in cases both of felonies and misdemeanors, and ascertain whether the consent, express or implied, of the accused can have the effect to dispense with the mode of trial appointed by law for criminal cases. As the question here presented has never been decided by this court, and is of importance, a somewhat extended reference to authorities is justified.

The first case to which I call attention is *Hopt v. Utah*, 110 U. S. 574, 579, 28 L. ed. 262, 265, 4 Sup. Ct. Rep. 202. That was a case of murder arising in Utah while a territory. It appeared that the trial, by triers appointed by the court, of challenges of proposed jurors, was not had in the presence of the accused. It was there argued

that his presence at the trial of such an issue was a privilege which he was entitled to waive, and that the entire proceedings against him should not fail because he chose not to exercise that privilege. This court, however, held that the trial of challenges could not legally take place except in the actual presence of the accused. In dealing with the suggestion that the right of the accused to be present before the triers was waived by his failure to object to their retirement from the court room, or to the trial of the several challenges in his absence, it was said: "We are of opinion that it was not within the power of the accused or his counsel to dispense with the statutory requirement as to his personal [84] presence at the trial. *The argument to the contrary necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view as well of the relations which the accused holds to the public as of the end of human punishment. The natural life, says Blackstone, 'cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow creatures, merely upon their own authority.' 1 Bl. Com. 133. The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. *That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused*, much less by his mere failure, when on trial and in custody, to object to unauthorized methods." 4 Bl. Com. 11.

In *Thompson v. Utah*, 170 U. S. 343, 353, 42 L. ed. 1061, 1067, 18 Sup. Ct. Rep. 620, 624, which was a case of grand larceny, charged to have been committed while Utah was a territory (the trial occurring after Utah became a state), one of the questions was whether the trial by a jury composed of eight jurors, as authorized by the statutes of the state, was a legal trial for a crime committed when Utah was a territory under the exclusive jurisdiction of the United States. It was contended that, as the accused did not object, until after verdict, to a trial by a jury of eight persons, he should not be heard to say that the trial was in violation of his constitutional rights. This court overruled that contention, saying: "It is sufficient to say that it was not in the power of one accused of felony, by consent expressly given or by his silence, to authorize a jury of only eight persons to pass upon the question of his guilt. The law in force when this crime was committed

did not permit *any* tribunal to deprive him of his liberty, except one constituted of *a court and a jury of twelve persons*." After referring to *Hopt v. Utah*, 110 U. S. 574, 579, 28 L. ed. 262, 265, 4 Sup. Ct. Rep. 202, the court proceeded: "If one under trial for a felony *the punishment of which is con-[85] finement in a penitentiary could not legally consent that the trial proceed in his absence, still less could he assent to be deprived of his liberty by a *tribunal not authorized by law to determine his guilt*."

"The infirmity," says Cooley, "in case of a trial by a jury of less than twelve, by consent, would be that the *tribunal would be one unknown to the law, created by mere voluntary act of the parties*; and it would in effect be an attempt to submit to a species of arbitration the question whether the accused has been guilty of an offense against the state." Const. Lim. 319.

A leading case is that of *Cancemi v. People*, 18 N. Y. 128, 136. Its doctrines have been widely accepted as based upon a sound interpretation of constitutional provisions relating to criminal prosecutions. The court of appeals of New York said: "These considerations make it apparent that the right of a defendant in a criminal prosecution to affect, by consent, the conduct of the case, should be much more limited than in civil actions. It should not be permitted to extend so far as to work radical changes in great and leading provisions as to the organization of the tribunals or the mode of proceeding prescribed by the Constitution and the laws. Effect may justly and safely be given to such consent in many particulars; and the law does, in respect to various matters, regard and act upon it as valid. Objections to jurors may be waived; the court may be substituted for triers to dispose of challenges to jurors; secondary in place of primary evidence may be received; admissions of facts are allowed; and in similar particulars, as well as in relation to mere formal proceedings generally, consent will render valid what without it would be erroneous. A plea of guilty to any indictment, whatever may be the grade of the crime, will be received and acted upon if it is made clearly to appear that the nature and effect of it are understood by the accused. In such a case the preliminary investigation of a grand jury, with the admission of the accusation in the indictment, is supposed *to be a sufficient safeguard to the [86] public interests. *But when issue is joined upon an indictment, the trial must be by the tribunal and in the mode which the Constitution and laws provide, without any essential change. The public officer prosecuting for the people has no authority to consent to such a change, nor has the defend-*

ant. Applying the above reasoning to the present case, the conclusion necessarily follows that the consent of the plaintiff in error to the withdrawal of one juror, and that the remaining eleven might render a verdict, could not lawfully be recognized by the court, at the circuit, and was a nullity. If a deficiency of one juror might be waived, there appears to be no good reason why a deficiency of eleven might not be; and it is difficult to say why, upon the same principle, the entire panel might not be dispensed with, and the trial committed to the court alone. It would be a highly dangerous innovation, in reference to criminal cases, upon the ancient and invaluable institution of trial by jury, and the Constitution and laws establishing and securing that mode of trial, for the court to allow of any number short of a full panel of twelve jurors, and we think it ought not to be tolerated."

Upon the general question whether the consent or silence of the defendant can excuse the failure of the court at the trial to enforce such essential rules as are prescribed by law for the trial of criminal cases, the case of *Hill v. People*, 16 Mich. 351, 356-358, is instructive. That was a case of murder. The defendant was found guilty, and after the trial it was discovered that one of the jurors was disqualified under the statutes of Michigan. But that fact was unknown to the accused and his counsel until after the rendition of the verdict. It was contended by the state that by neglecting to challenge that juror, the accused lost the right to avail himself of the objection; and was to be deemed to have thereby waived all objections to the juror or to a trial by eleven qualified jurors. It should be here observed that the Constitution of

[87] Michigan preserved the *right, in all criminal prosecutions, to "a speedy and public trial by an impartial jury, which may consist of less than twelve men in all courts not of record." Looking at the case as one in which the trial had been by eleven competent jurors only, the court considered the general question of waiver as applicable to criminal cases. Speaking by Judge Christiancy, and observing that under the state Constitution there could be no reasonable doubt of the competency of parties in civil cases to waive such an objection, or to stipulate for a trial by jury of less than twelve, the court said: "But a criminal prosecution, in which the people in their sovereign capacity prosecute for a crime against the laws of the whole society, and seek to subject the defendant to punishment, must, it seems to us, be considered as a proceeding *in invitum*, against the will of the defendant throughout, so far as relates to a question of this kind, or any question as to the legal

constitution of the court or jury by which he is to be tried. It would be adding materially to the generally recognized force of the obligation of contracts to hold that a defendant charged with a crime might, without a trial, enter into a building contract with the prosecuting attorney (representing the state) to go to the penitentiary for a certain number of years in satisfaction for the offense. And yet it would approximate such a position, to hold that he might be bound by a contract providing for a trial before a court or jury unknown to the Constitution or the laws, the result of which trial might be to place him in the same penitentiary. The true theory, we think, is that the people, in their political or sovereign capacity, *assume to provide by law the proper tribunals and modes of trial for offenses, without consulting the wishes of the defendant as such*; and upon them, therefore, devolves the responsibility, not only of enacting such laws, but of carrying them into effect, by furnishing the tribunals, the panels of jurors, and other safeguards for his trial, in accordance with the Constitution, which secures his rights."

The court added some general observations which may well *be heeded by every one [88] charged with the administration of the criminal laws. It said: "But independent of all theories, and as a practical question, we think there would be great danger in holding it competent for a defendant in a criminal case, by waiver or stipulation, to give authority which it could not otherwise possess, to a jury of less than twelve men, for his trial and conviction; or to deprive himself in any way of the safeguards which the Constitution has provided him, in the unanimous agreement of twelve men qualified to serve as jurors by the general laws of the land. Let it once be settled that a defendant may thus waive this constitutional right, and no one can foresee the extent of the evils which might follow; but the whole judicial history of the past must admonish us that very serious evils should be apprehended, and that every step taken in that direction would tend to increase the danger. One act or neglect might be recognized as a waiver in one case, and another in another, until the constitutional safeguards might be substantially frittered away. The only safe course is to meet the danger *in limine*, and prevent the first step in the wrong direction. It is the duty of courts to see that the constitutional rights of a defendant in a criminal case shall not be violated, however negligent he may be in raising the objection. It is in such cases, emphatically, that consent should not be allowed to give jurisdiction."

In *State v. Carman*, 63 Iowa, 130, 131. 50

Am. Rep. 741, 742, 18 N. W. 691, which was the case of an assault with an attempt to commit murder, the supreme court of Iowa said: "In our Code of Civil Practice it is provided that 'issues of fact in an action in an ordinary proceeding must be tried by a jury, unless the the same is waived.' § 2740. In our Code of Criminal Procedure there is no provision for the waiver of a jury. On the other hand, it is provided that 'an issue of fact must be tried by a jury of the county in which the indictment is found, unless a change of venue has been awarded.' § 4350. *We regard this provision as excluding the jurisdiction of the court, without a jury, to try such issues.* The question presented is not as to the [89] waiver of *a mere statutory privilege, but an imperative provision, based, as we view it, upon the soundest conception of public policy. Life and liberty are too sacred to be placed at the disposal of any one man, and always will be, so long as man is fallible. The innocent person, unduly influenced by his consciousness of innocence, and placing undue confidence in his evidence, would, when charged with crime, be the one most easily induced to waive his safeguards. There is no resemblance between such a case and that of a person pleading guilty. In the latter case there is no trial, but mere judgment upon the plea. If the language of the statute were less imperative than it is, the adjudications would support us in reaching the same conclusion."

In *State v. Mansfield*, 41 Mo. 470, 476, which involved the question of the right of the accused in capital crimes and felonies to waive his right to a jury of twelve persons, after referring to *Cancemi v. People*, 18 N. Y. 128, the supreme court of Missouri, speaking by Judge Wagner, conceded that in cases of misdemeanor, *created by statute*, the legislature, under the laws of that state, might provide for their prosecution in a summary way, without the formality of an indictment, and that the accused could waive a jury, or agree on a certain number. But there was no such statute in Missouri, and the court, in respect of the general question of the waiver of a jury, said: "Another good and sufficient reason, it occurs to us, is, that the prisoner's consent cannot change the law. His right to be tried by a jury of twelve men is not a mere privilege; it is a *positive requirement of the law*. He can unquestionably waive many of his legal rights or privileges. He may agree to certain facts, and dispense with formal proofs; he may consent to the introduction of evidence not strictly legal, or forbear to interpose challenges to the jurors; *but he has no power to consent to the creation of a new tribunal unknown to the law, to try his of-*

fense. The law, in its wisdom, has declared what shall be a legal jury in the trial of criminal cases; that it shall be composed of twelve; and a defendant; *when he is upon [90] trial, cannot be permitted to change the law, and substitute another and a different tribunal to pass upon his guilt or innocence. The law as to criminal trials should be based upon fixed standards, and should be clear, definite, and uniform, and absolute. If one juror can be withdrawn, there is no reason why six or eight may not be, and thus the accused, through persuasion or other causes, may have his life put in jeopardy, or be deprived of his liberty, through a body constituted in a manner unknown to the law. Aside from the illegality of such a procedure, public policy condemns it. The prisoner is not in a condition to exercise a free and independent choice without often creating prejudice against him."

In *Wilson v. State*, 16 Ark. 601, 608, which was a case of larceny, the supreme court of Arkansas said: "Hence there would seem to be no other mode for the trial of a criminal issue than that by jury. The difficulty is not obviated by any waiver of this mode of trial, *because the legislature has provided no other mode, in lieu of it, in such an event, as it has in civil cases. Nothing short of a confession of the facts, or the finding of them by the verdict of the jury, can regularly authorize the judgment of the court.* If the accused would not only waive his right to a trial by jury, but go further, and withdraw his plea, and then confess the facts charged against him in the indictment, the court would be authorized to render a judgment against him; but so long as his plea of not guilty is in, there is no mode by which the court can dispose of it, although the accused may waive a trial by jury, with all its attendant privileges, and desire ever so much that the issue may be disposed of by a reference of it to the judge, or any other referee or arbitrator, and the prosecuting attorney may desire the same, and act in concert with the accused; for the simple reason that the law makes no provision for any such referee or arbitrator in criminal cases. The only provision is for a confession of the facts, or a trial by jury to determine them."

A leading case upon the subject of trial by jury is that of **Work v. State of Ohio*, 2 [91] Ohio St. 296, 302, 305, 59 Am. Dec. 671, 672, 674. That was an information charging the defendant with assault and battery. The trial took place under an act of the Ohio legislature, which permitted a trial in such a case by a jury of six men, notwithstanding the Constitution of Ohio provided that the right of trial by jury should be inviolate. The defendant pleaded not guilty,

but was found guilty, and sentenced to pay a fine of \$100 and costs. In discussing the history of trial by jury, the court, speaking by Judge Ranney, said: "In what does the privilege of this great bulwark of personal liberty consist? The Constitution furnishes no answer, nor was it necessary that it should. If ages of uninterrupted use can give significance to language, the right of jury trial and the habeas corpus stand as representatives of ideas as certain and definite as any other in the whole range of legal learning. The institution of the jury, referred to in our Constitution, and its benefits secured to every person accused of crime, is precisely the same in every substantial respect, as that recognized in the great charter, and its benefits secured to the freemen of England, and again and again acknowledged in fundamental compacts as the great safeguard of life, liberty, and property; the same, brought to this continent by our forefathers, and perseveringly claimed as their birthright, in every contest with arbitrary power, and finally, an invasion of its privileges prominently assigned as one of the causes which was to justify them in the eyes of mankind in waging the contest which resulted in independence.

. . . We are of opinion it was this very tribunal, thus constituted, that those who framed and adopted the Constitution of this state intended to perpetuate, and make the safeguard of innocence, by securing its benefits to every person accused of crime, in any of its courts. There is certainly nothing in our history which points to a different conclusion. For half a century before its adoption, similar provisions had been so considered and acted upon. Until the passage of this law, *no person had ever* [92] *been convicted of crime, by less than the* *concurring assent of twelve of his peers; and no law has ever attempted to authorize it to be done. If the power exists to diminish the number of the jury, it may be applied to all cases, and it may be reduced to two as well as to six. *The same constitutional provision that secures the right in a charge involving the life of the accused, secures it also in every other criminal case.* It is no answer to say that this would not likely be done. If it had been deemed safe to leave it to the discretion of the general assembly, no constitutional provision was needed; but, whether needed or not, it has been ordained by a power which both the general assembly and this court are bound to obey." Again: "But, without pursuing these considerations further, our opinion is, that the essential and distinguishing features of the trial by jury as known at common law, and generally, if not universally, adopted in this country, were intended to be preserved, and 195 U. S.

its benefits secured to the accused in all criminal cases, by the constitutional provisions referred to. That it is beyond the power of the general assembly to impair the right, or materially change its character; that the number of jurors cannot be diminished, or a verdict authorized, short of a unanimous concurrence of all the jurors. It follows that the act under which this conviction was obtained, in so far as it provides for a jury of six only, and authorizes a conviction upon their finding, is unconstitutional and void."

In *United States v. Taylor*, 3 McCrary, 500, 11 Fed. 470, which was a criminal prosecution by information for the offense of carrying on the business of a retail dealer in liquors without having paid the special taxes required by law, the main question was as to the authority of the court to direct a verdict of guilty under the evidence. It was held by Judge McCrary that no such power existed in the court. In the course of his opinion he said that the constitutional guaranty of a jury in a criminal case was a right that *could not be waived, and that such a trial before the court, by the prisoner's consent, was erroneous.* It appears from the report of that case that Mr. *Justice Miller was consulted by Judge Mc[93] Crary, and concurred in the latter's views.

Among the cases cited by Judge McCrary was *State v. Maine*, 27 Conn. 281, which was a criminal information for placing a nuisance in a highway. The defendant pleaded not guilty. The case, *by agreement of the parties*, was tried by the court, which found the facts, and reserved the questions of law arising thereon for the advice of the supreme court of errors. The judges of the latter court unanimously held that, "*as no statute conferred on the superior court the power to try this or any other criminal charge, excepting through the intervention of a jury*, the court below could not legally try the case in the manner in which it had done, and would not be able to render a legal judgment on the facts, if the advice of this court was given upon them. They therefore refused to entertain the case."

In *Neales v. State*, 10 Mo. 498, which is an indictment for unlawfully carrying on the business of a dram-shop keeper without having a license therefor, it appears that the defendant pleaded not guilty, and *neither party requiring a jury*, the case was submitted to the court, who found him guilty, and assessed a fine of \$30 against him. The supreme court of Missouri, in which state there was a constitutional provision providing that the right of trial by jury should remain inviolate, said: "Another objection, equally fatal to the judgment,

was the trial of the cause by the court, on the plea of not guilty. It has heretofore been virtually decided by this court, in two cases, that unless the defendant pleads guilty to the charge contained in the indictment, the court cannot try the issue and assess a fine against him. *Thomas v. State*, 6 Mo. 457; *Ross v. State*, 9 Mo. 687. It is exclusively the province of a jury to try the issue of not guilty and the consent of the defendant for the court to try the same cannot confer such power on the court."

A case directly in point is that of *State v. Stewart*, 89 N. C. 563, 564. That was an [94] indictment for an assault and battery. *The defendant pleaded not guilty. A jury trial was waived, the court found the facts, and adjudged the accused guilty. The judgment was arrested and the state appealed. The supreme court of North Carolina said: "It is a fundamental principle of the common law, declared in '*Magna Charta*,' and again in our Bill of Rights, that 'no person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men, in open court.' Art. 1, § 13. The only exception to this is where the legislature may provide other means of trial for petty misdemeanors, with the right of appeal,—proviso in same section. This is not one of the petty misdemeanors embraced in the proviso; and if it was, no such means of trial as that adopted in this case has been provided by the legislature. The court here has undertaken to serve in the double capacity of judge and jury, and try the defendant without a jury, which it had no authority to do, even with the consent of the prisoner."

Later, in *State v. Holt*, 90 N. C. 749, 754, 47 Am. Rep. 544, 548,—which was an indictment for cruelty to animals,—the same court, after observing that it was the province and duty of the judiciary to watch over and protect the fundamental rights, in all matters that come before them, said: "There was not the remotest purpose in this case, we are sure, to infringe the right of trial by jury in a criminal action, but for convenience sake and to save time (because the facts were not disputed) the facts of the case were agreed upon by the state and the defendant, and submitted to the judge, instead of letting a jury hear the evidence, and render a verdict upon the issue, or find a special verdict. In our judgment, this was not only irregular, but wholly without the sanction of law. There is no statute that authorizes such procedure, and the Constitution forbids it. 'No person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men, in open court.' No jury was impaneled to try the issue; there was no verdict

of a jury; there was no conviction. The judgment of the court had nothing to warrant it, and there was nothing upon which [95] it could properly rest. *The defendant could not consent to a conviction by the court. It had no authority to try the issue of fact raised by the pleadings.* The defendant did not plead guilty; he did not enter the plea of *nolo contendere*, or submit; he pleaded *autrefois convict*, and a jury must try the issue raised by that plea. *State v. Stewart*, 89 N. C. 563; *State v. Moss*, 47 N. C. (2 Jones L.) 66; 1 Bishop, Crim. Pl. § 759, and cases there cited; *Cancemi v. People*, 18 N. Y. 128. *The legislature has not provided a means for the trial of cases like this, different from the ordinary method provided by law.* The court erred in passing upon the facts agreed upon and submitted to it without the finding of a jury, and for such error the judgment must be reversed and the court proceed to dispose of the case according to law."

Running through the adjudged cases is the thought that the facts necessary to be proved in order to sustain the charge of crime, where the plea is not guilty, must be ascertained in the mode ordained by law for such purpose. "When, therefore," says Blackstone, "a prisoner on his arraignment hath pleaded not guilty, and for his trial hath put himself upon the country, which country the jury are, the sheriff of the county must return a panel of jurors, *liberos et legales homines, de vicineto.*" Book 4, chap. 27, *350. Now, all will agree that when the crime charged is a felony, a trial in a circuit or district court of the United States, even with the consent of the accused, without a jury composed of twelve persons, would be unauthorized and unavailing for any legal purpose. Why? Because, and only because, the law, the supreme law of the land, has declared that the trial of all crimes shall be by jury. And, perhaps, all will agree that the constitutional injunction applies with like force to such misdemeanors as by statute are punishable with imprisonment, and that a circuit or district court of the United States is without jurisdiction, under a plea of not guilty, no jury being impaneled, to try any crime against the United States involving *life or liberty*. The consent of the accused in such a case certainly cannot confer upon the court *au- [96] thority to try the crime in a mode inconsistent with the one prescribed by the law.

In my judgment, the same principle must apply in the present case, although a fine only can be imposed. The case is embraced by the very words of the Constitution; for the offense charged is a crime,—none the less a crime because only a fine is involved,—and the constitutional mandate is that

the trial of all crimes, except impeachment, shall be by jury. By what authority can a Federal court except from the operation of the constitutional mandate a crime punishable by fine? It is said that only the property of the accused can be affected, and, therefore, to his consent in this criminal case should be accorded the same effect as is given to his consent in a purely civil case to which he might be a party, and which involved no element of crime. In this view I cannot concur. Something more than property is involved in a criminal case, although the penalty imposed may be simply a fine. Whether the accused has violated the laws of his country, and whether he shall be branded by the judgment of a court as a criminal, are things of more consequence to the public than property the value of which is to be measured in money. What shall constitute a crime, how that crime shall be tried, and in what way the guilt of the accused shall be manifested when he pleads not guilty, are exclusively for the government to declare and regulate, and it is not for the accused and the prosecutor, by the device of an agreement between them, to evade the requirements of the Constitution and provide a tribunal for the determination of the issue of crime or no crime different from that designated by the law. Crime or no crime, if the plea be not guilty, can be established in a court of the United States only by the verdict of a jury.

Undoubtedly, as already indicated, there were petty or minor crimes which, at common law, could be tried without a jury, and it may be assumed for the purposes of this case, that the constitutional provision that [97] all crimes except impeachment *shall be tried by jury is to be interpreted in the light of that fact. But, it may be repeated, that the trial, even of such cases, without a jury, was contrary to the genius of the common law, and was allowed by the courts *only in obedience to acts of Parliament*, which was not bound by a written constitution, and whose authority in matters of legislation was omnipotent, and, therefore, not to be disputed by any English court. An enumeration of all crimes against the United States which may be reasonably declared to belong to the class known at the common law as petty offenses, punishable *under legislative sanction* without the intervention of a jury, need not here be attempted. Nor is it necessary to express any final judgment upon the question whether the particular crime here involved might, *by statute*, be placed in that class and tried without a jury. It is enough to say that, even if Congress could place it in that class, and authorize its trial by summary proceedings, without a jury, or with a jury of less than

twelve, it has not done so. The case, therefore, is controlled by the express constitutional injunction that all crimes, except in cases of impeachment, shall be tried by a jury. The agreement of the accused and the prosecutor cannot confer jurisdiction, much less have the effect to displace the mode of trial established by the fundamental law, and substitute for it one inconsistent with the principles of the common law, as unmodified by any valid statute.

It is said that the nature of the offense and the amount of punishment prescribed must determine whether it is to be classed among serious or petty offenses. This, I take it, means that it is for the court, in the exercise of its inherent powers, to determine whether the offense is a serious one, to be tried alone by a jury, or a petty one, which may be tried without a jury. But the judiciary had no such function at common law. No court at common law assumed, without a jury, to try any offense, however trivial or petty, except under the authority of a statute conferring authority to that end. If the offense is punishable only by a fine of \$50, *as is the case here,—is it to be [98] deemed a petty offense? And yet is one punishable by a fine of \$500 to be deemed a serious one? Must there not be some fixed rule or limit on the subject? In my judgment, the Constitution establishes a rule which must be respected by every branch of the government. Yet, under the principles now announced, an offense punishable by a fine of five or ten thousand dollars may be regarded—if the court so wills—as a petty offense, triable without a jury. I cannot understand where the judiciary derives its authority to prescribe any rule on the subject, in face of the absolute constitutional requirement that all crimes, except in cases of impeachment, shall be tried by a jury, and in face of the further significant fact that no court at common law ever assumed to regard *any* crime, however trivial, as triable without a jury, except under express legislative sanction.

Again, it is said that in the original draft of the Constitution the words were “the trial of all criminal offenses . . . shall be by jury,” and that these words were changed in the Convention so as to read “the trial of all crimes.” Strangely enough, it is supposed that this change of words justifies the conclusion that the framers of the Constitution intended to dispense with a jury in such criminal offenses as the courts, uncontrolled by statute, deemed petty, as contrasted with those that they deemed serious. To say that “crimes” means something different from “criminal offenses” is something that I cannot comprehend. A crime is a criminal offense and a criminal

offense is a crime. But the contention of the prosecution, even if sound, does not answer the suggestion that, at common law, it was never the province of a court, by any inherent power it possessed, to prescribe what criminal offenses or crimes were triable, and what need not be tried, by jury. My point is that no criminal offense or crime against the United States can be tried except by jury, if the plea be not guilty, unless it be a petty offense or crime, and unless the legislative department [99] declares that it may be so *tried. If the offense or crime be, in reality, in its essence, a petty one, then Congress may authorize it to be tried without a jury. But Congress has not so declared in respect of the offense or crime charged against the present defendant. The trial by jury is not one of form, but of the very substance of the mode prescribed for the trial of crimes. It may not be waived merely by the consent of the accused and the prosecutor. In the present case the court, as I think, entrenches upon the domain of the legislative department of the government. It assumes, without authority, to prescribe a rule of criminal procedure which Congress has not, in its wisdom, undertaken to prescribe. It has made, not declared, law. There is no tendency, in these latter days, more dangerous than the assumption by one department of the government of powers that belong to another department.

It is contended that this mode of trial, at least in misdemeanors involving only a fine, ought to be sanctioned,—indeed, encouraged,—as convenient both for the government and the accused. What was said by Blackstone when referring to summary proceedings authorized by acts of Parliament in particular cases may well be repeated, at this day, whenever it is proposed, upon grounds of convenience, to dispense with juries in criminal prosecutions, and thereby introduce a new mode for the trial of crimes. He said: “And, however *convenient* these may appear at first (as doubtless all arbitrary powers, well executed, are the most *convenient*), yet let it be again remembered, that delays and little inconveniences in the forms of justice are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our Constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern.” Book 4, chap. 27, p. 350.

I insist that, as the offense charged in [100] each of these cases *was a crime against the

United States; as the Constitution expressly declares, without qualification, that the trial of all crimes, except impeachment, shall be by jury; as Congress has not assumed to declare that this case and like ones may be tried without a jury, the parties assenting; and as the trial of these cases by the court alone, without a jury, has no other sanction than the consent of the accused and the District Attorney, the judgment in each case should be reversed, and each case remanded, with directions to set aside the judgment, grant a new trial, and take such further proceedings as may be in conformity with law.

THOMAS E. KEPNER, *Plff. in Err.*,

v.

UNITED STATES.

(See S. C. Reporter's ed. 100-137.)

Criminal law—former jeopardy in Philippine Islands—appeal by government from acquittal.

So far as the right of the government to appeal from a judgment of acquittal in a court of first instance in the Philippine Islands was recognized by military order No. 58, as amended by the act of the Philippine Commission of August 10, 1901, it was taken away by the provision for immunity from second jeopardy for the same criminal offense, contained in the 5th section of the act of Congress of July 1, 1902 (32 Stat. at L. 691, chap. 1369), for the temporary civil government of the Philippine Islands, notwithstanding the recognition in the 9th section of that act of the established jurisdiction of the insular courts.

[No. 244.]

Argued April 21, 22, 1904. Decided May 31, 1904.

IN ERROR to the Supreme Court of the Philippine Islands, to review a judgment which reversed a judgment of acquittal of the crime of embezzlement, in the court of first instance in the city of Manila, and found the accused guilty of that offense, and imposed punishment therefor. *Reversed*, and the prisoner discharged.

The facts are stated in the opinion.

Mr. Charles H. Aldrich argued the cause, and, with Mr. James Hamilton Lewis, filed a brief for plaintiff in error:

Those natural rights embraced in the Con-

NOTE.—On the right of the state to appeal in a criminal case—see note to *People ex rel. Hodson v. Miner*, 19 L. R. A. 342.

On former jeopardy—see notes to *Com. v. Fitzpatrick*, 1 L. R. A. 451; *Aitenburg v. Com.* 4 L. R. A. 543; *Ex parte Lange*, 21 L. ed. U. S. 872; *United States v. Perez*, 6 L. ed. U. S. 165.

195 U. S.

stitution by prohibitions against interference with them, which are peculiar to Anglo-Saxon jurisprudence, and which are safeguarded by the first ten Amendments to the Federal Constitution, appertain to persons not members of the military service residing in the Philippine Islands. These amendments operate as limitations upon the power of Congress everywhere, and prevent Congress or anyone acting under the authority of the United States from denying to citizens of the United States residing in the Philippine Islands the rights guaranteed thereby.

Downes v. Bidwell, 182 U. S. 244, 283, 294, 45 L. ed. 1088, 1104, 1109, 21 Sup. Ct. Rep. 770; *Ex parte Milligan*, 4 Wall. 2, 18 L. ed. 281; *Scott v. Sandford*, 19 How. 398, 450, 15 L. ed. 691, 719; *Fong Yue Ting v. United States*, 149 U. S. 716, 738, 37 L. ed. 914, 921, 13 Sup. Ct. Rep. 1016; *Pollard v. Hagan*, 3 How. 212, 230, 11 L. ed. 565, 574; *Leitensdorfer v. Webb*, 20 How. 176, 15 L. ed. 891; *Murphy v. Ramsey*, 114 U. S. 44, 45, 29 L. ed. 57, 5 Sup. Ct. Rep. 747.

Under our system of jurisprudence the United States has no right of appeal in a criminal case, and the language of the Constitution, embodied in the President's instructions, and the act of Congress, must be so construed as to deny this right in the Philippine Islands.

United States v. Sanges, 144 U. S. 310, 312, 36 L. ed. 445, 446, 12 Sup. Ct. Rep. 609; *Sparf v. United States*, 156 U. S. 51, 87, 175, 176, 39 L. ed. 343, 356, 387, 15 Sup. Ct. Rep. 273; *United States v. Ball*, 163 U. S. 662, 671, 41 L. ed. 300, 303, 16 Sup. Ct. Rep. 1192.

These cases and the following show that there cannot be a "double jeopardy" under any circumstances:

Ex parte Lange, 18 Wall. 163, 172, 21 L. ed. 872, 877; *Berkowitz v. United States*, 35 C. C. A. 379, 93 Fed. 452; *Re Belt*, 159 U. S. 95, 98, 40 L. ed. 88, 89, 15 Sup. Ct. Rep. 987; *Ex parte Mason*, 105 U. S. 696, 699, 26 L. ed. 1213, 1214; *Murphy v. Massachusetts*, 177 U. S. 155, 44 L. ed. 711, 20 Sup. Ct. Rep. 639; *State v. Ward*, 48 Ark. 36, 3 Am. St. Rep. 213, 2 S. W. 191; *Black v. State*, 36 Ga. 447, 91 Am. Dec. 772; *Hilands v. Com.* 111 Pa. 1, 56 Am. Rep. 235, 2 Atl. 70; *State v. M'Kee*, 1 Bail. L. 651, 21 Am. Dec. 499; *Com. v. Fitzpatrick*, 121 Pa. 109, 1 L. R. A. 451, 6 Am. St. Rep. 757, 15 Atl. 466; *McDonald v. State*, 79 Wis. 651, 24 Am. St. Rep. 740, 48 N. W. 863; *O'Brian v. Com.* 9 Bush, 333, 15 Am. Rep. 715; *Durham v. State*, 5 Ill. 172, 39 Am. Dec. 407; *Kohlheimer v. State*, 39 Miss. 548, 77 Am. Dec. 689.

The intervention of a jury is not important. It is sufficient if the court had ju-

risdiction. Nor is it true, as stated by the supreme court of the Philippine Islands, that "jeopardy is not the peril of more than one trial, but the peril of more than one punishment."

Coleman v. Tennessee, 97 U. S. 509, 24 L. ed. 1118; *People v. Miner*, 144 Ill. 308, 19 L. R. A. 342, 33 N. E. 40; *United States v. Ball*, 163 U. S. 662, 41 L. ed. 300, 16 Sup. Ct. Rep. 1192.

It is conceded that, while a military government continues as an instrument of warfare, used to promote the objects of the invasion by weakening the enemy or strengthening the invader, its powers are practically boundless.

New Orleans v. New York Mail S. S. Co. 20 Wall. 387, 394, 22 L. ed. 354, 358.

But when the war is ended, and the military government ceases to be an instrument to promote actual warfare, and devotes itself simply to civil affairs, instead of military affairs, the limitations of the Constitution at once apply. This follows from the well-settled doctrine that a military government is the creature of necessity, and its acts must be justified by necessity.

Ex parte Milligan, 4 Wall. 2, 127, 18 L. ed. 281, 297; *Raymond v. Thomas*, 91 U. S. 712, 23 L. ed. 434.

It is also established that, upon the cession of the Philippine Islands to the United States, all of the laws of the former sovereignty which were incompatible with the character and institutions of our government became of no effect.

Chicago, R. I. & P. R. Co. v. McGlinn, 114 U. S. 542, 546, 29 L. ed. 270, 271, 5 Sup. Ct. Rep. 1005; *American Ins. Co. v. 356 Bales of Cotton*, 1 Pet. 542, 7 L. ed. 255; *More v. Steinbach*, 127 U. S. 70, 80, 32 L. ed. 51, 55, 8 Sup. Ct. Rep. 1067.

Mr. Lebbeus R. Wilfley argued the cause and filed a brief for defendant in error:

This court has recently held in the so-called *Insular Cases* that the provisions of the Constitution do not of their own force attach to newly acquired territory immediately upon the date of acquisition; that power to extend the provisions of the Constitution to the territories rests in Congress; that, notwithstanding the fact that there are certain prohibitions contained in the Constitution, relating to fundamental rights, which go to the very root of the power of Congress to act, at all times, in all places, and under all circumstances, yet there are other limitations contained in that instrument, not absolute in their nature, relating to such matters as methods of procedure and forms of judicial trials, which do not restrict Congress in the exercise of its power to create local governments and make

needed rules and regulations for the territories of the United States.

This position is identical with that taken by Chief Justice Marshall, in *American Ins. Co. v. 356 Bales of Cotton*, 1 Pet. 542, 7 L. ed. 255.

Congress may provide such modes of trial and methods of procedure as, in its judgment, are best adapted to the needs of the people of the territory.

Re Ross (Ross v. McIntyre) 140 U. S. 453, 35 L. ed. 581, 11 Sup. Ct. Rep. 897; *Hawaii v. Mankichi*, 190 U. S. 197, 47 L. ed. 1016, 23 Sup. Ct. Rep. 787.

The legislature is always presumed to have had former statutes before it, to have been acquainted with their judicial construction, and to have passed new statutes on the same subjects with reference thereto.

State v. Gerhardt, 145 Ind. 439, 33 L. R. A. 313, 44 N. E. 469; *Ailesbury v. Pattison*, 1 Doug. 28; *Steele v. Lineberger*, 72 Pa. 241.

Every statute should be so interpreted and construed as to ascertain and carry into effect the meaning and intention of the legislative body by which it was enacted.

Black, Constr. & Interpretation of Laws, § 24; Sutherland, Stat. Constr. § 234; *Hawaii v. Mankichi*, 190 U. S. 197, 47 L. ed. 1016, 23 Sup. Ct. Rep. 787.

If possible, a statute should be so interpreted and construed as to give effect to every provision therein.

Sutherland, Stat. Constr. § 239; Black, Constr. & Interpretation of Laws, § 232; *Stougher's Case*, 8 Coke, 169; *State v. South Kingston*, 18 R. I. 258, 22 L. R. A. 67, 27 Atl. 599; *Cleveland, C. C. & St. L. R. Co. v. Buckus*, 133 Ind. 513, 18 L. R. A. 729, 33 N. E. 421; *Storms v. Stevens*, 104 Ind. 46, 3 N. E. 401; *Hunt v. Lake Shore & M. S. R. Co.* 112 Ind. 69, 13 N. E. 263.

There is a strong presumption against the repeal by a statute, by implication, of an existing law; there is a presumption against unnecessary change of laws.

Maxwell, Interpretation of Stat. 2d ed. 96; Black, Constr. & Interpretation of Laws, § 52; Sutherland, Stat. Constr. § 217; *Robinson's Case*, 131 Mass. 376, 41 Am. Rep. 239; *Manuel v. Manuel*, 13 Ohio St. 458; *Bear v. Bear*, 33 Pa. 525; *Thompson v. Mylne*, 4 La. Ann. 206; *Childers v. Johnson*, 6 La. Ann. 634; *State v. Massey*, 4 L. R. A. 309, note, 103 N. C. 356; *Hunt v. Chicago Horse & Dummy R. Co.* 121 Ill. 638, 13 N. E. 176; *Plum v. Lugar*, 49 N. J. L. 557, 9 Atl. 779; *State ex rel. Hudspeth v. Cooper*, 114 Ind. 12, 16 N. E. 518; *Pacific R. Co. v. Cass County*, 53 Mo. 17; *McVey v. McVey*, 51 Mo. 406.

If two provisions of a statute are in-

consistent, the more particular provision will prevail over the more general one.

Black, Constr. & Interpretation of Laws, 140; *State, Bartlett, Prosecutor, v. Trenton*, 38 N. J. L. 64.

When a general intention is expressed, and also a particular intention which is incompatible with the general one, the particular intention shall be considered an exception to the general one.

State ex rel. Douglas County v. Cornell, 53 Neb. 556, 39 L. R. A. 513, 68 Am. St. Rep. 629, 74 N. W. 59.

Where two or more provisions contained in the same statute are directly in conflict with one another, and cannot be brought into harmony by any rule of construction, one or the other of the two following principles must be applied in the construction of said statute: (a) The provision latest in position will prevail; or (b) the contradictory provisions cancel each other, and both are void.

Sutherland, Stat. Constr. § 220.

The proposition that the provision which is latest in position repeals the other has been laid down in a number of cases.

Packer v. Sunbury & E. R. Co. 19 Pa. 211; *Harrington v. Rochester Trustees*, 10 Wend. 547; *Gibbons v. Brittenum*, 56 Miss. 232; *Ryan v. State*, 5 Neb. 276.

A law permitting an appeal on the part of the state from a judgment of acquittal in the trial court, and requiring the final verdict of the court to be reached in accordance with the settled principles of law and justice before it can support a valid judgment, is not in derogation of any fundamental doctrine of the common law, or inconsistent with the principles found in all systems of jurisprudence, or of the Constitution, or in violation of any principle of original justice, that supports and enforces the conclusiveness of a valid final judgment.

State v. Lee, 65 Conn. 265, 27 L. R. A. 499, 48 Am. St. Rep. 202, 30 Atl. 1110; *People v. Webb*, 38 Cal. 467; *State v. Garvey*, 42 Conn. 232.

Solicitor General Hoyt also argued the cause and filed a brief for defendant in error:

The identity of the law of jeopardy in the Roman, French, and Spanish systems is manifest. The thing forbidden in each system is the second accusation of a person for an offense of which he has already been acquitted. An appeal by the state being by no possible construction a second accusation, it follows that such an appeal is not a second putting in jeopardy.

Bouvier, Dict. *Non bis in idem*; 11 Merlin, Répertoire, p. 528; Justinian Code, lib. ix. title ii. l. 9; Napoleonic Code d'Instruction Criminelle, art. 360; Fuero Real (A.

D. 1255), lib. iv. title xxi. l. 13; Siete Partidas (A. D. 1263), Part vii. title i. l. xii: Arrazola, Enc. Spanish Law, ed. 1848: Tomo I. p. 511.

The provisions of the Constitution respecting trial by jury do not apply to the Philippine Islands.

Downes v. Bidwell, 182 U. S. 277, 282, 283, 294, 295, 45 L. ed. 1102, 1104, 1105. 1109, 21 Sup. Ct. Rep. 770; *Chicago, R. I. & P. R. Co. v. McGlinn*, 114 U. S. 542, 29 L. ed. 270, 5 Sup. Ct. Rep. 1005; Halleck, International Law, 1st ed. chap. 33, § 14: *Hawaii v. Mankichi*, 190 U. S. 197, 217, 218, 47 L. ed. 1016, 1022, 1023, 23 Sup. Ct. Rep. 787; *Holden v. Hardy*, 169 U. S. 366, 387, 42 L. ed. 780, 789, 18 Sup. Ct. Rep. 383; *Hurtado v. California*, 110 U. S. 529, 530, 531, 28 L. ed. 236, 237, 4 Sup. Ct. Rep. 111, 292; *Bolln v. Nebraska*, 176 U. S. 83, 44 L. ed. 382, 20 Sup. Ct. Rep. 287; *Maxwell v. Dow*, 176 U. S. 581, 44 L. ed. 597, 20 Sup. Ct. Rep. 448, 494.

An appeal in a criminal case from a judgment of acquittal by a court of first instance in the Philippine Islands is valid; and such an appeal does not put a defendant twice in jeopardy, contrary to the Constitution and laws of the United States.

State v. Lee, 65 Conn. 265, 27 L. R. A. 498, 48 Am. St. Rep. 202, 30 Atl. 1110.

Mr. Justice Day delivered the opinion of the court:

Thomas E. Kepner, a practising lawyer in the city of Manila, Philippine Islands, was charged with a violation of the law in the embezzlement of the funds of his client (*estafa*.) Upon trial, in November, 1901, in the court of first instance, without a jury, he was acquitted, it being the judgment of the court that he was not guilty of the offense charged. Upon appellate proceedings by the United States to the supreme court of the Philippine Islands, the judgment of the court of first instance, finding the accused not guilty, was reversed, and Kepner was found guilty, and sentenced to a term of [111] imprisonment of one year, eight months, and twenty-one days, suspended from any public office or place of trust, and deprived of the right of suffrage.

Error was assigned in the appellate court upon the ground that the accused had been put in jeopardy a second time by the appellate proceedings, in violation of the law against putting a person twice in jeopardy for the same offense, and contrary to the Constitution of the United States.

The appeal was taken by the United States on December 20, 1901. A motion to dismiss the appeal was made on January 1, 1902. The motion was finally overruled on October 11, 1902; the final decision in the case, finding 195 U. S.

ing the accused guilty, and imposing the sentence, was rendered on December 3, 1902.

A proper consideration of the question herein made renders it necessary to notice some of the steps by which the jurisdiction of the courts in which the accused was tried was established.

The United States acquired the Philippine Islands by cession under the treaty of peace executed at Paris, between the United States and Spain, on December 10, 1898, the final ratifications being exchanged April 11, 1899 [30 Stat. at L. 1754].

The islands, after American occupation, had been under military rule prior to the creation of the Philippine Commission.

Under the control of the military government, orders had been issued, among others, military order number 58, dated April 23, 1900, which order was in part as follows:

"General Orders, No. 58.

Manila, P. I., April 23, 1900.

"In the interests of justice, and to safeguard the civil liberties of the inhabitants of these islands, the Criminal Code of Procedure now in force therein is hereby amended in certain of its important provisions as indicated in the following enumerated sections:

"Sec. 3. All public offenses triable in [112] courts of first instance or in courts of similar jurisdiction, now established or that hereafter may be established, must be prosecuted by complaint or information.

"Rights of accused at the trial.

"Sec. 15. In all criminal prosecutions the defendant shall be entitled:

"1. To appear and defend in person and by counsel at every stage of the proceedings.

"2. To be informed of the nature and cause of the accusation.

"3. To testify as a witness in his own behalf; but if a defendant offers himself as a witness, he may be cross-examined as any other witness. His neglect or refusal to be a witness shall not in any manner prejudice or be used against him.

"4. To be exempt from testifying against himself.

"5. To be confronted at the trial by and to cross-examine the witnesses against him. Where the testimony of a witness for the prosecution has previously been taken down by question and answers in the presence of the accused or his counsel, the defense having had an opportunity to cross-examine the witness, the deposition of the latter may be read, upon satisfactory proof to the court that he is dead or insane, or cannot with due diligence be found in the islands.

"6. To have compulsory process issue for obtaining witnesses in his own favor.

"7. To have a speedy and public trial.

"8. To have the right of appeal in all cases.

"Sec. 43. From all final judgments of the courts of first instance or courts of similar jurisdiction, and in all cases in which the law now provides for appeals from said courts, an appeal may be taken to the supreme court, as hereinafter prescribed.

[113] "Sec. 44. Either party may appeal from a final judgment, *or from an order made after judgment, affecting the substantial rights of the appellant, or in any case now permitted by law. The United States may also appeal from a judgment for the defendant, rendered on a demurrer to an information or complaint, and from an order dismissing a complaint or information.

"Sec. 50. It shall not be necessary to forward to the supreme court the record, or any part thereof, of any case in which there shall have been an acquittal, or in which the sentence imposed does not exceed confinement in prison for one year, or a fine of 250 pesos, exclusive of costs, unless such case shall have been duly appealed. But such sentences shall be executed upon the order of the court in which the trial was had. The record in cases in which the death penalty, or imprisonment exceeding one year, or a fine exceeding 250 pesos, exclusive of costs of trial, shall have been imposed, shall be forwarded to the clerk of the criminal branch of the supreme court within twenty days, but not earlier than fifteen days after the rendition of the sentence. All cases involving sentence of death, or of imprisonment exceeding six years, or of fine exceeding 1250 pesos, or in which an appeal shall have been taken, shall be submitted to the criminal branch of the supreme court, and shall thereafter take the same course as is now provided by law. Cases forwarded to the supreme court involving sentences less serious than those hereinbefore last mentioned, and not appealed, shall be referred by the clerk to the ministerio fiscal for consideration, and if the latter return the same, concurring in the sentence imposed, the record shall immediately be returned to the trial court for execution of sentence. If the ministerio fiscal shall not concur in the sentence, the case shall be submitted to the criminal branch of the supreme court, and shall thereafter take the same course as is now provided by law when that officer shall recommend a sentence in any respect more severe than that imposed by the trial judge, and for the consideration of the *court, without the necessity of

[114]

a further defense or hearing, when that officer recommends a lighter sentence."

This order was amended by an act of the Commission (No. 194), passed August 10, 1901, and is as follows:

"(G) No. 194. An Act Conferring Jurisdiction on Justices of the Peace, etc.

"Sec. 1. Every justice of the peace in the Philippine Islands is hereby invested with authority to make preliminary investigation of any crime alleged to have been committed within his municipality, jurisdiction to hear and determine which is by law now vested in the judges of courts of first instance.

"Sec. 4. So much of § 50 of said general order No. 58 as requires courts of first instance, or clerks thereof, to forward to the supreme court or the ministerio fiscal the record of all criminal cases for revision or consideration, except where the death penalty is imposed as the judgment or part of the judgment of such court of first instance, is hereby repealed, and it shall not be necessary to forward to the supreme court or the ministerio fiscal the record, or any part thereof, of any case in which there shall have been an acquittal, or in which the penalty imposed is not death, unless such case shall have been duly appealed, as provided in such order. The records of all cases in which the death penalty shall have been imposed by any court of first instance, whether the defendant shall have appealed or not, shall be forwarded to the supreme court for investigation and judgment, as law and justice shall dictate."

Courts were established for the islands under an act passed by the Commission June 11, 1901:

"Sec. 2. The judicial power of the government of the Philippine Islands shall be vested in a supreme court, courts of first instance, and courts of justices of the peace, together with such special jurisdictions of municipal courts and other special tribunals as now are or hereafter may be authorized by law. The two courts first named shall be courts of record.

"Sec. 16. The jurisdiction of the supreme [115] court shall be of two kinds:

"1. Original; and

"2. Appellate.

"Sec. 17. The supreme court shall have original jurisdiction to issue writs of mandamus, certiorari, prohibition, habeas corpus and quo warranto in the cases and in the manner prescribed in the Code of Civil Procedure, and to hear and determine the controversies thus brought before it, and in other cases provided by law.

"Sec. 18. The supreme court shall have appellate jurisdiction of all actions and special

proceedings properly brought to it from courts of first instance, and from other tribunals from whose judgment the law shall specially provide an appeal to the supreme court.

"Sec. 19. The supreme court shall have power to issue writs of certiorari and all other auxiliary writs and process necessary to the complete exercise of its original or appellate jurisdiction.

"Sec. 39. The existing audiencia or supreme court is hereby abolished, and the supreme court provided by this act is substituted in place thereof.

"Sec. 55. The jurisdiction of courts of first instance shall be of two kinds:

"1. Original; and

"2. Appellate.

"Sec. 56. Courts of first instance shall have original jurisdiction. . . . 6. In all criminal cases in which a penalty of more than six months' imprisonment or a fine exceeding \$100 may be imposed.

"Sec. 65. The existing courts of first instance are hereby abolished, and the courts of first instance provided by this act are substituted in place thereof.

[116] "Sec. 66. There shall be courts of justice of the peace as in this section provided:

"1. The existing courts of justices of the peace established by military orders since the 13th day of August, 1898, are hereby recognized and continued, and the justices of such courts shall continue to hold office during the pleasure of the Commission.

"2. In every province in which there now is, or shall hereafter be established, a court of first instance, courts of justice of the peace shall be established in every municipality thereof which shall be organized under the municipal code, or which has been organized and is being conducted as a municipality, when this act shall take effect, under and by virtue of the municipal code.

"Sec. 68. A justice of the peace shall have original jurisdiction for the trial of all misdemeanors and offenses arising within the municipality of which he is a justice, in all cases where the sentence might not by law exceed six months' imprisonment or a fine of \$100. . . ."

On July 1, 1902, Congress passed an act (32 Stat. at L. 691, chap. 1369):

"Act of Congress of July 1, 1902, Temporarily to Provide for the Administration of the Affairs of Civil Government in the Philippine Islands, and for Other Purposes.

"Be it enacted by the Senate and House of Representatives of the United States of 195 U. S.

America, in Congress assembled, That the action of the President of the United States in creating the Philippine Commission, and authorizing said Commission to exercise the powers of government to the extent, and in the manner and form, and subject to the regulation and control set forth in the instructions of the President to the Philippine Commission, dated April seventh, nineteen hundred, and in creating the offices of civil governor and vice governor of the Philippine Islands, and authorizing said civil governor and vice governor to exercise the powers of government to the extent and in the manner and form set forth in the executive order [117] dated June twenty-first, nineteen hundred and one, and in establishing four executive departments of government in said islands as set forth in the act of the Philippine Commission, entitled 'An Act Providing an Organization for the Departments of the Interior, of Commerce and Police, of Finance and Justice, and of Public Instruction,' enacted September sixth, nineteen hundred and one, is hereby approved, ratified, and confirmed, and until otherwise provided by law the said islands shall continue to be governed as thereby and herein provided, and all laws passed hereafter by the Philippine Commission shall have an enacting clause as follows: 'By authority of the United States, be it enacted by the Philippine Commission.' The provisions of section eighteen hundred and ninety-one of the Revised Statutes of eighteen hundred and seventy-eight shall not apply to the Philippine Islands.

"Future appointments of civil governor, vice governor, members of said Commission, and heads of executive departments shall be made by the President, by and with the advice and consent of the Senate.

"Sec. 5. That no law shall be enacted in said islands which shall deprive any person of life, liberty, or property without due process of law, or deny to any person therein the equal protection of the laws.

"That in all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel, to demand the nature and cause of the accusation against him, to have a speedy and public trial, to meet the witnesses face to face, and to have compulsory process to compel the attendance of witnesses in his behalf.

"That no person shall be held to answer for a criminal offense without due process of law; and no person for the same offense shall be twice put in jeopardy of punishment, nor shall be compelled in any criminal case to be a witness against himself.

"That all persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses.

[118] * "That no law impairing the obligation of contracts shall be enacted.

"That no person shall be imprisoned for debt.

"That the privilege of the writ of habeas corpus shall not be suspended, unless, when in cases of rebellion, insurrection, or invasion the public safety may require it, in either of which events the same may be suspended by the President, or by the governor, with the approval of the Philippine Commission, wherever, during such period, the necessity for such suspension shall exist.

"That no *ex post facto* law or bill of attainder shall be enacted.

"That no law granting a title of nobility shall be enacted, and no person holding any office of profit or trust in said islands shall, without the consent of the Congress of the United States, accept any present, emolument, office, or title of any kind whatever from any king, queen, prince, or foreign state.

"That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

"That the right to be secure against unreasonable searches and seizures shall not be violated.

"That neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist in said islands.

"That no law shall be passed abridging the freedom of speech or of the press, or the right of the people peaceably to assemble and petition the government for redress of grievances.

"That no law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof, and that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed.

"That no money shall be paid out of the treasury except in pursuance of an appropriation by law.

"That the rule of taxation in said islands shall be uniform.

19] * "That no private or local bill which may be enacted into law shall embrace more than one subject, and that subject shall be expressed in the title of the bill.

"That no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.

"That all money collected on any tax levied or assessed for a special purpose shall be treated as a special fund in the treasury, and paid out for such purpose only.

"Sec. 9. That the supreme court and the

courts of first instance of the Philippine Islands shall possess and exercise jurisdiction as heretofore provided, and such additional jurisdiction as shall hereafter be prescribed by the government of said islands, subject to the power of said government to change the practice and method of procedure. The municipal courts of said islands shall possess and exercise jurisdiction as heretofore provided by the Philippine Commission, subject in all matters to such alteration and amendment as may be hereafter enacted by law; and the chief justice and associate justices of the supreme court shall hereafter be appointed by the President by and with the advice and consent of the Senate, and shall receive the compensation heretofore prescribed by the Commission until otherwise provided by Congress. The judges of the court of first instance shall be appointed by the civil governor, by and with the advice and consent of the Philippine Commission: *Provided*, That the admiralty jurisdiction of the supreme court and courts of first instance shall not be changed except by act of Congress.

"Sec. 10. That the Supreme Court of the United States shall have jurisdiction to review, revise, reverse, modify, or affirm the final judgments and decrees of the supreme court of the Philippine Islands in all actions, cases, causes, and proceedings now pending therein or hereafter determined thereby in which the Constitution or any statute, treaty, title, right, or privilege of the United States is involved, or in causes in *which the value in controversy exceeds [120] twenty-five thousand dollars, or in which the title or possession of real estate exceeding in value the sum of twenty-five thousand dollars, to be ascertained by the oath of either party or of other competent witnesses, is involved or brought in question; and such final judgments or decrees may and can be reviewed, revised, reversed, modified, or affirmed by said Supreme Court of the United States on appeal or writ of error by the party aggrieved, in the same manner, under the same regulations, and by the same procedure, as far as applicable, as the final judgments and decrees of the circuit courts of the United States."

The act just quoted became a law before the final conviction of the accused in the supreme court of the islands.

It is contended by the government that that part of the law under immediate consideration, which provides that no person, for the same offense, shall be twice put in jeopardy, must be construed in view of the system of laws prevailing in the islands before the same were ceded to the United States, and that the purpose of Congress was to make effectual the jurisprudence of

the islands as known and established before American occupation, and that the provision against double jeopardy must be read in the light of the understanding of that expression in the civil law, or rather the Spanish law, as it was then in force.

The citations in the brief of the learned counsel for the government seem to establish that under the Spanish law, as theretofore administered, one who had been convicted by a judgment of the court of last resort could not again be prosecuted for the same offense. We notice some of these provisions:

In Spanish law the doctrine found expression in *Fuero Real* (A. D. 1255) and the *Siete Partidas* (A. D. 1263).

"After a man, accused of any crime, has been acquitted by the court, no one can afterwards accuse him of the same offense (except in certain specified cases). *Fuero Real*, lib. iv., title xxi., 1, 13.

[121] "If a man is acquitted by a valid judgment of any offense of which he has been accused, no other person can afterwards accuse him of the offense (except in certain cases). *Siete Partidas*, Part vii., title i, l. xii."

In the encyclopedia of Spanish law, published by Don Lorenzo Arrazola in 1848, it is said, in considering the persons who may be accused of crime:

"It is another of the general exceptions that a person cannot be accused who has formerly been accused and adjudged of the same crime, since the most essential effect of all judicial decisions upon which execution can issue is to constitute unalterable law. Tomo, I., pag. 511."

Under that system of law it seems that a person was not regarded as being in jeopardy in the legal sense until there had been a final judgment in the court of last resort. The lower courts were deemed examining courts, having preliminary jurisdiction, and the accused was not finally convicted or acquitted until the case had been passed upon in the audiencia, or supreme court, whose judgment was subject to review in the supreme court at Madrid for errors of law, with power to grant a new trial. The trial was regarded as one continuous proceeding, and the protection given was against a second conviction after this final trial had been concluded in due form of law. The change introduced under military order No. 58, as amended by act 194 of the Commission, made the judgment of the court of first instance final, in cases other than capital, whether the accused be convicted or acquitted, unless an appeal was prosecuted by the government or the accused in the manner pointed out.

In order to determine what Congress
195 U. S.

meant in the language used in the act under consideration, "No person for the same offense shall be twice put in jeopardy of punishment," we must look to the origin and source of the expression, and the judicial construction put upon it before the enactment in question was passed. A consideration of the events preceding this regulation makes evident the intention of Congress to *carry some, at least, of the essential principles of American constitutional jurisprudence to these islands, and to engraft them upon the law of this people, newly subject to our jurisdiction. [122]

That it was the intention of the President in the instructions to the Philippine Commission to adopt a well-known part of the fundamental law of the United States, and to give much of the beneficent protection of the Bill of Rights to the people of the Philippine Islands, is not left to inference; for in his instructions, dated April 7, 1900 (see *Public Laws and Resolutions of Philippine Com.*, 6-9), he says:

"In all the forms of government and administrative provisions which they are authorized to prescribe the Commission should bear in mind that the government which they are establishing is designed not for our satisfaction or for the expression of our theoretical views, but for the happiness, peace, and prosperity of the people of the Philippine Islands, and the measures adopted should be made to conform to their customs, their habits, and even their prejudices, to the fullest extent consistent with the accomplishment of the indispensable requisites of just and effective government."

But he was careful to add:

"At the same time the Commission should bear in mind, and the people of the islands should be made plainly to understand, that there are certain great principles of government which have been made the basis of our governmental system, which we deem essential to the rule of law and the maintenance of individual freedom, and of which they have, unfortunately, been denied the experience possessed by us: that there are also certain practical rules of government which we have found to be essential to the preservation of these great principles of liberty and law, and that these principles and these rules of government must be established and maintained in their islands for the sake of their liberty and happiness, however much they may conflict with the customs of laws or procedure with which they are familiar. It is evident that the most enlightened thought of the Philippine Islands fully appreciates the importance of these principles and rules, and they will inevitably, within a short time, command universal assent. Upon every division and branch [123]

of the government of the Philippines, therefore, must be imposed these inviolable rules:

"That no person shall be deprived of life, liberty, or property without due process of law; that private property shall not be taken for public use without just compensation; that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense; that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted; that no person shall be put twice in jeopardy for the same offense or be compelled, in any criminal case, to be a witness against himself; that the right to be secure against unreasonable searches and seizures shall not be violated; that neither slavery nor involuntary servitude shall exist except as a punishment for crime; that no bill of attainder or *ex post facto* law shall be passed; that no law shall be passed abridging the freedom of speech or of the press or of the rights of the people to peaceably assemble and petition the government for a redress of grievances; that no law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof, and that the free exercise and enjoyment of religious profession and worship without discrimination or preference shall forever be allowed."

[124] These words are not strange to the American lawyer or student of constitutional history. They are the familiar language of the Bill of Rights, slightly changed in form, but not in substance, as found in the first nine amendments to the Constitution of the United States, with the omission of the provision preserving the right to trial by jury and the right of the people to bear arms, and adding the prohibition of the 13th Amendment against slavery or involuntary servitude *except as a punishment for crime, and that of article 1, § 9, to the passage of bills of attainder and *ex post facto* laws. These principles were not taken from the Spanish law; they were carefully collated from our own Constitution, and embody almost verbatim the safeguards of that instrument for the protection of life and liberty.

When Congress came to pass the act of July 1, 1902, it enacted, almost in the language of the President's instructions, the Bill of Rights of our Constitution. In view of the expressed declaration of the President, followed by the action of Congress, both adopting, with little alteration, the provisions of the Bill of Rights, there would seem to be no room for argument that in

this form it was intended to carry to the Philippine Islands those principles of our government which the President declared to be established as rules of law for the maintenance of individual freedom, at the same time expressing regret that the inhabitants of the islands had not theretofore enjoyed their benefit.

How can it be successfully maintained that these expressions of fundamental rights, which have been the subject of frequent adjudication in the courts of this country, and the maintenance of which has been ever deemed essential to our government, could be used by Congress in any other sense than that which has been placed upon them in construing the instrument from which they were taken?

It is a well-settled rule of construction that language used in a statute which has a settled and well-known meaning, sanctioned by judicial decision, is presumed to be used in that sense by the legislative body. *The Abbotsford*, 98 U. S. 440, 25 L. ed. 168.

It is not necessary to determine in this case whether the jeopardy provision in the Bill of Rights would have become part of the law of the islands without congressional legislation. The power of Congress to make rules and regulations for territory incorporated in or owned by the United States is settled by an unbroken line of decisions of this court, and is no longer open to question. *American Ins. Co. v. 356 Bales of Cotton*, 1 *Pet. 511, 7 L. ed. 242; *Murphy* [125] v. *Ramsey*, 114 U. S. 15, 29 L. ed. 47, 5 Sup. Ct. Rep. 747; *Church of Jesus Christ of L. D. S. v. United States*, 136 U. S. 1, 42, 43, 34 L. ed. 481, 491, 10 Sup. Ct. Rep. 792; *Downes v. Bidwell*, 182 U. S. 244, 45 L. ed. 1088, 21 Sup. Ct. Rep. 770; *Hawaii v. Mankichi*, 190 U. S. 197, 47 L. ed. 1016, 23 Sup. Ct. Rep. 787. This case does not call for a discussion of the limitations of such power, nor require determination of the question whether the jeopardy clause became the law of the islands after the ratification of the treaty, without Congressional action, as the act of Congress made it the law of these possessions when the accused was tried and convicted.

It is argued that in the act of July 1, 1902, Congress recognized the jurisdiction of the Philippine courts in § 9 as follows:

"Sec. 9. That the supreme court and the courts of first instance of the Philippine Islands shall possess and exercise jurisdiction as heretofore provided, and such additional jurisdiction as shall hereafter be prescribed by the government of said islands, subject to the power of said government to change the practice and method of procedure."

The argument is, that Congress intended to leave the right of appeal as provided by

military order No. 58, as amended by the Commission, in full force.

But Congress, in § 5, had already specifically provided that no person should be put twice in jeopardy of punishment for the same offense. While § 9 recognizes the established jurisdiction of the courts of the islands, it was not intended to repeal the specific guaranty of § 5, which is direct legislation pertaining to the particular subject. It is a well-settled principle of construction that specific terms covering the given subject-matter will prevail over general language of the same or another statute which might otherwise prove controlling. *Re Rouse, H. & Co.* 33 C. C. A. 356, 63 U. S. App. 570, 91 Fed. 97-100, and cases therein cited; *Townsend v. Little*, 109 U. S. 504, 512, 27 L. ed. 1012, 1015, 3 Sup. Ct. Rep. 357.

In ascertaining the meaning of the phrase taken from the Bill of Rights it must be construed with reference to the common law from which it is taken. 1 Kent, Com. 336.

[126] *United States v. Wong Kim Ark*, 169 U. S. 649, 42 L. ed. 890, 18 Sup. Ct. Rep. 456, in which this court said:

"In this, as in other respects, it [a constitutional provision] must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution. *Minor v. Happersett*, 21 Wall. 162, 22 L. ed. 627; *Ex parte Wilson*, 114 U. S. 417, 29 L. ed. 89, 5 Sup. Ct. Rep. 935; *Boyd v. United States*, 116 U. S. 616, 624, 625, 29 L. ed. 746, 749, 6 Sup. Ct. Rep. 524; *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564. The language of the Constitution, as has been well said, could not be understood without reference to the common law. 1 Kent Com. 336; Bradley, J., in *Moore v. United States*, 91 U. S. 270, 274, 23 L. ed. 346, 347."

At the common law, protection from second jeopardy for the same offense clearly included immunity from second prosecution where the court having jurisdiction had acquitted the accused of the offense. The rule is thus stated by Hawkins, Pleas of the Crown, quoted by Mr. Justice Story in *United States v. Gibert*, 2 Sumn. 39 Fed. Cas. No. 15,204:

"The plea (says he) of *autrefois acquit* is grounded on this maxim, that a man shall not be brought into danger of his life for one and the same offense more than once. From whence it is generally taken by all our books, as an undoubted consequence, that where a man is once found not guilty, on an indictment or appeal, free from error, and well commenced before any court which hath jurisdiction of the cause, he may, by the common law, in all cases, plead such ac-

quittal in bar of any subsequent indictment or appeal for the same crime."

In this court it was said by Mr. Justice Miller, in *Ex parte Lange*, 18 Wall. 163, 21 L. ed. 872:

"The common law not only prohibited a second punishment for the same offense, but went further, and forbid a second trial for the same offense, whether the accused had suffered punishment or not, and whether, in the former trial, he had been acquitted or convicted."

And in as late a case as *Wemyss v. Hopkins*, L. R. 10 Q. B. 378, it was held that a conviction before a court of competent jurisdiction, even without a jury, was a bar to a second prosecution. [127]

In that case the appellant had been summarily convicted before a magistrate for negligently, and by wilful misconduct, driving a carriage against a horse ridden by the respondent, and was afterwards convicted on the same facts for unlawful assault. It was held that the first conviction was a bar to the second. In the course of the opinion it was said by Blackburn, J.:

"I think the fact that the appellant had been convicted by justices under one act of Parliament for what amounted to an assault is a bar to a conviction under another act of Parliament for the same assault. The defense does not arise on a plea of *autrefois convict*, but on the well-established rule at common law, that where a person has been convicted and punished for an offense by a court of competent jurisdiction, *Transit in rem judicatam*; that is, the conviction shall be a bar to all further proceedings for the same offense, and he shall not be punished again for the same matter; otherwise there might be two different punishments for the same offense. The only point raised is whether a defense in the nature of a plea of *autrefois convict* would extend to a conviction before two justices whose jurisdiction is created by statute. I think the fact that the jurisdiction of the justices is created by statute makes no difference. Where the conviction is by a court of competent jurisdiction it matters not whether the conviction is by a summary proceeding before justices or by trial before a jury."

In the same case it was said by Lush, J.: "I am also of opinion that the second conviction should be quashed, upon the ground that it violated a fundamental principle of law, that no person shall be prosecuted twice for the same offense. The act charged against the appellant on the first occasion was an assault upon the respondent while she was riding a horse on the highway, and it therefore became an offense for which the appellant might be punished under ei-

[128]ther of two *statutes. The appellant was prosecuted for the assault, and convicted under one of the statutes, 3 and 4 Wm. iv., chap. 50, § 78, and fined, and he therefore cannot be afterwards convicted again for the same act under the other statute."

It is true that some of the definitions given by the text-book writers, and found in the reports, limit jeopardy to a second prosecution after verdict by a jury; but the weight of authority, as well as decisions of this court, have sanctioned the rule that a person has been in jeopardy when he is regularly charged with a crime before a tribunal properly organized and competent to try him; certainly so after acquittal. *Coleman v. Tennessee*, 97 U. S. 509, 24 L. ed. 1118. Undoubtedly in those jurisdictions where a trial of one accused of crime can only be to a jury, and a verdict of acquittal or conviction must be by a jury, no legal jeopardy can attach until a jury has been called and charged with the deliverance of the accused. But, protection being against a second trial for the same offense, it is obvious that where one has been tried before a competent tribunal having jurisdiction he has been in jeopardy as much as he could have been in those tribunals where a jury is alone competent to convict or acquit. *People v. Miner*, 144 Ill. 308, 19 L. R. A. 342, 33 N. E. 43; *State v. Bowen*, 45 Minn. 145, 47 N. W. 650; *State v. Layne*, 93 Tenn. 668, 36 S. W. 390.

In *United States v. Sanges*, 144 U. S. 310, 36 L. ed. 445, 12 Sup. Ct. Rep. 609, it was held that a writ of error did not lie in favor of the United States in a criminal case: Mr. Justice Gray said:

"From the time of Lord Hale to that of *Chadwick's Case* [11 Q. B. 173, 205], just cited, the text-books, with hardly an exception, either assume or assert that the defendant (or his representative) is the only party who can have either a new trial or a writ of error in a criminal case; and that a judgment in his favor is final and conclusive. See 2 Hawk. P. C. chap. 47, § 12; chap. 50, §§ 10 *et seq.*; Bacon Abr. Trial, L. 9, Error, B.; 1 Chitty, Crim. Law, 657, 747; Starkie, Crim. Pl. 2d ed. 357, 367, 371; Archbold, Crim. Pl. & Pl. 12th Eng. and 6th Am. ed. 177, 179.

"But whatever may have been, or may be, [129] the law of *England upon that question, it is settled by an overwhelming weight of American authority that the state has no right to sue out a writ of error upon a judgment in favor of the defendant in a criminal case, except under and in accordance with express statutes, whether that judgment was rendered upon a verdict of acquittal, or upon the determination by the court of a question of law."

124

In the course of the opinion Justice Gray cites, among other cases, *Com. v. Cummings* and *Com. v. McGinnis*, opinion by Chief Justice Shaw, 3 Cush. 212, '50 Am. Dec. 732. In Archbold, Crim. Pl. & Pr. Pomeroy's ed., 199, it was said: "There is no instance of error being brought upon a judgment for a defendant, after an acquittal."

That the learned justice could not have intended to intimate that a second prosecution could be allowed by statute after an acquittal of the offense is shown by the subsequent decision of this court in *United States v. Ball*, 163 U. S. 662, 41 L. ed. 300, 16 Sup. Ct. Rep. 1192, in which Mr. Justice Gray also delivered the opinion of the court. In that case an attempt was made to prosecute for the second time one Millard F. Ball, who had been acquitted upon a defective indictment, which had been held bad upon the proceedings in error prosecuted by others jointly indicted with Millard F. Ball, who had been convicted at the trial. The court below held Ball's plea of former jeopardy to be bad. But this court reversed the judgment, and in the course of the opinion it was said:

"The Constitution of the United States, in the 5th Amendment, declares, 'Nor shall any person be subject to be twice put in jeopardy of life or limb.' The prohibition is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial. An acquittal before a court having no jurisdiction is, of course, like all the proceedings in the case, absolutely void, and therefore no bar to subsequent indictment and trial in a court which has jurisdiction of the offense. *Com. v. Peters*, 12 Met. 387; 2 Hawk. P. C. *chap. 35, § 3; 1 Bishop, Crim. [130] Law, § 1028. But although the indictment was fatally defective, yet, if the court had jurisdiction of the cause and of the party, its judgment is not void, but only voidable by writ of error; and, until so avoided, cannot be collaterally impeached. If the judgment is upon a verdict of guilty, and unreversed, it stands good and warrants the punishment of the defendant accordingly, and he could not be discharged by a writ of habeas corpus. *Ex parte Parks*, 93 U. S. 18, 23 L. ed. 787. If the judgment is upon an acquittal, the defendant, indeed, will not seek to have it reversed, and the government cannot. *United States v. Sanges*, 144 U. S. 310, 36 L. ed. 445, 12 Sup. Ct. Rep. 609. But the fact that the judgment of a court having jurisdiction of the case is practically final affords no reason for allowing its validity and conclusiveness to be impugned in another case. . . . As to the defendant who had been acquitted by the ver-

195 U. S.

dict duly returned and received, the court could take no other action than to order his discharge. The verdict of acquittal was final, and could not be reviewed, on error or otherwise, without putting him twice in jeopardy, and thereby violating the Constitution. However it may be in England, in this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense. *United States v. Sanges*, 144 U. S. 310, 36 L. ed. 445, 12 Sup. Ct. Rep. 609; *Com. v. Tuck*, 20 Pick. 356, 365; *West v. State*, 22 N. J. L. 212, 231; 1 Lead. Crim. Cas. 532."

It is, then, the settled law of this court that former jeopardy includes one who has been acquitted by a verdict duly rendered, although no judgment be entered on the verdict, and it was found upon a defective indictment. The protection is not, as the court below held, against the peril of second punishment, but against being again tried for the same offense.

We are not here dealing with those statutes which give to the government a right of review upon the steps merely preliminary to a trial and before the accused is legally put in jeopardy, as where a discharge is had upon motion to quash, or a demurrer to the indictment is sustained before jeopardy *has attached. Such statutes have been quite generally sustained in jurisdictions which deny the right of second trial where a competent court has convicted or acquitted the accused. *People v. Webb*, 38 Cal. 467. Mr. Bishop, in his work upon Criminal Law, sums up the scope and authority of such statutes as follows:

"A legislative provision for the rehearing of criminal causes cannot be interpreted—or, at least, it cannot have force—to violate the constitutional rule under consideration, whatever be the words in which the provision is expressed. When, therefore, a defendant has been once in jeopardy, the jeopardy cannot be repeated without his consent, whatever statute may exist on the subject. Such a statute will be interpreted with the Constitution, and be held to apply only to cases where it constitutionally may. And if it undertakes to give to the state the right of appeal, to retry the party charged, after acquittal, it is invalid. And so the writ of error, or the like, allowed to the state, can authorize the state to procure the reversal of erroneous proceedings and commence anew, only in those cases in which the first proceeding did not create legal jeopardy." 1 Bishop, Crim. Law, 5th ed § 1026.

The author's conclusion has support in the case of *People v. Miner*, 144 Ill. 308, 19 L. R. A. 342, 33 N. E. 40, wherein a statute giving an appeal when the accused had

been acquitted before a competent tribunal was held in violation of § 10, article 2, of the Constitution of that state, providing that no person shall be put twice in jeopardy for the same offense. So in the case of *People v. Webb*, 38 Cal. 467, a statute undertaking to give the right of appeal to the people in criminal cases was held to be limited to the cases in which errors in the proceedings may occur before legal jeopardy has attached. In the course of a well-considered opinion it was said:

"The question thus presented is of most grave importance, and, so far as we are advised, has never been directly passed upon by this court; hence we have given it a most patient consideration, and after a careful examination of the authorities *as to the[132] construction of similar provisions in the Constitutions of other states, and the Constitution of the United States, we are entirely satisfied that this court has no authority in criminal cases, under our state Constitution, to order a new trial of a defendant at the instance of the prosecution for mere errors in the ruling of the court during the progress of the trial after the jury have been charged with the case, and have rendered a verdict of not guilty. No case has been called to our attention, and after a most diligent examination of authorities, we have not been able to find a single American case where a retrial has been ordered or sanctioned by an appellate court at the instance of the prosecution, after the defendant had been once put upon his trial for an alleged felony, upon a valid indictment before a competent court and jury, and acquitted by the verdict of such jury; but we find a vast number of adjudications of the highest judicial tribunals of the different states and many of the Federal courts to the effect that no such retrial is authorized by the common law, and is directly interdicted by the Constitution of the United States, and also of most of the several states. The universal maxim of the common law of England, as Sir William Blackstone expresses it, 'that no man is to be brought into jeopardy of his life more than once for the same offense,' is embraced in article 5 of amendments to the Constitution of the United States, and in the Constitutions of several states, in the following language: 'Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;' and in many other states the same principle is incorporated in the organic law, in language substantially the same as hereinbefore quoted from the Constitution of this state. While the Constitutions of some few states are destitute of this or any similar provision, other state Constitutions, such as of New Hampshire,

Rhode Island, New Jersey, and Iowa, merely interdict a second trial for the same offense after acquittal."

The case of *State v. Lee*, 65 Conn. 265, 27 L. R. A. 498, 48 Am. St. Rep. 202, 30 Atl. 1110, in the reasoning of the court seems opposed to this view. But no reference [133] *is made in the course of the opinion to any constitutional requirement in Connecticut as to double jeopardy. An examination of the Constitution of that state and amendments as published in General Statutes of Connecticut, Revision of 1902, discloses no provision upon the subject of jeopardy, and we conclude there is none.

The exceptional character of the decision in *State v. Lee* is stated by the learned editor of American State Reports in a note to the case as reported in 48 Am. St. Rep. 202, in the following language:

"This case, in its view of former jeopardy, stands out in bold relief against the commonly understood meaning of what constitutes once in jeopardy."

And further:

"The law almost universally prevalent is that a verdict of acquittal in a criminal case is final and conclusive, and that there can be no new trial of a criminal prosecution after an acquittal in it. *People v. Corning*, 2 N. Y. 9, 49 Am. Dec. 364, and note," 48 Am. St. Rep. 213, 214.

The *Ball Case*, 163 U. S. 662, 41 L. ed. 300, 16 Sup. Ct. Rep. 1192, establishes that to try a man after a verdict of acquittal is to put him twice in jeopardy, although the verdict was not followed by judgment. That is practically the case under consideration, viewed in the most favorable aspect for the government. The court of first instance, having jurisdiction to try the question of the guilt or innocence of the accused, found Kepner not guilty; to try him again upon the merits, even in an appellate court, is to put him a second time in jeopardy for the same offense, if Congress used the terms as construed by this court in passing upon their meaning. We have no doubt that Congress must be held to have intended to have used these words in the well-settled sense, as declared and settled by the decisions of this court.

It follows that military order No. 58, as amended by act of the Philippine Commission No. 194, in so far as it undertakes to permit an appeal by the government after [134] acquittal, was *repealed by the act of Congress of July, 1902, providing immunity from second jeopardy for the same criminal offense.

This conclusion renders it unnecessary to consider, if the question was presented in this case, whether the accused was entitled to the right of a trial by jury.

Judgment reversed and prisoner discharged.

Mr. Justice **Holmes**, with whom concurred Mr. Justice **White** and Mr. Justice **McKenna**, dissenting:

I regret that I am unable to agree with the decision of the majority of the court. The case is of great importance, not only in its immediate bearing upon the administration of justice in the Philippines, but, since the words used in the act of Congress are also in the Constitution, even more because the decision necessarily will carry with it an interpretation of the latter instrument. If, as is possible, the constitutional prohibition should be extended to misdemeanors (*Ex parte Lange*, 18 Wall. 163, 173, 21 L. ed. 872, 877), we shall have fastened upon the country a doctrine covering the whole criminal law, which, it seems to me, will have serious and evil consequences. At the present time in this country there is more danger that criminals will escape justice than that they will be subjected to tyranny. But I do not stop to consider or to state the consequences in detail, as such considerations are not supposed to be entertained by judges, except as inclining them to one of two interpretations, or as a tacit last resort in case of doubt. It is more pertinent to observe that it seems to me that logically and rationally a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy, from its beginning to the end of the cause. Everybody agrees that the principle in its origin was a rule forbidding a trial in a new and independent case where a man already had been tried once. But there is no rule that a man may not be tried twice in the same case. It has been decided by this court that he may be tried a second time, even for his life, if the jury *dis- [135] agree (*United States v. Perez*, 9 Wheat. 579, 6 L. ed. 165; see *Simmons v. United States*, 142 U. S. 148, 35 L. ed. 968, 12 Sup. Ct. Rep. 171; *Logan v. United States*, 144 U. S. 263, 36 L. ed. 429, 12 Sup. Ct. Rep. 617; *Thompson v. United States*, 155 U. S. 271, 39 L. ed. 146, 15 Sup. Ct. Rep. 73), or, notwithstanding their agreement and verdict, if the verdict is set aside on the prisoner's exceptions for error in the trial. *Hopt v. Utah*, 104 U. S. 631, 635, 26 L. ed. 873, 874, 110 U. S. 574, 28 L. ed. 262, 4 Sup. Ct. Rep. 202, 114 U. S. 488, 492, 29 L. ed. 183, 185, 5 Sup. Ct. Rep. 972, 120 U. S. 430, 442, 30 L. ed. 708, 712, 7 Sup. Ct. Rep. 614; *United States v. Ball*, 163 U. S. 662, 672, 41 L. ed. 300, 303, 16 Sup. Ct. Rep. 1192. He even may be tried on a new indictment if the judgment on the first is ar- 195 U. S.

rested upon motion. *Ex parte Lange*, 18 Wall. 163, 174, 21 L. ed. 872, 878; 1 Bishop, Crim. Law, 5th ed. § 998. I may refer further to the opinions of Kent and Curtis, in *People v. Olcott*, 2 Johns. Cas. 301; 2 Day, 507, note; *United States v. Morris*, 1 Curt. C. C. 23, Fed. Cas. No. 15,815, and to the well-reasoned decision in *State v. Lee*, 65 Conn. 265, 27 L. R. A. 498, 48 Am. St. Rep. 202, 30 Atl. 1110.

If a statute should give the right to take exceptions to the government, I believe it would be impossible to maintain that the prisoner would be protected by the Constitution from being tried again. He no more would be put in jeopardy a second time when retried because of a mistake of law in his favor, than he would be when retried for a mistake that did him harm. It cannot matter that the prisoner procures the second trial. In a capital case, like *Hopt v. Utah*, a man cannot waive, and certainly will not be taken to waive without meaning it, fundamental constitutional rights. *Thompson v. Utah*, 170 U. S. 343, 353, 354, 42 L. ed. 1061, 18 Sup. Ct. Rep. 620. Usually no such waiver is expressed or thought of. Moreover, it cannot be imagined that the law would deny to a prisoner the correction of a fatal error unless he should waive other rights so important as to be saved by an express clause in the Constitution of the United States.

It might be said that when the prisoner takes exceptions he only is trying to get rid of a jeopardy that already exists,—that so far as the verdict is in his favor, as when he is found guilty of manslaughter upon an indictment for murder, according to some decisions he will keep it, and can be retried only for the less offense, so that the [136] jeopardy only is continued *to the extent that it already has been determined against him, and is continued with a chance of escape. I believe the decisions referred to to be wrong, but, assuming them to be right, we must consider his position at the moment when his exceptions are sustained. The first verdict has been set aside. The jeopardy created by that is at an end, and the question is, What shall be done with the prisoner? Since at that moment he no longer is in jeopardy from the first verdict, if a second trial in the same case is a second jeopardy even as to the less offense, he has a right to go free. In view of these difficulties it has been argued that, on principle, he has that right if a mistake of law is committed at the first trial. 1 Bishop, Crim. Law, 5th ed. §§ 999, 1047. But even Mr. Bishop admits that the decisions are otherwise, and the point is settled in this court by the cases cited above. That fetish happily being destroyed, the necessary alterna-

tive is that the Constitution permits a second trial in the same case. The reason, however, is not the fiction that a man is not in jeopardy, in case of a misdirection, for it must be admitted that he is in jeopardy, even when the error is patent on the face of the record; as when he is tried on a defective indictment, if judgment is not arrested. *United States v. Ball*, 163 U. S. 662, 41 L. ed. 300, 16 Sup. Ct. Rep. 1192. Moreover, if the fiction were true, it would be equally true when the misdirection was in favor of the prisoner. The reason, I submit, is that there can be but one jeopardy in one case. I have seen no other, except the suggestion of waiver, and that I think cannot stand.

If what I have said so far is correct, no additional argument is necessary to show that a statute may authorize an appeal by the government from the decision by a magistrate to a higher court, as well as an appeal by the prisoner. The latter is everyday practice, yet there is no doubt that the prisoner is in jeopardy at the trial before the magistrate, and that a conviction or acquittal not appealed from would be a bar to a second prosecution. That is what was decided, and it is all that was decided or intimated, relevant to this case, in *Wemyss v. *Hopkins*, L. R. 10 Q. B. 378. For the [137] reasons which I have stated already, a second trial in the same case must be regarded as only a continuation of the jeopardy which began with the trial below.

Mr. Justice **Brown**, dissenting:

Under our Anglo-Saxon system of jurisprudence I have always supposed that a verdict of acquittal upon a valid indictment terminated the jeopardy, that no further proceedings for a review could be taken either in the same or in an appellate court, and that it was extremely doubtful whether even Congress could constitutionally authorize such review.

Conceding all this, however, I think that in applying the principle to the Philippine Islands, Congress intended to use the words in the sense in which they had theretofore been understood in those islands. By that law, in which trial by jury was unknown, the jeopardy did not terminate, if appeal were taken to the audiencia or supreme court, until that body had acted upon the case. The proceedings before the court of first instance were, in all important cases, reviewable by the supreme court upon appeal which acted finally upon the case, and terminated the jeopardy. This was evidently the view, of the military commander in general order No. 58, and of the Philippine Commission in the act of August 10, 1901 (No. 194), in both of which an appeal to

the supreme court was contemplated, even after a judgment of acquittal. I think this also must have been the intention of Congress, particularly in view of § 9 of the Philippine act of July 1, 1902, which provided that "the supreme court and the courts of first instance of the Philippine Islands shall possess and exercise jurisdiction as heretofore provided . . . subject to the power of said government to change the practice and modes of procedure." It seems to me impossible to suppose that Congress intended to place in the hands of a single judge the great and dangerous power of finally acquitting the most notorious criminals.

Leave to file a petition for rehearing denied on October 17, 1904.

[138]*FRED. L. DORR and Edward F. O'Brien.
Plffs. in Err.,
v.

UNITED STATES.

(See S. C. Reporter's ed. 138-158.)

Power of Congress over the territories—trial by jury in Philippine Islands—libel—comments on privileged matter—legislative power of Philippine Commission.

1. Congress, under the power to govern territory of the United States, implied in the right to acquire it, and expressly conferred by U. S. Const. art. 4, § 3, was not bound to include the right of trial by jury in the system of laws enacted by the act of July 1, 1902 (32 Stat. at L. 691, chap. 1369), for the temporary civil government of the Philippine Islands, ceded to the United States by Spain, and not incorporated into the United States by congressional action.
2. The right of trial by jury was not extended by the Federal Constitution, without legislation, and of its own force, to the Philippine Islands, ceded to the United States by Spain, and not incorporated into the United States by congressional action.
3. Striking headlines prefixed to a newspaper report of a judicial proceeding, which held the prosecuting witness up to the public as "traitor, seducer, and perjurer," with the additional phrase "wife would have killed him," are not privileged, even if the report itself was privileged, under act No. 277 of the Philippine Commission, § 7, as a fair and true report of judicial proceedings,—especially in view of the provision of the following section

NOTE.—On the power of Congress over the territories—see note to First Nat. Bank v. Yankton County, 25 L. ed. U. S. 1046.

On the license of the press—see note to Morey v. Morning Journal Assn., 9 L. R. A. 621.

On privileged publications—see notes to Byam v. Collins, 2 L. R. A. 129; Missouri P. R. Co. v. Richmond, 4 L. R. A. 280; John W. Lovell Co. v. Houghton, 6 L. R. A. 363; White v. Nicholls, 11 L. ed. U. S. 591.

of that act, that "libelous remarks or comments connected with matter privileged by the last section receive no privilege by reason of being so connected."

4. Congress could lawfully delegate, by the act of March 2, 1901 (31 Stat. at L. 910, chap. 803), to such persons as should be appointed by the President, the power to legislate for the Philippine Islands, including the power to enact the "libel law" passed on October 24, 1901.

[No. 583.]

Argued April 21, 22, 1904. Decided May 31, 1904.

IN ERROR to the Supreme Court of the Philippine Islands, to review a judgment which affirmed a conviction of libel in the court of first instance of the city of Manila. *Affirmed.*

The facts are stated in the opinion.

No brief or argument for plaintiff's in error.

Mr. Lebeus R. Willey argued the cause and filed a brief for defendant in error:

The article over which the headlines in question appeared was not privileged.

Stackpole v. Hennen, 6 Mart. N. S. 481, 17 Am. Dec. 187; *Com. v. Godshalk*, 13 Phila. 575.

The headlines in question were libelous because they were "remarks or comments" within the meaning of the law.

Century Dict. Comment; Standard Dict. Remark; Webster Dict. Comment, Remark.

It is held in some states that, where there is no law with reference to comments and remarks, headlines may be used if they fairly and accurately forecast the article published, but they must be true and faithful epitomes of what is contained in the account of the court proceedings.

Lawyers' Co-op. Pub. Co. v. West Pub. Co. 32 App. Div. 585, 52 N. Y. Supp. 1120; *Hayes v. Press Co.* 127 Pa. 642, 5 L. R. A. 643, 14 Am. St. Rep. 874, 18 Atl. 331.

The headlines in question were libelous because they were not a fair epitome or index to the article itself.

Newell, *Defamation, Slander & Libel*, pp. 556, 557; *Andrews v. Chapman*, 3 Car. & K. 288.

The headlines in question were libelous because they were published with malice.

Newell, *Slander & Libel*, p. 554; *Salisbury v. Union & Advertiser Co.* 45 Hun, 120.

Congress in the exercise of its power to make needful rules and regulations for the territories has often delegated its powers as to the territorial governments.

The power to establish territorial government has been too long exercised by Congress and acquiesced in by the Supreme Court to be deemed an unsettled question.

De Lima v. Bidwell, 182 U. S. 1, 45 L. ed. 1041, 21 Sup. Ct. Rep. 743; *American Ins. Co. v. 356 Bales of Cotton*, 1 Pet. 511, 7 L. ed. 242.

Solicitor General Hoyt also argued the cause and filed a brief for defendant in error. For his contentions see his brief as reported in *Kepner v. United States*, ante, 114.

Mr. Justice **Day** delivered the opinion of the court:

The case presents the question whether, in the absence of a statute of Congress expressly conferring the right, trial by jury is a necessary incident of judicial procedure in the Philippine Islands, where demand for trial by that method has been made by the accused, and denied by the courts established in the islands.

The recent consideration by this court, and the full discussion had in the opinions delivered in the so-called "Insular cases," renders superfluous any attempt to reconsider the constitutional relation of the powers of the government to territory acquired by a treaty cession to the United States. *De Lima v. Bidwell*, 182 U. S. 1, 45 L. ed. 1041, 21 Sup. Ct. Rep. 743; *Downes v. Bidwell*, 182 U. S. 244, 45 L. ed. 1088, 21 Sup. Ct. Rep. 770. The opinions rendered in those cases cover every phase of the question, either legal or historical, and it would be useless to undertake to add to the elaborate consideration of the subject had therein. In the still more recent case of *Hawaii v. Mankichi*, 190 U. S. 197, 47 L. ed. 1016, 23 Sup. Ct. Rep. 787, the right to a jury trial in [140] outlying *territory of the United States was under consideration. For the present purpose it is only necessary to state certain conclusions which are deemed to be established by prior adjudications, and are decisive of this case.

It may be regarded as settled that the Constitution of the United States is the only source of power authorizing action by any branch of the Federal government. "The government of the United States was born of the Constitution, and all powers which it enjoys or may exercise must be either derived expressly or by implication from that instrument." *Downes v. Bidwell*, 182 U. S. 244-288, 45 L. ed. 1088-1106, 21 Sup. Ct. Rep. 770, and cases cited. It is equally well settled that the United States may acquire territory in the exercise of the treaty-making power by direct cession as the result of war, and in making effectual the terms of peace; and for that purpose has the powers of other sovereign nations. This principle has been recognized by this court from its earliest decisions. The convention which framed the Constitution of the United States, in view of the territory already pos-

sessed and the possibility of acquiring more, inserted in that instrument, in article 4, § 3, a grant of express power to Congress "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

As early as the February term, 1810, of this court, in the case of *Sere v. Pitot*, 6 Cranch, 332, 3 L. ed. 240, Chief Justice Marshall, delivering the opinion of the court, said:

"The power of governing and of legislating for a territory is the inevitable consequence of the right to acquire and to hold territory. Could this position be contested, the Constitution of the United States declares that 'Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.' Accordingly we find Congress possessing and exercising the absolute and undisputed power of governing and legislating for the territory of Orleans. Congress has *given them [141] a legislative, an executive, and a judiciary, with such powers as it has been their will to assign to those departments respectively."

And later, the same eminent judge, delivering the opinion of the court in the leading case upon the subject (*American Ins. Co. v. 356 Bales of Cotton*, 1 Pet. 511, 542, 7 L. ed. 242, 255), says:

"The Constitution confers absolutely on the government of the Union the powers of making war and of making treaties; consequently that government possesses the power of acquiring territory, either by conquest or by treaty.

"The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession, or on such as its new master shall impose. On such transfer of territory it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved, and new relations are created between them and the government which has acquired their territory. The same act which transfers their country transfers the allegiance of those who remain in it; and the law, which may be denominated political, is necessarily changed, although that which regulates the intercourse and general conduct of individuals remains in force until altered by the newly-created power of the state.

"On the 22d of February, 1819, Spain ceded Florida to the United States. The 6th article of the treaty of cession contains the following provision: 'The inhabitants of the territories which His Catholic Majesty cedes the United States by this treaty shall be incorporated in the Union of the United States as soon as may be consistent with the principles of the Federal Constitution, and admitted to the enjoyment of the privileges, rights, and immunities of the citizens of the United States.' [8 Stat. at L. 256.]

[142] "This treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities of the citizens of the United States. It is unnecessary to inquire whether this is not their condition, independent of stipulation. They do not, however, participate in political power; they do not share in the government till Florida shall become a state. In the meantime Florida continues to be a territory of the United States, governed by virtue of that clause in the Constitution which empowers Congress 'to make all needful rules and regulations respecting the territory or other property belonging to the United States.'"

While these cases, and others which are cited in the late case of *Downes v. Bidwell*, 182 U. S. 244-288, 45 L. ed. 1088-1106, 21 Sup. Ct. Rep. 770, sustain the right of Congress to make laws for the government of territories, without being subject to all the restrictions which are imposed upon that body when passing laws for the United States, considered as a political body of states in union, the exercise of the power expressly granted to govern the territories is not without limitations. Speaking of this power, Mr. Justice Curtis, in the case of *Scott v. Sandford*, 19 How. 614, 15 L. ed. 787, said:

"If, then, this clause does contain a power to legislate respecting the territory, what are the limits of that power?"

"To this I answer that, in common with all the other legislative powers of Congress, it finds limits in the express prohibitions on Congress not to do certain things; that, in the exercise of the legislative power, Congress cannot pass an *ex post facto* law or bill of attainder; and so in respect to each of the other prohibitions contained in the Constitution."

In every case where Congress undertakes to legislate in the exercise of the power conferred by the Constitution, the question may arise as to how far the exercise of the power is limited by the "prohibitions" of that instrument. The limitations which are to be applied in any given case involving territorial government must depend upon

the relation of the particular territory to the United States, concerning which Congress is exercising the power conferred by the Constitution. That *the United States [143] may have territory which is not incorporated into the United States as a body politic, we think was recognized by the framers of the Constitution in enacting the article already considered, giving power over the territories, and is sanctioned by the opinions of the justices concurring in the judgment in *Downes v. Bidwell*, 182 U. S. 244-288, 45 L. ed. 1088-1106, 21 Sup. Ct. Rep. 770.

Until Congress shall see fit to incorporate territory ceded by treaty into the United States, we regard it as settled by that decision that the territory is to be governed under the power existing in Congress to make laws for such territories, and subject to such constitutional restrictions upon the powers of that body as are applicable to the situation.

For this case the practical question is, Must Congress, in establishing a system for trial of crimes and offenses committed in the Philippine Islands, carry to their people by proper affirmative legislation a system of trial by jury?

If the treaty-making power could incorporate territory into the United States without congressional action, it is apparent that the treaty with Spain, ceding the Philippines to the United States [30 Stat. at L. 1759], carefully refrained from so doing; for it is expressly provided that (article 9): "The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress." In this language it is clear that it was the intention of the framers of the treaty to reserve to Congress, so far as it could be constitutionally done, a free hand in dealing with these newly-acquired possessions.

The legislation upon the subject shows that not only has Congress hitherto refrained from incorporating the Philippines into the United States, but in the act of 1902, providing for temporary civil government (32 Stat. at L. 691, chap. 1369), there is express provision that § 1891 of the Revised Statutes of 1878 shall not apply to the Philippine Islands. This is the section giving force and effect to the Constitution and laws of the United States, not locally inapplicable, within all the organized territories, and every *territory thereafter organ- [144] ized, as elsewhere within the United States.

The requirements of the Constitution as to a jury are found in article 3, § 2:

"The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the states where the said

crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed."

And in article 6 of the amendments to the Constitution:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury, of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

It was said in the *Mankichi Case*, 190 U. S. 197, 47 L. ed. 1016, 23 Sup. Ct. Rep. 787, that when the territory had not been incorporated into the United States these requirements were not limitations upon the power of Congress in providing a government for territory in execution of the powers conferred upon Congress. Opinion of Mr. Justice White, p. 220, citing *Hurtado v. California*, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; *Re Ross*, 140 U. S. 453, 473, 35 L. ed. 581, 589, 11 Sup. Ct. Rep. 897; *Bolln v. Nebraska*, 176 U. S. 83, 44 L. ed. 382, 20 Sup. Ct. Rep. 287, and cases cited on page 86, L. ed. p. 383, Sup. Ct. Rep. p. 288; *Maxwell v. Dow*, 176 U. S. 581, 584, 44 L. ed. 597, 598, 20 Sup. Ct. Rep. 448, 494; *Downes v. Bidwell*, 182 U. S. 244, 45 L. ed. 1088, 21 Sup. Ct. Rep. 770.

In the same case Mr. Justice Brown, in the course of his opinion, said:

"We would even go farther, and say that most, if not all, the privileges and immunities contained in the Bill of Rights of the Constitution were intended to apply from the moment of annexation; but we place our decision of this case upon the ground that the two rights alleged to be violated in this case [right to trial by jury and presentment by grand jury] are not fundamental in their [145] nature, but concern merely a method *of procedure which sixty years of practice had shown to be suited to the conditions of the islands, and well calculated to conserve the rights of their citizens to their lives, their property, and their well being."

As we have had occasion to see in the case of *Kepner v. United States*, 195 U. S. 100, ante, 114, 24 Sup. Ct. Rep. 797, the President, in his instructions to the Philippine Commission, while impressing the necessity of carrying into the new government the guaranties of the Bill of Rights securing those safeguards to life and liberty which are deemed essential to our government, was careful to reserve the right to trial by jury, 195 U. S.

which was doubtless due to the fact that the civilized portion of the islands had a system of jurisprudence founded upon the civil law, and the uncivilized parts of the archipelago were wholly unfitted to exercise the right of trial by jury. The Spanish system, in force in the Philippines, gave the right to the accused to be tried before judges, who acted in effect as a court of inquiry, and whose judgments were not final until passed in review before the audiencia, or superior court, with right of final review, and power to grant a new trial for errors of law, in the supreme court at Madrid. To this system the Philippine Commission, in executing the power conferred by the orders of the President, and sanctioned by act of Congress (act of July 1, 1902, 32 Stat. at L. 691, chap. 1369), has added a guaranty of the right of the accused to be heard by himself and counsel, to demand the nature and cause of the accusation against him, to have a speedy and public trial, to meet the witnesses against him face to face, and to have compulsory process to compel the attendance of witnesses in his behalf. And, further, that no person shall be held to answer for a criminal offense without due process of law, nor be put twice in jeopardy of punishment for the same offense, nor be compelled in any criminal case to be a witness against himself. As appears in the *Kepner Case*, 195 U. S. 100, ante, 114, 24 Sup. Ct. Rep. 797, the accused is given the right of appeal from the judgment of the court of first instance to the supreme court, and, in capital cases, the case goes to the latter court without appeal. *It cannot be [146] successfully maintained that this system does not give an adequate and efficient method of protecting the rights of the accused as well as executing the criminal law by judicial proceedings which give full opportunity to be heard by competent tribunals before judgment can be pronounced. Of course, it is a complete answer to this suggestion to say, if such be the fact, that the constitutional requirements as to a jury trial, either of their own force or as limitations upon the power of Congress in setting up a government, must control in all the territory, whether incorporated or not, of the United States. But is this a reasonable interpretation of the power conferred upon Congress to make rules and regulations for the territories?

The cases cited have firmly established the power of the United States, like other sovereign nations, to acquire, by the methods known to civilized peoples, additional territory. The framers of the Constitution, recognizing the possibility of future extension by acquiring territory outside the states, did not leave to implication alone the power

to govern and control territory owned or to be acquired, but, in the article quoted, expressly conferred the needful powers to make regulations. Regulations in this sense must mean laws, for, as well as states, territories must be governed by laws. The limitations of this power were suggested by Mr. Justice Curtis in the *Scott Case*, above quoted, and Mr. Justice Bradley, in the *Church of Jesus Christ of L. D. S. v. United States*, 136 U. S. 1, 34 L. ed. 481, 10 Sup. Ct. Rep. 792, said:

"Doubtless Congress, in legislating for the territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers, than by any express and direct application of its provisions."

This language was quoted with approbation by Mr. Justice Brown in *Downes v. Bidwell*, 182 U. S. 244-288, 45 L. ed. 1088-1106, 21 Sup. Ct. Rep. 770, and in the same [147] case Mr. Justice White said: "'Whilst, therefore, there is no express or implied limitation on Congress in exercising its power to create local governments for any and all of the territories, by which that body is restrained from the widest latitude of discretion, it does not follow that there may not be inherent, although unexpressed, principles which are the basis of all free government, which cannot be with impunity transcended. But this does not suggest that every express limitation of the Constitution which is applicable has not force, but only signifies that even in cases where there is no direct command of the Constitution which applies, there may nevertheless be restrictions of so fundamental a nature that they cannot be transgressed, although not expressed in so many words in the Constitution.'"

In treating of article 4, § 3, Judge Cooley, in his work on Constitutional Law, says:

"The peculiar wording of the provision [§ 3, article 4] has led some persons to suppose that it was intended Congress should exercise, in respect to the territory, the rights only of a proprietor of property, and that the people of the territories were to be left at liberty to institute governments for themselves. It is no doubt most consistent with the general theory of republican institutions that the people everywhere should be allowed self-government; but it has never been deemed a matter of right that a local community should be suffered to lay the foundations of institutions, and erect a structure of government thereon, without the guidance and restraint of a superior au-

thority. Even in the older states, where society is most homogeneous and has fewest of the elements of disquiet and disorder, the state reserves to itself the right to shape municipal institutions; and towns and cities are only formed under its directions, and according to the rules and within the limits the state prescribes. With still less reason could the settlers in new territories be suffered to exercise sovereign powers. The practice of the government, originating before the adoption of the Constitution, has been for Congress to establish governments for the territories; and *whether the juris-[148] diction over the district has been acquired by grant from the states, or by treaty with a foreign power, Congress has unquestionably full power to govern it; and the people, except as Congress shall provide for, are not of right entitled to participate in political authority until the territory becomes a state. Meantime they are in a condition of temporary pupillage and dependence; and while Congress will be expected to recognize the principle of self-government to such extent as may seem wise, its discretion alone can constitute the measure by which the participation of the people can be determined." Cooley, Principles of Const. Law, 164.

If the right to trial by jury were a fundamental right which goes wherever the jurisdiction of the United States extends, or if Congress, in framing laws for outlying territory belonging to the United States, was obliged to establish that system by affirmative legislation, it would follow that, no matter what the needs or capacities of the people, trial by jury, and in no other way, must be forthwith established, although the result may be to work injustice and provoke disturbance rather than to aid the orderly administration of justice. If the United States, impelled by its duty or advantage, shall acquire territory peopled by savages, and of which it may dispose or not hold for ultimate admission to statehood, if this doctrine is sound, it must establish there the trial by jury. To state such a proposition demonstrates the impossibility of carrying it into practice. Again, if the United States shall acquire by treaty the cession of territory having an established system of jurisprudence, where jury trials are unknown, but a method of fair and orderly trial prevails under an acceptable and long-established code, the preference of the people must be disregarded, their established customs ignored, and they themselves coerced to accept, in advance of incorporation into the United States, a system of trial unknown to them and unsuited to their needs. We do not think it was intended, in giving power to Congress to make regulations for the ter-

ritories, to hamper its exercise with this condition.

[149] *We conclude that the power to govern territory, implied in the right to acquire it, and given to Congress in the Constitution in article 4, § 3, to whatever other limitations it may be subject, the extent of which must be decided as questions arise, does not require that body to enact for ceded territory, not made a part of the United States by congressional action, a system of laws which shall include the right of trial by jury, and that the Constitution does not, without legislation, and of its own force, carry such right to territory so situated.

Other assignments of error bring further questions before the court which we will proceed to notice. The case was a prosecution for libel, brought at the instance of Don Benito Legarda, a member of the Philippine Commission, against the plaintiffs in error, Dorrr and O'Brien, who were proprietors and editors of a newspaper published in the city of Manila, known as the "Manila Freedom." It appears that Legarda was the prosecuting witness against one Valdez, editor of a certain Spanish newspaper called the "Miau." At the time of the trial of Valdez, under the Spanish law then in force in the islands, the truth could not be given in defense in a prosecution for criminal libel. Notwithstanding this fact, counsel for Valdez, in the form of an offer of proof, read a paper in court, making certain statements with reference to the libel charged, tending to show the truth thereof. In what purported to be a report of the proceeding, the Manila Freedom printed an article containing the matter set forth in the offer to prove, with headlines in large type, as follows:

"TRAITOR, SEDUCER, AND PERJURER.
SENSATIONAL ALLEGATIONS AGAINST
COMMISSIONER LEGARDA.

MADE OF RECORD AND READ IN ENGLISH—SPANISH READING WAIVED.

Wife would have killed him.

Legarda pale and nervous."

The prosecution of the plaintiffs in error [150] was based upon the *publication of these headlines, which were charged to be a false and malicious libel, printed in the English language, of and concerning Don Benito Legarda. At the time Valdez was tried, in which case the occurrence undertaken to be reported took place, the Spanish law was in force, denying the right to put in evidence the truth of the alleged libelous matter. At the time of the trial of the plaintiffs in 195 U. S.

error the Philippine Commission had passed act No. 277, known as the libel law:

[No. 277.]

"An Act Defining the Law of Libel and Threats to Publish a Libel, Making Libel and Threats to Publish Libel Misdemeanors, Giving a Right of Civil Action Therefor, and Making Obscene or Indecent Publications Misdemeanors.

"By authority of the President of the United States, be it enacted by the United States Philippine Commission that: Sec 1. A libel is a malicious defamation, expressed either in writing, printing, or by signs or pictures, or the like, or public theatrical exhibitions, tending to blacken the memory of one who is dead or to impeach the honesty, virtue, or reputation, or publish the alleged or natural defects of one who is alive, and thereby expose him to public hatred, contempt, or ridicule.

"Sec. 4. In all criminal prosecutions for libel the truth may be given in evidence to the court, and if it appears to the court that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted; otherwise he shall be convicted; but to establish this defense, not only must the truth of the matter so charged be proven, but also that it was published with good motives and for justifiable ends.

"Sec. 6. Every author, editor, or proprietor of any book, newspaper, or serial publication is chargeable with the publication of any words contained in any part of such book or number of each newspaper or serial, as fully as if he were the author of the same.

"*Sec. 7. No reporter, editor, or proprietor [151] of any newspaper is liable to any prosecution for a fair and true report of any judicial, legislative, or other public official proceedings, or of any statement, speech, argument, or debate in the course of the same, except upon proof of malice in making such report, which shall not be implied from the mere fact of publication.

"Sec. 8. Libelous remarks or comments connected with matter privileged by the last section receive no privilege by reason of being so connected.

"Enacted October 24, 1901."

The contention is that the publication is privileged under §§ 7 and 8, the claim being that the publication was a fair and truthful report of judicial proceedings. Testimony was introduced in the court below tending to show malice, and there was no proof to support the truth of the charges in the alleged libel, which were found to be without

basis and wanton, and as the findings of the two lower courts in a case brought in review here are not ordinarily disturbed, the case upon this branch might rest upon that proposition. It is evident, however, that the publication in question did not stop with a simple report of the judicial proceedings. Indeed, the paper offered in evidence could not have been received under the law then in force,—a fact concerning which no comment was made in the report of the proceedings. Furthermore, § 8 of the law, while permitting, as privileged, a fair and truthful report of judicial proceedings, except upon express proof of malice, does not make privileged libelous remarks or comments in connection with the privileged matter. The draftsman of the law evidently had in mind the law of criminal libel in newspaper publications as it exists in this country. The privilege extends to a full and correct report of judicial proceedings without prejudicial comment. The rule is nowhere better stated than by Judge Cooley in his work on Constitutional Limitations, 7th ed., p. 637:

[152] **"It seems to be settled that a fair and impartial account of judicial proceedings, which have not been *ex parte*, but in the hearing of both parties, is, generally speaking, a justifiable publication. But it is said that if a party is to be allowed to publish what passes in a court of justice, he must publish the whole case, and not merely state the conclusion which he himself draws from the evidence. A plea that the supposed libel was, in substance, a true account and report of a trial, has been held bad; and a statement of the circumstances of a trial as from counsel in the case has been held not privileged. The report must also be strictly confined to the actual proceedings in court, and must contain no defamatory observations or comments from any quarter whatsoever, in addition to what forms strictly and properly the legal proceedings."*

Many cases are cited by the learned author in support of this conclusion. In *Hayes v. Press Co.* 127 Pa. 642, 5 L. R. A. 643, 14 Am. St. Rep. 874, 18 Atl. 331, headlines stating "Hotel Proprietors Embarrassed," in giving an account of a judgment rendered in the suit of a bank against the proprietors of a certain hotel, was held not privileged. In *Newell on Defamation, Slander and Libel*, chap. 19, § 163, the author says:

"The publisher must add nothing of his own. He must not state his opinion of the conduct of the parties, or impute motives therefor; he must not insinuate that a particular witness committed perjury. That is not a report of what occurred; it is simply his comment on what occurred, and to this no privilege attaches. Often such

comments may be justified on another ground,—that they are fair and bona fide criticism on a matter of public interest, and are therefore not libelous. But such observations, to which quite different considerations apply, should not be mixed up with the history of the case. Lord Campbell said: 'If any comments are made, they should not be made as part of the report. The report should be confined to what takes place in court; and the two things—report and comment—should be kept separate.' And all sensational headings to reports should be avoided." *Thomas v. Crosswell*, 7 Johns, 264, 5 Am. Dec. 269.

These headlines were not privileged matter at the common law, and were libelous remarks or comments if the matter could be deemed otherwise privileged, within the meaning of § 8 of the Philippine libel law. An inspection of them would seem to be sufficient to demonstrate this fact. The complainant was held up to the public where the paper circulated in striking headlines as "Traitor, Seducer, Perjurer," and while these words were quoted, as well as the phrase "Wife would have killed him," their publication in this manner was certainly the equivalent to a remark or comment unnecessary to a fair and truthful report of judicial proceedings, and likely to raise inferences highly detrimental to the character and standing of the one concerning whom they were printed and published.

Further error is assigned in that act No. 277 of the laws of the Philippine Commission was not passed by competent legal authority. The act was one of the laws of the Philippine Commission, passed by that body by virtue of the authority given the President under the so-called Spooner resolution of March 2, 1901 [31 Stat. at L. 910, chap. 803]. The right of Congress to authorize a temporary government of this character is not open to question at this day. The power has been frequently exercised and is too well settled to require further discussion. *De Lima v. Bidwell*, 182 U. S. 1, 196, 45 L. ed. 1041, 1056, 21 Sup. Ct. Rep. 743.

Judgment affirmed.

Mr. Justice **Peckham**, concurring:

I concur in the result of the opinion of the court in this case, which upholds the conviction of the plaintiffs in error on a trial at Manila, Philippine Islands, for a criminal offense, without a jury. I do so simply because of the decision in *Hawaii v. Mankichi*, 190 U. S. 197, 47 L. ed. 1016, 23 Sup. Ct. Rep. 787. That case was decided by the concurring views of a majority of this court, and although *I did not and do not concur in those views, yet the case in

my opinion is authority for the result arrived at in the case now before us, to wit, that a jury trial is not a constitutional necessity in a criminal case in Hawaii or in the Philippine Islands. But, while concurring in this judgment, I do not wish to be understood as assenting to the view that *Downes v. Bidwell*, 182 U. S. 244, 45 L. ed. 1088, 21 Sup. Ct. Rep. 770, is to be regarded as authority for the decision herein. That case is authority only for the proposition that the plaintiff therein was not entitled to recover the amount of duties he had paid under protest upon the importation into the city of New York of certain oranges from the port of San Juan, in the Island of Porto Rico, in November, 1900, after the passage of the act known as the Foraker act [31 Stat. at L. 77, chap. 191]. The various reasons advanced by the judges in reaching this conclusion, which were not concurred in by a majority of the court, are plainly not binding. The *Mankichi Case* is, however, directly in point, and calls for an affirmance of this judgment.

I am authorized to say that the CHIEF JUSTICE and Mr. Justice **Brewer** agree in this concurring opinion.

Mr. Justice **Harlan**, dissenting:

I do not believe now any more than I did when *Hawaii v. Mankichi*, 190 U. S. 197, 47 L. ed. 1016, 23 Sup. Ct. Rep. 787, was decided, that the provisions of the Federal Constitution as to grand and petit juries relate to mere methods of procedure, and are not fundamental in their nature. In my opinion, guaranties for the protection of life, liberty, and property, as embodied in the Constitution, are for the benefit of all, of whatever race or nativity, in the states composing the Union, or in any territory, however acquired, over the inhabitants of which the government of the United States may exercise the powers conferred upon it by the Constitution.

The Constitution declares that no person, except in the land *or naval forces, shall be held to answer for a capital or otherwise infamous crime, except on the presentment or indictment of a grand jury; and forbids the conviction, in a criminal prosecution, of any person, for any crime, except on the unanimous verdict of a petit jury composed of twelve persons. Necessarily, that mandate was addressed to every one committing crime punishable by the United States. This court, however, holds that these provisions are not fundamental, and may be disregarded in any territory acquired in the manner the Philippine Islands were acquired, although, as heretofore decided by this court, they could not be disregarded in what are commonly called the organized

territories of the United States. *Thompson v. Utah*, 170 U. S. 343, 42 L. ed. 1061, 18 Sup. Ct. Rep. 620. I cannot assent to this interpretation of the Constitution. It is, I submit, so obviously inconsistent with the Constitution that I cannot regard the judgment of the court otherwise than as an amendment of that instrument by judicial construction, when a different mode of amendment is expressly provided for. Grand juries and petit juries may be, at times, somewhat inconvenient in the administration of criminal justice in the Philippines. But such inconveniences are of slight consequence compared with the dangers to our system of government arising from judicial amendments of the Constitution. The Constitution declares that it "shall be the supreme law of the land." But the court in effect adjudges that the Philippine Islands are not part of the "land," within the meaning of the Constitution, although they are governed by the sovereign authority of the United States, and although their inhabitants are subject in all respects to its jurisdiction,—as much so as are the people in the District of Columbia or in the several states of the Union. No power exists in the judiciary to suspend the operation of the Constitution in any territory governed, as to its affairs and people, by authority of the United States. As a Filipino committing the crime of murder in the Philippine Islands may be hung by the sovereign authority of the United States, and as the Philippine Islands are under a *civil, not [156] military, government, the suggestion that he may not, of right, appeal for his protection to the jury provisions of the Constitution, which constitutes the only source of the power that the government may exercise at any time or at any place, is utterly revolting to my mind, and can never receive my sanction. The Constitution, without excepting from its provisions any persons over whom the United States may exercise jurisdiction, declares expressly that "the trial of all crimes, except in cases of impeachment, shall be by jury." It is now adjudged that that provision is not fundamental in respect of a part of the people over whom the United States may exercise full legislative, judicial and executive power. Indeed, it is adjudged, in effect, that the above clause, in its application to this case, is to be construed as if it read: "The trial of all crimes, except in cases of impeachment, and except where Filipinos are concerned, shall be by jury." Such a mode of constitutional interpretation plays havoc with the old-fashioned ideas of the fathers, who took care to say that the Constitution was the supreme law,—supreme everywhere, at all times, and over all persons who are subject to

the authority of the United States. According to the principles of the opinion just rendered, neither the governor nor any American civil officer in the Philippines, although citizens of the United States, although under an oath to support the Constitution, and although in those distant possessions for the purpose of enforcing the authority of the United States, can claim, of right, the benefit of the jury provisions of the Constitution, if tried for crime committed on those Islands. Besides there are many thousands of American soldiers in the Philippines. They are there by command of the United States, to enforce its authority. They carry the flag of the United States, and have not lost their American citizenship. Yet, if charged in the Philippines with having committed a crime against the United States of which a civil tribunal may take cognizance, they cannot, under the present decision, claim of

[157] right a trial by jury. So that, if an *American soldier, in discharge of his duty to his country, goes into what some call our "outlying dependencies," he is, it seems, "outside of the Constitution," in respect of a right which this court has said was justly "dear to the American people," and has "always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy;" a right which, Mr. Justice Story said, was, from very early times, insisted on by our ancestors in the parent country "as the great bulwark of their civil and political liberties." *Parsons v. Bedford*, 3 Pet. 433, 436, 7 L. ed. 732, 733; 2 Story, Const. § 1779. Referring to the declaration by a French writer, that Rome, Sparta, and Carthage having lost their liberties, those of England must in time perish, Blackstone observed that the writer "should have recollected that Rome, Sparta, and Carthage, at the time their liberties were lost, were strangers to the trial by jury." 2 Bl. Com. 379.

In a former case I had occasion to say, and I still think, that "neither the life, nor the liberty, nor the property of any person, within any territory or country over which the United States is sovereign, can be taken, under the sanction of any civil tribunal, acting under its authority, by any form of procedure inconsistent with the Constitution of the United States;" that "the Constitution is the supreme law in every territory, as soon as it comes under the sovereign dominion of the United States for purposes of civil administration, and whose inhabitants are under its entire authority and jurisdiction." [*Hawaii v. Mankichi*, 190 U. S. 197, 47 L. ed. 1016, 23 Sup. Ct. Rep. 787.]

My views as to the scope and meaning of the provisions of the Constitution which relate to grand and petit juries, and as to

the relations of the United States to our newly acquired possessions, have been more fully stated in cases heretofore decided in this court,† and I have therefore not deemed it *necessary, in the present case, to enter[158] upon a review of the authorities.

I dissent from the opinion and judgment of the court.

SECUNDINO MENDEZONA y MENDEZONA, *Plff. in Err.*,

v.

UNITED STATES.

(See S. C. Reporter's ed. 158.)

Criminal law—former jeopardy in Philippine Islands—appeal by government from acquittal.

This case is governed by the decision in *Kepner v. United States*, ante, 114.

[No. 584.]

Argued April 21, 22, 1904. Decided May 31, 1904.

IN ERROR to the Supreme Court of the Philippine Islands to review a judgment which reversed a judgment of acquittal of the crime of *estafa* in the court of first instance in the city of Manila, and found the accused guilty of that offense, and imposed punishment therefor. *Reversed*, and the prisoner discharged.

No brief or argument for plaintiff in error.

Mr. **Lebbeus R. Wilfey** and Solicitor General **Hoyt** argued the cause and filed briefs for defendant in error.

For their contentions see their briefs as reported in *Kepner v. United States*, ante, 114.

Mr. Justice **Day** delivered the opinion of the court:

This case involves the question just decided in *Kepner v. United States*, 195 U. S. 100, ante, 114, 24 Sup. Ct. Rep. 797. The plaintiff in error was acquitted in the court of first instance, and convicted in the supreme court of the Philippine Islands.

For the reasons stated in the *Kepner Case*, the judgment herein is reversed, and the prisoner discharged.

Dissenting: Mr. Justice **Brown**, Mr. Justice **White**, Mr. Justice **McKenna**, and Mr. Justice **Holmes**.

Leave to file a petition for rehearing denied on October 17, 1904.

† *Hurtado v. California*, 110 U. S. 516, 538, 28 L. ed. 232, 239, 4 Sup. Ct. Rep. 111, 292; *Thompson v. Utah*, 170 U. S. 343, 42 L. ed. 1061, 18 Sup. Ct. Rep. 620; *Maxwell v. Dow*, 176 U. S. 581, 605, 44 L. ed. 597, 606, 20 Sup. Ct. Rep. 448, 494; *Downes v. Bidwell*, 182 U. S. 244, 375, 45 L. ed. 1088, 1140, 21 Sup. Ct. Rep. 770; *Hawaii v. Mankichi*, 190 U. S. 197, 221, 226, 47 L. ed. 1016, 1024, 1026, 23 Sup. Ct. Rep. 787.

CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES,

AT

OCTOBER TERM, 1904.

Vol. 195.

THE DECISIONS
OF THE
Supreme Court of the United States
AT
OCTOBER TERM, 1904.

[159]*AUGUST CLIFF, *Plff. in Err.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 159-165.)

Excises — tax on artificially colored oleomargarine — appeal — conclusiveness of finding of fact.

1. Oleomargarine containing a small quantity of a vegetable oil, which substantially serves only to give the product the yellow shade which causes it to resemble butter, cannot be regarded as within the proviso in the act of August 2, 1886 (24 Stat. at L. 209, chap. 840, U. S. Comp. Stat. 1901, p. 2228), § 8, as amended by the act of May 9, 1902 (32 Stat. at L. 193, chap. 784, U. S. Comp. Stat. Supp. 1903, p. 266), imposing a lesser tax on oleomargarine when "free from artificial coloration that causes it to look like butter of any shade of yellow," on the theory that the use of a substance which Congress has, in § 2 of the original act, recognized as a possible ingredient, cannot be artificial coloration, since this congressional enumeration of ingredients specifically includes coloring matter.
2. A finding that the use of palm oil as an ingredient of oleomargarine was substantially only for coloring purposes will not be disturbed on appeal, where it is based on testimony that, out of a total of 160 ounces, only 1½ ounces were palm oil, and that this quantity imparted the yellow shade which caused the product to resemble butter.

[No. 19.]

Argued December 2, 1903. Decided October 24, 1904.

[IN ERROR to the District Court of the United States for the Northern District of Illinois to review a conviction of having

knowingly purchased and received for sale oleomargarine which had not been stamped according to law. *Affirmed.*

The facts are stated in the opinion.

Mr. William D. Guthrie argued the cause, and, with Mr. John Maynard Harlan, filed a brief for plaintiff in error:

The position of the government is clearly in conflict with the decisions.

Merritt v. Welsh, 104 U. S. 694, 26 L. ed. 896; *Seeberger v. Farwell*, 139 U. S. 608, 35 L. ed. 297, 11 Sup. Ct. Rep. 650; *Magone v. Luckmeyer*, 139 U. S. 612, 35 L. ed. 298, 11 Sup. Ct. Rep. 651; *United States v. Schoverling*, 146 U. S. 76, 81, 36 L. ed. 893, 895, 13 Sup. Ct. Rep. 24; *United States v. Irwin*, 24 C. C. A. 349, 45 U. S. App. 746, 78 Fed. 799; *Morrill v. Jones*, 106 U. S. 466, 27 L. ed. 267, 1 Sup. Ct. Rep. 423.

Doubt, if there be any, in this case, should be resolved in favor of the plaintiff in error.

United States v. Wigglesworth, 2 Story, 369, Fed. Cas. No. 16,690; *Hartranft v. Wiegmann*, 121 U. S. 609, 30 L. ed. 1012, 7 Sup. Ct. Rep. 1240; *United States v. Isham*, 17 Wall. 496, 21 L. ed. 728; *American Net & Twine Co. v. Worthington*, 141 U. S. 468, 35 L. ed. 821, 12 Sup. Ct. Rep. 55. See also *Eidman v. Martinez*, 184 U. S. 578, 583, 46 L. ed. 697, 701, 22 Sup. Ct. Rep. 515; *Rice v. United States*, 4 C. C. A. 104, 10 U. S. App. 670, 53 Fed. 910; *Matheson v. United States*, 18 C. C. A. 143, 38 U. S. App. 25, 71 Fed. 394; *Re Southern P. Co.* 82 Fed. 311, 31 C. C. A. 263, 59 U. S. App. 496, 87 Fed. 863; *Schoenemann v. United States*, 56 C. C. A. 104, 119 Fed. 584; *Dean v. Charlton*, 27 Wis. 522.

The rulings of the Commissioners of Internal Revenue cannot have the effect of amending the law. They may aid in carrying the law as it exists into execution, but they cannot change its positive provisions.

United States v. 200 Barrels of W!

NOTE.—On regulation of traffic in oleomargarine—see notes to *State v. Marshall*, 1 L. R. A. 52; *Com. v. Miller*, 6 L. R. A. 633; *Com. use of Allegheny County v. Weiss*, 11 L. R. A. 532.

95 U. S. 571, 576, 24 L. ed. 491, 492; *United States v. Eaton*, 144 U. S. 678, 687, 688, 36 L. ed. 592, 594, 12 Sup. Ct. Rep. 764.

Messrs. William D. Guthrie and Francis J. Kearful also filed a brief for plaintiff in error:

If, in view of the palm-oil question, the legislation of Congress is defective to accomplish the purpose intended, the remedy is one for Congress to supply; it cannot be placed in the hands of the commissioner.

Merritt v. Welsh, 104 U. S. 694, 26 L. ed. 896; *Secberger v. Farwell*, 139 U. S. 608, 35 L. ed. 297, 11 Sup. Ct. Rep. 650; *Magone v. Luckemeyer*, 139 U. S. 612, 35 L. ed. 298, 11 Sup. Ct. Rep. 651; *United States v. Schoverling*, 146 U. S. 76, 81, 36 L. ed. 893, 895, 13 Sup. Ct. Rep. 24; *United States v. Irwin*, 24 C. C. A. 349, 45 U. S. App. 746, 78 Fed. 799; *Morrill v. Jones*, 106 U. S. 466, 27 L. ed. 267, 1 Sup. Ct. Rep. 423; *United States v. Eaton*, 144 U. S. 677, 687, 36 L. ed. 591, 594, 12 Sup. Ct. Rep. 764; *United States v. 200 Barrels of Whiskey*, 95 U. S. 571, 576, 24 L. ed. 491, 492.

For further contentions of these counsel, see their brief as reported in *Schick v. United States*, ante, 99.

Messrs. William D. Guthrie, Miller Outcalt, Charles E. Prior, Francis J. Kearful, Delavan B. Cole, and Charles C. Carnahan also filed a brief for plaintiff in error.

For their contentions see their brief as reported in *McCray v. United States*, ante, 78.

Solicitor General Hoyt argued the cause and filed a brief for defendant in error. For his contentions see his brief as reported in *McCray v. United States*, ante, 78.

Mr. Justice Brewer delivered the opinion of the court:

August Cliff was convicted in the district [160] court of the *United States for the northern district of Illinois of a violation of § 11 of the act of August 2, 1886 (24 Stat. at L. 209, chap. 840, U. S. Comp. Stat. 1901, p. 2228), amended May 9, 1902 (32 Stat. at L. 193, chap. 784, U. S. Comp. Stat. Supp. 1903, p. 266). A judgment for \$50, as prescribed by the section, was entered, with an order for collection by execution. That judgment was brought directly to this court by writ of error. The constitutionality of the oleomargarine legislation and the right to waive a trial by jury in petty criminal offenses were affirmed in *McCray v. United States*, 195 U. S. 27, ante, 78, 24 Sup. Ct. Rep. 769, and *Schick v. United States*, 195 U. S. 65, ante, 99, 24 Sup. Ct. Rep. 826. Nothing need be added to the opinions in those cases on these questions.

There is in this case a further question. Section 2 reads:

"Sec. 2. That for the purposes of this act certain manufactured substances, certain extracts, and certain mixtures and compounds, including such mixtures and compounds with butter, shall be known and designated as 'oleomargarine,' namely: All substances heretofore known as oleomargarine, oleo, oleomargarine-oil, butterine, lardine, suine, and neutral; all mixtures and compounds of oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine, and neutral; all lard extracts and tallow extracts; and all mixtures and compounds of tallow, beef fat, suet, lard, lard oil, vegetable oil annatto, and other coloring matter, intestinal fat, and offal fat made in imitation or semblance of butter, or, when so made, calculated or intended to be sold as butter or for butter."

In § 8 is this provision:

"Sec. 8. That upon oleomargarine which shall be manufactured and sold, or removed for consumption or use, there shall be assessed and collected a tax of ten cents per pound, to be paid by the manufacturer thereof; and any fractional part of a pound in a package shall be taxed as a pound: *Provided*, When oleomargarine is free from artificial coloration that causes it to look like butter of any shade of yellow said tax shall be one fourth of one cent per pound."

By § 14 the Commissioner of Internal Revenue—

"is authorized to decide what substances, extracts, mixtures, or *compounds, which [161] may be submitted for his inspection in contested cases, are to be taxed under this act; and his decision in matters of taxation under this act shall be final. The Commissioner may also decide whether any substance made in imitation or semblance of butter, and intended for human consumption, contains ingredients deleterious to the public health."

Defendant was charged with having knowingly purchased and received for sale "certain oleomargarine which had not been stamped according to law,—that is to say, 10 pounds of a mixture and compound composed, as he, the said August Cliff, well knew, of oleo oil, neutral lard, cotton-seed oil, milk, common salt, and palm oil (which said last-named ingredient, to wit, palm oil, produced an artificial coloration in the said oleomargarine that caused it to look like butter of a shade of yellow), which said oleomargarine had then lately before, to wit, on the day aforesaid, been manufactured at Chicago aforesaid by William J. Moxley."

It was shown that the tax of 10 cents per pound had not been paid, that the package contained 10 pounds, that its ingredients

and their proportions were: 3 pounds of oleo oil; 1 pound and 12 ounces of neutral lard; 2 pounds of cotton-seed oil; 1 pound and 14½ ounces of milk; 1 pound and 4 ounces of salt; 1½ ounces of palm oil. In other words, out of 160 ounces, only 1½ ounces were palm oil. There was introduced in evidence a ruling of the Commissioner of Internal Revenue, as follows:

"This office rules that where so minute and infinitesimal a quantity of a vegetable oil is used in the manufacture of oleomargarine as is proposed to be used of palm oil, and through its use the finished product looks like butter of any shade of yellow, it cannot be considered that the oil is used with the purpose or intention of being a bona fide constituent part or element of the product, but is used solely for the purpose of producing or imparting a yellow color to [162] the oleomargarine, *and, therefore, that the oleomargarine so colored is not free from artificial coloration, and becomes subject to the tax of 10 cents per pound."

Now the contention is that, Congress having by § 2 named the possible ingredients of oleomargarine, the coloring given to a compound of some or all by the use of one of the named ingredients is a natural coloring, and not an artificial coloration, subjecting to a tax of 10 cents per pound. In order that the precise contention may be understood we quote the following from one of the briefs filed for plaintiff in error:

"By parity of reasoning, when one is speaking of oleomargarine, natural coloration means a coloration due to a natural ingredient of oleomargarine; and to find out whether a certain ingredient is a natural ingredient of oleomargarine, we turn to the statute which defines the nature of oleomargarine. If the color-giving ingredient be a natural, that is a statutory, ingredient of oleomargarine, then how can it be truly said that the color caused by such ingredient is 'artificial coloration' merely because the quantity of such ingredient used is small or even minute, and the purpose of its use is to impart the desired color? Howsoever minute may be the quantity of palm oil used, it is none the less a vegetable oil, a statutory, or, so to speak, a natural, ingredient of oleomargarine, and displaces in the finished product an equal volume of some other statutory ingredient of oleomargarine; as, for instance, cotton-seed oil. The statute confers no power upon the Commissioner to prescribe the formula for the manufacture of oleomargarine, or the proportion of the different ingredients, or to exclude any ingredient except upon the ground of its being deleterious to health. But does not the government, in effect, assume such power to be in the Commissioner, when, by reason of his 195 U. S.

arbitrary classification, based upon the quantity of palm oil used, it requires a tax of 10 cents per pound upon oleomargarine containing a small or minute proportion of palm oil, while, if the percentage used of that oil were large enough to constitute what the Commissioner would regard as a substantial *part of the finished product, it is conceded [163] that the tax would be only ¼ of a cent per pound?"

We do not undervalue the force of this argument, but, as applied to this case, hold that it cannot prevail. It is true that under the last clause of § 2 oleomargarine includes "all mixtures and compounds" of the substances named, "made in imitation or semblance of butter, or, when so made, calculated or intended to be sold as butter or for butter," and that palm oil is a vegetable oil, one of those substances. But in this enumeration Congress included not only those substances which, entering into the composition of oleomargarine, make it suitable for food, and, so to speak, form its body, but also others used only for coloring. After naming some it adds specifically, "and other coloring matter." The purpose in so including "coloring matter" is obvious. It was to prevent excluding from the operation of the statute anything in its nature oleomargarine by the addition of a substance not in reality an ingredient, but serving substantially only the purpose of coloring the product to cause it to look like butter. The fact that one of the ingredients of this compound is palm oil does not show that such oil does anything else than color the product composed of other ingredients, and if it does substantially only this, it is rightfully styled an artificial coloration. Otherwise the proviso practically nullifies the body of the section. For "other coloring matter" includes all coloring matter; at least, all of the nature of those named; and hence the addition of any coloring matter would produce only a natural, and not an artificial, coloration, and thus relieve the product from the 10-cent tax. It will be noted that the regular tax imposed upon oleomargarine by § 8 is 10 cents a pound, the exception thereto being stated in the proviso, and a party who claims the benefit thereof must make it clear that his oleomargarine is within its scope. That exception is "when oleomargarine is free from artificial coloration that causes it to look like butter of any shade of yellow." Bearing in mind, also, that one of the purposes of this legislation *was to prevent the sale [164] of oleomargarine as and for butter, it must be held that when any substance, although named as a possible ingredient of oleomargarine, substantially serves only the function of coloring the mass, and so as to cause the product to "look like butter of any 141

shade of yellow," it is an artificial coloration.

Whether the Commissioner of Internal Revenue has all the authority which is in terms committed to him by § 14 need not be determined. The letter containing his ruling was admitted in evidence without objection. Irrespective of such ruling, and upon the other testimony, the judge who tried the case, and whose decision must be considered as equivalent to the verdict of a jury, could rightfully have found that this package of oleomargarine was artificially colored by the small amount of palm oil used in its manufacture. A witness testified that he called at the place of business of the defendant, "and found this 10-pound package of oleomargarine, which had been colored with palm oil to a very decided shade of yellow, like natural June butter, bearing a tax-paid stamp of $\frac{1}{4}$ of a cent a pound." Other witnesses testified to the exact per cent of palm oil used in the preparation of the package. One said that "the article so manufactured was according to a formula used in the course of business, with the exception of the palm oil. It is what we call the 'Daisy grade,'—the lower grade. It is a substitute for butter." Another testified that "a very small proportion of palm oil is necessary only to produce what is considered a desirable color in oleomargarine. The color of palm oil is a reddish yellow. Its natural color is such that it may be used to make oleomargarine or white substances to look like butter." Further, the defendant offered quite an amount of testimony, which was received by the court, and afterwards, on motion, stricken out as irrelevant and immaterial. Included in this was that of the secretary of the manufacturer, who testified that "before July 1, 1902, we used only the Wells-Richardson improved butter color to produce an artificial coloration. Since *that date we have used the same article. We have used some palm oil. We used that for a few days only, until the Commissioner of Internal Revenue ruled that its use would subject the product to the 10-cent tax."

The verdict of a jury is conclusive upon a question of fact unless plainly against the evidence. The same weight, as we have said, must be given to the finding of a court, and upon the testimony received without objection a finding that this palm oil served substantially only to color the product cannot be disturbed. Indeed, the fact was made certain by the testimony offered by the defendant, although that testimony was afterwards stricken out by the court as immaterial.

We see no error in the record, and the judgment is affirmed.

The CHIEF JUSTICE, Mr. Justice **Harlan**, and Mr. Justice **Peckham** dissented.

HUGH STEVENSON, Matilda C. Alloway,
Paul E. Stevenson, *et al.*, *Appts.*

v.

WILLIAM FAIN, John Fain, Robert Fain,
et al.

(See S. C. Reporter's ed. 165-170.)

Appeal—finality of decree of circuit court of appeals.

The jurisdiction of a Federal circuit court over a controversy between citizens of different states, claiming under grants from different states, depends entirely upon the diversity of citizenship, within the meaning of the rule that makes the decrees of a circuit court of appeals final in cases in which diversity of citizenship is the sole ground of original jurisdiction, since Congress, in the various judiciary acts, has only conferred original jurisdiction on the circuit courts over controversies of this character when the parties are citizens of the same state.

[No. 8.]

Argued and submitted October 18, 19, 1904.
Decided November 7, 1904.

A PPEAL from the United States Circuit Court of Appeals for the Sixth Circuit to review a decree which affirmed a decree of the Circuit Court for the Eastern District of Tennessee dismissing a bill to remove a cloud upon the title to real property which the parties claimed under grants respectively from the states of Tennessee and North Carolina. *Dismissed for want of jurisdiction.*

See same case below, 53 C. C. A. 467, 116 Fed. 147.

Statement by Mr. Chief Justice **Fuller**:

This was a bill filed by Stevenson and others, citizens and residents of New York and Rhode Island, against Fain and others, citizens and residents of North Carolina and Georgia, in the circuit court of the United States for the eastern district of Tennessee, to remove a cloud upon the title to a *body[166] of wild lands lying adjacent to the boundary between Tennessee and North Carolina.

Complainants claimed title under grants from the state of Tennessee, and alleged that the lands lay wholly in Monroe county, Tennessee. Defendants alleged that the lands lay wholly within the county of Cherokee, in the state of North Carolina, and that they were lawfully granted to their ancestor by that state.

[165]

The issue involved the true boundary line between North Carolina and Tennessee. The circuit court held that the lands lay in the state of North Carolina, and that the title was in defendants, and dismissed the bill.

Thereupon an appeal was taken to the circuit court of appeals for the sixth circuit, and, on hearing, the decree of the circuit court was affirmed. 53 C. C. A. 467, 116 Fed. 147.

From the decree of the circuit court of appeals this appeal was prosecuted.

Mr. T. S. Webb argued the cause, and, with *Messrs. Charles Seymour, Hu. L. McClung, and L. M. G. Baker*, filed a brief for appellants.

Mr. John W. Green submitted the cause for appellees. *Mr. Samuel G. Shields* was with him on the brief.

Mr. Chief Justice Fuller delivered the opinion of the court:

If the jurisdiction of the circuit court was dependent entirely on diversity of citizenship, the decree of the circuit court of appeals was final, and this appeal cannot be maintained. The contention of appellants is that it was not so dependent because jurisdiction also existed in that the parties claimed under grants from different states, to which it is replied that, under the Constitution and laws, the circuit courts are not vested with jurisdiction on that ground except when the parties are citizens of the same state.

By § 1 of article 3 of the Constitution it [167] is provided *that "the judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may, from time to time, ordain and establish." And by § 2 that "the judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states, between a state and citizens of another state, between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens, or subjects. 2. In all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, 195 U. S.

with such exceptions, and under such regulations, as the Congress shall make."

The Supreme Court alone "possesses jurisdiction derived immediately from the Constitution, and of which the legislative power cannot deprive it" (*United States v. Hudson*, 7 Cranch, 32, 3 L. ed. 259), but the jurisdiction of the circuit courts depends upon some act of Congress (*Turner v. Bank of North America*, 4 Dall. 8, 10, 1 L. ed. 718, 719; *M'Intire v. Wood*, 7 Cranch, 504, 506, 3 L. ed. 420, 421).

The use of the word "controversies" as in contradistinction to the word "cases," and the omission of the word "all" in respect of controversies, left it to Congress to define the controversies over which the courts it was empowered to ordain and establish might exercise jurisdiction, and the manner in which it was to be done.

By the 11th section of the judiciary act of September 24, 1789, it was provided that the circuit courts of the United States should "have original cognizance, concurrent with the *courts of the several states, of all [168] suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs or petitioners, or an alien is a party, or the suit is between a citizen of the state where the suit is brought and a citizen of another state." [1 Stat. at L. 78, chap. 20.]

In *Bank of United States v. Deveaux*, 5 Cranch, 61, 85, 3 L. ed. 38, 44, **Mr. Chief Justice Marshall** said:

"The judicial power of the United States, as defined in the Constitution, is dependent, 1st, on the nature of the case; and, 2d, on the character of the parties. By the judicial act, the jurisdiction of the circuit court is extended to cases where the constitutional right to plead and be impleaded, in the courts of the Union, depends on the character of the parties; but where that right depends on the nature of the case, the circuit courts derive no jurisdiction from that act, except in the single case of a controversy between citizens of the same state claiming lands under grants from different states."

And that jurisdiction was conferred by the 12th section of the act, which provided that "if in any action commenced in a state court the title of land is concerned, and the parties are citizens of the same state," either party might remove the cause to the circuit court on the fact being made to appear that the parties claimed under grants of different states. This section was carried forward as § 647 of the Revised Statutes, U. S. Comp. Stat. 1901, p. 524, and reappears in substance in § 3 of the act of March 3, 1875. 18

Stat. at L. 470, chap. 137, U. S. Comp. Stat. 1901, p. 510.

By the 1st section of the latter act original jurisdiction was given to the circuit courts of cases, among others, "arising under the Constitution or laws of the United States, or treaties," or in which there was "a controversy between citizens of the same state claiming lands under grants of different states."

The acts of March 3, 1887 (24 Stat. at L. 552, chap. 373), and of August 13, 1888 (25 Stat. at L. 433, chap. 866), are to the same purport.

Two cases arising under the judiciary act [169] of 1789 are cited: **Pawlet v. Clark*, 9 Cranch, 292, 3 L. ed. 735, decided March 10, 1815, and *Colson v. Lewis*, 2 Wheat. 377, 4 L. ed. 266, decided March 14, 1817.

In *Pawlet v. Clark* it appeared that the parties were citizens of Vermont, and that the cases were pending in the circuit court for the district of Vermont, but the reporter's statement does not show that the case was commenced in the state court. The record on file in this court, however, discloses that such was the fact, and that the cause was removed into the circuit court under the 12th section.

Colson v. Lewis is not well reported. It was a bill in equity in which Lewis and others were complainants and Rawleigh Colson was the sole defendant. It came here on certificate, and the title was "Lewis and others against Colson," and not as given in the report. The case stated shows that the case was removed from the state court into the circuit court of Kentucky, and that the complainants were citizens of Virginia; but the citizenship of defendant was not disclosed. The headnote asserts that the parties were citizens of Kentucky. But the certificate of the clerk, as appears from our files, sets forth "that it is stated in the bill that the deft. Rawleigh Colson is a citizen of the state of Virginia."

In both cases the parties were citizens of the same state, and the cases were originally commenced in the state courts, and the circuit courts acquired jurisdiction by removal. The judiciary act of 1789 vested the circuit courts with original jurisdiction on the ground of diversity of citizenship, but not where title was claimed under grants of different states. Congress manifestly accepted the letter of the Constitution, and, as the judicial power extended to controversies where citizens of the same state claimed title under grants of different states, assumed that cases presenting such controversies would be commenced in the state courts, and provided that those cases might be removed

when that fact was made to appear. The particular constitutional provision was treated as not open to a construction which would make it embrace "citizens of different [170] states. Naturally enough, as the reason for the extension of the Federal judicial power to controversies between citizens of different states, and to controversies between citizens of the same state claiming lands under grants of different states, was in substance the same. 2 Story, Const. § 1696.

And when the act of 1875 enlarged the original jurisdiction, no view to the contrary was indicated.

Ayres v. Polsdorfer, 187 U. S. 585, 47 L. ed. 314, 23 Sup. Ct. Rep. 196, was an action of ejectment brought in the circuit court by citizens of one state against those of another, and the case, having gone to judgment, was carried to the circuit court of appeals, and the judgment affirmed. A writ of error from this court was then sought to be sustained because, as was contended, the evidence disclosed, though the pleadings did not, that the parties claimed under grants of different states. But we held that if the emergence of such a question might have justified taking the case directly to this court, having gone to the court of appeals, it could not, after judgment, then be brought here.

As Congress has not conferred jurisdiction on the circuit courts over controversies between citizens of different states because, apart from diversity of citizenship, they may have claimed title by grants from different states, even if it had power to do so, which is not conceded, the result is that *the appeal must be dismissed*.

*MRS BEULAH SCHWEER and J. C. Nor-[171]
man, *Appts.*,
v.

J. C. BROWN, Trustee for G. H. Schweer,
Bankrupt.

(See S. C. Reporter's ed. 171, 172.)

*Direct appeal to Federal Supreme Court—
when jurisdiction is in issue.*

A direct appeal from a Federal district court to the Supreme Court cannot be maintained under the act of March 3, 1891 (26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549), § 5, because the jurisdiction of the lower court was questioned, unless it was the jurisdiction of that court as a court of

NOTE.—On direct review, in the Federal Supreme Court, of judgments or decrees of the district and circuit courts—see note to *Gwin v. United States*, 46 L. ed. U. S. 741.

the United States that was in issue, and that question is certified to the appellate court.

[No. 162.]

Submitted October 31, 1904. Decided November 7, 1904.

APPPEAL from the District Court of the United States for the Eastern District of Arkansas to review a decree requiring the payment to the trustee in bankruptcy of a sum of money as a part of the assets of the bankrupt's estate. *Dismissed* for want of jurisdiction.

The facts are stated in the opinion.

Mr. **Daniel W. Jones** submitted the cause for appellants. *Messrs. Harry H. Myers* and *U. S. Bratton* were on his brief.

Mr. **Robert E. Wiley** submitted the cause for appellee. Mr. *George B. Pugh* was on his brief.

THE CHIEF JUSTICE: This was a summary proceeding in the district court of the United States for the eastern district of Arkansas, in bankruptcy, requiring the payment to the trustee in bankruptcy of the sum of \$2,000 as part of the assets of the bankrupt's estate. In return to a rule, one of the respondents alleged that he had paid the money over to the other, and denied the jurisdiction of the court. The other, Mrs. *Schweer*, denied that she had or ever had had any money belonging or due to the estate, and denied jurisdiction. The matter was heard before a referee, who made findings of fact and conclusions of law, and ordered the return of the money. It was then carried to the district court and there heard *de novo*. The district court sustained the referee, and entered decree for the payment of the money to the trustee. Thereupon an appeal was taken directly to this court on

[172] the *ground that the case fell within the first of the classes of cases enumerated in § 5 of the judiciary act of March 3, 1891 [26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549]. But that class only includes cases where the question is as to the jurisdiction of courts of the United States as such, and the question has to be certified. That was not the question raised here, and none such was certified. And it is settled that the district court had jurisdiction to determine whether any adverse claim to the money was asserted at the time the petition was filed. *Mueiller v. Nugent*, 184 U. S. 1, 46 L. ed. 405, 22 Sup. Ct. Rep. 269; *Louisville Trust Co. v. Comingor*, 184 U. S. 18, 46 L. ed. 413, 22 Sup. Ct. Rep. 293.

If the court erred in retaining jurisdiction on the merits, the remedy was by petition to the circuit court of appeals, under § 24b of the bankruptcy law [30 Stat. at L. 553, chap. 541, U. S. Comp. Stat. 1901, p. 3432]. *Holden v. Stratton*, 191 U. S. 115, 48 L. ed. 116, 24 Sup. Ct. Rep. 45.

Appeal dismissed.

RICARDO AMADO, *Plff. in Err.*,
v.

UNITED STATES.

(See S. C. Reporter's ed. 172-176.)

Error to district court of the United States for the district of Porto Rico.

1. The review in the Federal Supreme Court of final judgments of the district court of the United States for the district of Porto Rico is not necessarily confined, by the act of April 12, 1900 (31 Stat. at L. 77, 85, chap. 191), § 35, to the class of cases therein described as those where the Constitution of the United States or a treaty thereof or an act of Congress is brought in question and the right claimed thereunder is denied, in view of the prior clause of that section, authorizing such review if the case be one which, if determined in a territorial supreme court, may be carried up to the Federal Supreme Court.
2. The claim in a written motion in arrest of judgment or sentence that the indictment did not set forth "an offense under the statutes of the United States" is too indefinite to give the Federal Supreme Court jurisdiction of a writ of error to the district court of the United States for the district of Porto Rico, under the act of April 12, 1900 (31 Stat. at L. 77, 85, chap. 191), § 35, as of a case where the Constitution of the United States or a treaty thereof or an act of Congress was brought in question and the right claimed thereunder denied.

[No. 33.]

Submitted October 25, 1904. Decided November 7, 1904.

IN ERROR to the District Court of the United States for the District of Porto Rico to review a conviction of having unlawfully received and concealed merchandise which had been imported without the payment of the customs duties. *Dismissed* for want of jurisdiction.

The facts are stated in the opinion.

Plaintiff in error submitted the cause on the record.

Assistant Attorney General **Purdy** submitted the cause for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

The Revised Statutes of the United States provide that "if any person shall fraudu-

lently or knowingly import or bring into the United States, or assist in so doing, any merchandise, contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of, such merchandise after importation, knowing the same to have been imported contrary to law, such merchandise shall be forfeited, and the offender shall be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or be imprisoned for any time not exceeding two years, or both." § 3082, U. S. Comp. Stat. 1901, p. 2014.

The act of April 12th, 1900, temporarily providing revenues and a civil government for Porto Rico, declares, among other things, that on and after its passage "the same tariffs, customs, and duties shall be levied, collected, and paid upon all articles imported into Porto Rico from ports other than those of the United States which are required by law to be collected upon articles imported into the United States from foreign countries;" also, that "the statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Porto Rico as in the United States, except the internal revenue laws, which, in view of the provisions of section three, shall not have force and effect in Porto Rico." 31 Stat. at L. 77, 80, chap. 191, §§ 2, 14.

[174] *These statutes being in force, the plaintiff in error, Amado, was indicted in the district court of the United States for Porto Rico, upon the charge of having, on May 28th, 1901, unlawfully received, concealed, and facilitated the transportation, concealment, and sale of certain specified quantities of Holland gin, vermouthe, brandy, and Danish beer, theretofore, as the accused well knew, fraudulently imported into Porto Rico, contrary to law, without the payment to the United States of the duties imposed upon such articles.

The accused was duly arraigned, and found guilty by a jury. A motion in arrest of judgment having been overruled, he was sentenced to confinement in the penitentiary of Porto Rico for one year and one day, and to pay a fine of \$500. A new trial was denied, and the accused sued out the present writ of error.

In allowing the writ the judge of the district court expressed some doubt whether error would lie, but he resolved the doubt in favor of the defendant.

The government insists that the writ of error should be dismissed for want of jurisdiction in this court to review the judgment below; otherwise, that the judgment should be affirmed.

It is provided by the above act of April

12th, 1900, that the district court of the United States for Porto Rico "shall have, in addition to the ordinary jurisdiction of district courts of the United States, jurisdiction of all cases cognizant in the circuit courts of the United States, and shall proceed therein in the same manner as a circuit court." 31 Stat. at L. 77, 84, chap. 191, § 34.

The act also provides that writs of error and appeals from the final decisions of the supreme court of Porto Rico and the district court of the United States shall be allowed and may be taken to this court "in the same manner and under the same regulations and in the same cases as from the supreme courts of the territories of the United States; and such writs of error and appeal shall be allowed in all cases where *the Constitution of the United States, or [175] treaty thereof, or an act of Congress, is brought in question and the right claimed thereunder is denied." Id. § 35.

The review of the final judgment of the district court of the United States for Porto Rico is not restricted to those cases in which the Constitution, or a treaty of the United States, or an act of Congress, is brought in question and the right claimed under it denied. This construction is too narrow and technical. There may be cases—certainly civil cases—in the United States district court for Porto Rico that do not involve any question arising under the Constitution, or a treaty, or an act of Congress; and yet if the case be one which, if determined in a supreme court of one of the territories of the United States, could be brought here for re-examination, the final judgment could be reviewed by this court, although no right of a distinctly Federal nature was involved. *Royal Ins. Co. v. Martin*, 192 U. S. 149-60, 48 L. ed. 385-388, 24 Sup. Ct. Rep. 247; *Hijo v. United States*, 194 U. S. 315, 320, 48 L. ed. 994, 995, 24 Sup. Ct. Rep. 727. See *Crowley v. United States*, 194 U. S. 461, 48 L. ed. 1075, 24 Sup. Ct. Rep. 731. But even this test, if applied here, will not avail the accused; for the statutes regulating the appellate jurisdiction of this court do not authorize a review of the final judgment in a supreme court of one of the territories of the United States in a criminal case like this one.

Can our jurisdiction be sustained by reference to the words, in the Porto Rico act, "in all cases where the Constitution of the United States, or a treaty thereof, or an act of Congress, is brought in question and the right claimed thereunder is denied?" We must answer this question in the negative. The nearest approach to a claim of specific right under the Constitution, or a treaty of

the United States, or under an act of Congress, was when the accused, in his written motion to arrest the judgment or sentence, insisted that the indictment did not set forth "an offense under the statutes of the United States." But that language amounted to nothing more, in legal effect, than a plea of not guilty, or a demurrer upon the general ground that the indictment [176] did not state enough to *show an offense. It was not an assertion of any particular right under the Constitution, or under any treaty, or under an act of Congress, which would be denied to him if the prosecution was sustained. His contention was only that he was not subject to criminal prosecution by reason of anything set forth in the indictment. The indictment was plainly sufficient under the statute prescribing the offense charged, and the objections to it were too indefinite to meet the requirements of the act of 1900, and make the case one which, by that act, could be brought to this court for review. Unless the case was one in which the judgment could be reviewed here, then such judgment would be final, and not subject to review; for no case determined in the United States court for Porto Rico can be carried to a circuit court of appeals. We said, in *Royal Ins. Co. v. Martin*, 192 U. S. 149, 160, 48 L. ed. 385, 388, 24 Sup. Ct. Rep. 247, 250, that "Congress did not intend that any connection should exist between the United States court for Porto Rico and any circuit court of appeals established under the act of 1891 [26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 547]."

The writ of error must be dismissed for want of jurisdiction in this court, and it is so ordered.

RICHARD C. CRAWFORD *et al.*, Plffs. *in
Err.,
v.

JOHN E. BURKE.

(See S. C. Reporter's ed. 176-194.)

Bankruptcy — provable debts — discharge.

1. A claim arising out of the conversion by stockbrokers of shares purchased and held by them on a customer's account, charging him with commission and interest, and crediting him with amounts received as margins, is provable under the bankruptcy act of July 1, 1898 (30 Stat. at L. 562, chap. 541, U. S. Comp. Stat. 1901, p. 3447), § 63a, as a debt "founded upon an open account, or upon a contract, express or implied."
2. Only such debts created by the fraud of a bankrupt as were so created while he was acting as an officer or in a fiduciary capacity are

excepted from the operation of a discharge in bankruptcy by the act of July 1, 1898 (30 Stat. at L. 550, chap. 541, U. S. Comp. Stat. 1901, p. 3428). § 17, subd. 4, since to hold that the language of this subdivision, making an exception in favor of debts "created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer, or in any fiduciary capacity," includes all debts fraudulently contracted, would render meaningless the exception in subd. 2, in favor of such claims for fraud as have been reduced to judgment.

3. A creditor, by electing to bring an action in trover, as for a fraudulent conversion, does not deprive his debt of its provable character under the bankruptcy act of July 1, 1898 (30 Stat. at L. 562, chap. 541, U. S. Comp. Stat. 1901, p. 3447), § 63a, where it is "founded upon an open account, or upon a contract, express or implied," in view of the recognition of the provable character of claims for fraud in general, inferable from the exception from the operation of a discharge in bankruptcy which § 17 of that act makes in favor of claims for fraud which have been reduced to judgment, or which originated in the bankrupt's acts while acting as an officer or in a fiduciary capacity.

[No. 22.]

Argued April 25, 26, 1904. Decided November 7, 1904.

IN ERROR to the Supreme Court of the State of Illinois to review a judgment which affirmed a judgment of the Appellate Court in and for the First District of that State, which had in turn affirmed a judgment of the Circuit Court of Cook County in favor of plaintiff in an action in trover in which defendants had set up their discharge in bankruptcy as a defense. *Reversed* and remanded for further proceedings.

See same case below, 201 Ill. 581, 66 N. E. 833.

Statement by Mr. Justice **Brown**:

This was an action in trover instituted September 10, 1897, in the circuit court of Cook county, Illinois, by Burke against Crawford & Valentine, plaintiffs in error, to recover damages for the wilful and fraudulent conversion of certain reversionary interests of the plaintiff in 550 shares of Metropolitan Traction stock.

There were ten counts in the declaration. In each of the first five counts it was alleged that the defendant firm of Crawford & Valentine were stockbrokers and dealers in investment securities; that plaintiff employed the defendants as his brokers and agents to buy, hold, and carry stocks for him, subject to his order; that defendants had in their possession, or under their control, certain shares of the capital stock of the Metropolitan Traction Company, which

they were holding as a pledge and security for the amount due them from the plaintiff on said stock; that defendants wrongfully, wilfully, and fraudulently, and without his knowledge or consent, sold said shares of stock, and wilfully and fraudulently, and with intent to cheat and defraud the plaintiff, converted plaintiff's reversionary interest in said stock to their use, whereby it was wholly lost.

[178] In each of the last five counts it was alleged that after defendants had wrongfully and fraudulently, and without plaintiff's knowledge or consent, sold the plaintiff's stock, and converted the proceeds of such sales to their own use, they falsely and fraudulently represented to him that they still had the stock on hand and were carrying it for him; that their correspondents in Philadelphia, where the stock had been bought, were calling upon them for further demands or margins, and that it therefore became necessary to call upon the plaintiff to make further payments on the stock in order to comply with their correspondents' demands and to be secured against loss. It was averred in each of said counts that such representations were false and fraudulent, and by means thereof defendants obtained from the plaintiff the aggregate sum of \$10,800.

To this declaration defendants pleaded not guilty, upon which issue was joined January 4, 1900, and on May 12, 1900, a jury trial was waived in writing. The case rested without action until January 3, 1901, when defendants filed their separate pleas of *pais darrein continuance*, setting up that on April 5, 1900, the defendants had received their discharge in bankruptcy, in the district court for the northern district of Illinois, and that plaintiff's claims were provable and not excepted from the operation of such discharge. The plaintiff replied, denying that his claim was provable, and averred that the same was excepted from such operation.

Notwithstanding the plea of *pais darrein continuance*, the plaintiff introduced evidence and proved the allegations in his declaration, and the amount of damages he had sustained. Defendants were found guilty upon all the counts, and judgment entered against them.

The case was taken to the appellate court, where, it appearing that one of the justices had taken part in the trial of the case below, and that the two remaining justices were unable to agree upon the case, the judgment of the circuit court was affirmed. The judgment of the appellate court was also affirmed by the supreme court of Illinois (201 Ill. 581, 66 N. E. 833), to review which judgment this writ of error was sued out.

Messrs. George Packard and Charles E. Vroman argued the cause, and, with *Mr. Harrison Musgrave*, filed a brief for plaintiffs in error:

The claim of defendant in error is a provable debt in bankruptcy, under the bankruptcy act of 1898.

Re Hirschman, 104 Fed. 69; *Toledo, W. & W. R. Co. v. Chew*, 67 Ill. 383; *Elliott v. Jackson*, 3 Wis. 649; *Staat v. Evans*, 35 Ill. 455; *Western Assur. Co. v. Towle*, 65 Wis. 247, 26 N. W. 106; *Dashaway Asso. v. Rogers*, 79 Cal. 211, 21 Pac. 742; *Re Filer*, 125 Fed. 261; *Re Silverman*, 101 Fed. 219; *Collier, Bankr.* 338, 344; *Beers v. Hamlin*, 99 Fed. 695; *Re Hilton*, 104 Fed. 981; *Re Graff*, 117 Fed. 343.

As stockholders or factors, plaintiffs in error were not acting in a fiduciary capacity.

Chapman v. Forsyth, 2 How. 202, 11 L. ed. 236; *Neal v. Clark* (*Neal v. Scruggs*) 95 U. S. 704, 24 L. ed. 586; *Keime v. Graff*, 17 Nat. Bankr. Reg. 319, Fed. Cas. No. 7,650; *Hennequin v. Clews*, 111 U. S. 676, 28 L. ed. 565, 4 Sup. Ct. Rep. 576; *Grover & B. Sewing Mach. Co. v. Clinton*, 5 Biss. 324, Fed. Cas. No. 5,845; *Noble v. Hammond*, 129 U. S. 68, 32 L. ed. 623, 9 Sup. Ct. Rep. 235; *Upshur v. Briscoe*, 138 U. S. 375, 34 L. ed. 934, 11 Sup. Ct. Rep. 313; *Austill v. Crawford*, 7 Ala. 340; *Woolsey v. Cade*, 54 Ala. 383, 25 Am. Rep. 711; *Sanders v. Sanders*, 56 Ark. 588, 20 S. W. 517; *Chipley v. Frierson*, 18 Fla. 642; *Georgia R. Co. v. Cubbedge*, 75 Ga. 323; *Du Pont v. Beck*, 81 Ind. 274; *Phillips v. Russell*, 42 Me. 361; *Hayman v. Pond*, 7 Met. 330; *Halpin v. May*, 100 Mass. 499; *Cronan v. Cotting*, 104 Mass. 245, 6 Am. Rep. 232; *Woodward v. Towne*, 127 Mass. 42, 34 Am. Rep. 337; *Green v. Chilton*, 57 Miss. 599, 34 Am. Rep. 483; *Gibson v. Gorman*, 44 N. J. L. 327; *Palmer v. Hussey*, 87 N. Y. 308; *Lawrence v. Harrington*, 122 N. Y. 408, 25 N. E. 406; *Mulock v. Byrnes*, 129 N. Y. 25, 29 N. E. 244; *Bissell v. Couchaine*, 15 Ohio, 64; *Curtis v. Waring*, 92 Pa. 109; *Scott v. Porter*, 93 Pa. 40, 39 Am. Rep. 719; *Pankey v. Nolan*, 6 Humph. 155; *Hammond v. Noble*, 57 Vt. 200; *Slayton v. Wells*, 66 Vt. 63, 28 Atl. 632; *Wilson v. Kirby*, 88 Ill. 570; *Svanoe v. Jurgens*, 144 Ill. 507, 33 N. E. 955; *Shipherd v. Furness*, 153 Ill. 590, 39 N. E. 1096; *Pierce v. Shippee*, 90 Ill. 376, 16 Am. & Eng. Enc. Law 2d ed. p. 781; *Re Basch*, 97 Fed. 761; *Bracken v. Milner*, 104 Fed. 522.

The clause "fraud," etc., used in subd. 4 of § 17 of the bankruptcy act, is limited and restricted by the qualifying clause "while acting in a fiduciary capacity."

There being no fiduciary relation between

the parties, the debt is not within the exception, and hence is barred.

Re Rhutassel, 96 Fed. 599; *Re Hirschman*, 104 Fed. 69; *Re Lewensohn*, 99 Fed. 74; *Hargadine-McKittrick Dry Goods Co. v. Hudson*, 111 Fed. 361; *Gee v. Gee*, 84 Minn. 384, 87 N. W. 1116; *Re Bullis*, 68 App. Div. 508, 73 N. Y. Supp. 1048; *Allen v. Ferguson*, 18 Wall. 1, 21 L. ed. 854.

"Fraud," as used in the act, means positive fraud involving moral turpitude,—not constructive fraud, or fraud in law. Conversion by one in lawful possession of property is not fraud within the meaning of the bankruptcy act. Hence the claim of defendant in error does not fall within the meaning of the term "fraud," as there used. And on this point the entire evidence is properly before the court on the plea *puis* and the replication thereto.

Chitty, Pl. 246; *Clough v. Shepherd*, 31 N. H. 490; *Teel v. Fonda*, 4 Johns. 304; *Neal v. Clark* (*Neal v. Scruggs*) 95 U. S. 704, 24 L. ed. 586; *Hennequin v. Clews*, 111 U. S. 676, 28 L. ed. 565, 4 Sup. Ct. Rep. 576; *Noble v. Hammond*, 129 U. S. 68, 32 L. ed. 623, 9 Sup. Ct. Rep. 235; *Upshur v. Briscece*, 138 U. S. 365, 34 L. ed. 931, 11 Sup. Ct. Rep. 313; *Keime v. Graff*, 17 Nat. Bankr. Reg. 319, Fed. Cas. No. 7,650; *Bracken v. Milner*, 104 Fed. 522; *Burnham v. Pidcock*, 58 App. Div. 273, 68 N. Y. Supp. 1009; *Re Benedict*, 37 Misc. 230, 75 N. Y. Supp. 165; *Re Gaylord*, 113 Fed. 131; *Scott v. Porter*, 93 Pa. 38, 39 Am. Rep. 726; *Watertown Carriage Co. v. Hall*, 66 App. Div. 84, 72 N. Y. Supp. 466; *Crosby v. Miller*, 25 R. I. 172, 55 Atl. 328; *Western Union Cold Storage Co. v. Hurd*, 116 Fed. 442.

The case made by defendant in error shows that there was no fraudulent intent or positive fraud on the part of plaintiffs in error, and that the relations between the parties were purely contractual, and therefore not responsive to the counts either for conversion or deceit.

Markham v. Jaudon, 41 N. Y. 239; *Wood v. Hayes*, 15 Gray, 375; *Re Swift*, 105 Fed. 493; *Covell v. Loud*, 135 Mass. 41, 46 Am. Rep. 446; *Weston v. Jordan*, 168 Mass. 401, 47 N. E. 133; *Corbett v. Underwood*, 83 Ill. 324, 25 Am. Rep. 392.

The evidence shows that the transactions out of which the claim of defendant in error arises were of a gambling character, and illegal and void at common law and under the statute. The court may, at any stage, when it appears that the matter involved is forbidden by public policy or is against public morality, decline to consider a claim so founded, regardless of the pleadings.

Lyon v. Culbertson, 83 Ill. 38, 25 Am. 195 U. S.

Rep. 349; *Soby v. People*, 31 Ill. App. 242; *Cothran v. Ellis*, 125 Ill. 506, 16 N. E. 646; *Schneider v. Turner*, 130 Ill. 39, 6 L. R. A. 164, 22 N. E. 497; *Oscanyon v. Winchester Repeating Arms Co.* 103 U. S. 261, 26 L. ed. 539; *Jamicson v. Wallace*, 167 Ill. 396, 59 Am. St. Rep. 302, 47 N. E. 762; *Martin Emerich Outfitting Co. v. Siegel, C. & Co.* 108 Ill. App. 364.

Mr. John E. Burke in propria persona argued the cause and filed a brief for defendant in error:

The claims of defendant in error were claims for unliquidated damages arising out of torts; they were claims for damages occasioned by positive fraud; they were not provable in bankruptcy, and therefore were not barred by the discharge of plaintiffs in error.

Collier, Bankr. ed. 1900, p. 385; *Lowell*, Bankr. pp. 487, 488; *Re Yates*, 114 Fed. 365; *Re Hirschman*, 104 Fed. 69; *Re Big Meadows Gas Co.* 113 Fed. 974, 7 Am. Bankr. Rep. 697; *Old Colony Boot & Shoe Co. v. Parker S. A. Co.* 183 Mass. 557, 67 N. E. 870; *Watertown Carriage Co. v. Hall*, 75 App. Div. 201, 77 N. Y. Supp. 1028.

If defendant in error might have waived the fraud and sued in assumpsit for money had and received, he did not see fit to do so. He was under no obligation to waive the fraud and base his claims upon an implied contract. Not having done so, his claims were not provable.

Williamson v. Dickens, 27 N. C. (5 Ired. L.) 259; *Hughes v. Oliver*, 8 Pa. 426; *Graham v. Chicago, M. & St. P. R. Co.* 53 Wis. 473, 10 N. W. 609; *Bradner v. Strang*, 89 N. Y. 299, 114 U. S. 555, 560, 29 L. ed. 248, 250, 5 Sup. Ct. Rep. 1038.

If the claims were not provable, the discharge was not a bar, and the judgment should be affirmed.

Collier v. Stanbrough, 6 How. 21, 12 L. ed. 327; *Dewey v. Des Moines*, 173 U. S. 197, 198, 43 L. ed. 666, 19 Sup. Ct. Rep. 379; *Murdock v. Memphis*, 20 Wall. 590, 636, 22 L. ed. 429, 444.

The presumption is that the reading of a statute according to its grammatical construction gives its correct sense. The grammatical construction should be followed unless it will pervert the legislative intent.

Lake County v. Rollins, 130 U. S. 662, 670, 32 L. ed. 1060, 1063, 9 Sup. Ct. Rep. 651; *Endlich*, Interpretation of Statutes, § 2; 26 Am. & Eng. Enc. Law, 2d ed. p. 613; *City Trust, S. D. & Surety Co. v. Lee*, 107 Ill. App. 263, 204 Ill. 69; *Cushing v. Worrick*, 9 Gray, 382; *State v. Jernigan*, 7 N. C. (3 Murph.) 12; *Dearborn v. Brookline*, 97 Mass. 466; *Wetmore v. Wetmore*, 17 Pa. Co. Ct. 11; *Quinn v. Lowell Electric Light Corp.* 140 Mass. 106, 3 N. E. 200; *Price v.*

Price, 10 Ohio St. 316; *Hamilton v. The A. B. Hamilton*, 16 Ohio St. 428; *Zimmerman v. Willard*, 114 Ill. 364, 2 N. E. 70.

Courts will, in the construction of statutes, for the purpose of arriving at the real meaning and intention of the lawmakers, disregard the punctuation, or repunctuate, if need be, to render the true meaning of the statute.

Price v. Price, 10 Ohio St. 316; *Bouvier*, Law Dict. 347, 402; *Hamilton v. The A. B. Hamilton*, 16 Ohio St. 428; *Cushing v. Worrick*, 9 Gray, 382; *Hammock v. Farmers' Loan & T. Co.* 105 U. S. 77, 84, 26 L. ed. 1111, 1113; *Joy v. St. Louis*, 138 U. S. 1, 32, 34 L. ed. 843, 852, 11 Sup. Ct. Rep. 243.

Punctuation has a position in the law, though a subordinate one. Being used in the instrument with the intent to make the meaning plainer, it should certainly be considered in court to aid in discovering that meaning.

"Punctuation—How Considered in the Law," 45 Cent. L. J. 229, 236; *Albright v. Payne*, 43 Ohio St. 8, 1 N. E. 20; *Joy v. St. Louis*, 138 U. S. 1, 32, 34 L. ed. 843, 852, 11 Sup. Ct. Rep. 243.

When an act or part of an act which has received a judicial construction is reenacted in substantially the same terms, that construction must be considered to have the sanction of the legislature, unless the contrary appears. Mere change in the phraseology works no change in the established interpretation thereof, unless it clearly appears that such was the intention of the legislature.

Black, Interpretation of Laws, 161; *Bradley v. State*, 69 Ala. 318; *Huddleston v. Askey*, 56 Ala. 218; *Posey v. Pressley*, 60 Ala. 243; *McDonald v. Hovey*, 110 U. S. 619, 628, 28 L. ed. 269, 271, 4 Sup. Ct. Rep. 142; *Potter's Dwarrr. Stat.* pp. 181, note 2, 274, note 4; *Bishop, Stat. Crimes*, §§ 75, 82; *Yates's Case*, 4 Johns. 318; *Dominick v. Michael*, 4 Sandf. 374; *The Devonshire*, 8 Sawy. 209, 13 Fed. 39; *Reiche v. Smythe*, 13 Wall. 162, 20 L. ed. 566; *Willis v. Eastern Trust & Bkg. Co.* 169 U. S. 295, 307, 42 L. ed. 752, 758, 18 Sup. Ct. Rep. 347; *Com. v. Hartnett*, 3 Gray, 450; *State ex rel. Pearson v. Cornell*, 54 Neb. 647, 75 N. W. 25.

A discharge in bankruptcy does not release a bankrupt from debts created by his positive fraud involving moral turpitude or intentional wrong.

Re Thomas, 92 Fed. 912; *Re Blumberg*, 94 Fed. 476, 1 Am. Bankr. Rep. 633; *Re Black*, 97 Fed. 493; *Re Basch*, 97 Fed. 761; *Re Lewensohn*, 99 Fed. 73; *Re Steed*, 107 Fed. 682; *Lowell, Bankr.* §§ 433, 488; *Collier, Bankr.* 3d ed. pp. 200, 202, 345; *Bracken v. Milner*, 104 Fed. 522; *Re Cole*, 106 Fed. 837; *Frey v. Torrey*, 36 Misc. 216,

73 N. Y. Supp. 201, 32 N. Y. Civ. Proc. Rep. 386, 75 N. Y. Supp. 40, 175 N. Y. 501, 67 N. E. 1082; *Stevens v. Meyers*, 72 App. Div. 128, 76 N. Y. Supp. 332; *Predmore v. Torrey*, 38 Misc. 127, 77 N. Y. Supp. 86; *Re Wollock*, 120 Fed. 516, 9 Am. Bankr. Rep. 685; *Watertown Carriage Co. v. Hall*, 176 N. Y. 313, 68 N. E. 629.

Bankrupt laws are enacted with the object and intention of relieving honest men, but not rascals, from the burden of their debts.

Re Silverman, 1 Sawy. 410, Fed. Cas. No. 12,855; *Re Dow*, 105 Fed. 889; *Re Becker*, 106 Fed. 54; *Turner v. Turner*, 108 Fed. 785; *Liebke v. Thomas*, 116 U. S. 606, 29 L. ed. 745, 6 Sup. Ct. Rep. 496; *Re Scott*, 126 Fed. 981; *McDonald v. Brown*, 23 R. I. 546, 58 L. R. A. 768, 10 Am. Bankr. Rep. 58, 91 Am. St. Rep. 659, 51 Atl. 213; *Disler v. McCauley*, 35 Misc. 411, 71 N. Y. Supp. 949; *Tinker v. Colwell*, 193 U. S. 473, 48 L. ed. 754, 24 Sup. Ct. Rep. 505.

Mr. Justice **Brown** delivered the opinion of the court:

A year after this case was put at issue, and upon the opening of the trial, defendants filed their separate pleas *puis darrein continuance*, setting up their discharge in bankruptcy, and averring that plaintiff's claim was a provable debt, and the discharge a complete defense.

It is a well-settled principle of law, and was so held by the supreme court of Illinois in this case, that a plea *puis darrein continuance* waives all prior pleas, and amounts to an admission of the cause of the action set up in the plaintiff's declaration. *Mount v. Scholes*, 120 Ill. 394, 11 N. E. 401; *East St. Louis v. Renshaw*, 153 Ill. 491, 38 N. E. 1048; *Angus v. Chicago Trust & Sav. Bank*, 170 Ill. 298, 48 N. E. 946; *Kimball v. Huntington*, 10 Wend. 675, 25 Am. Dec. 590.

But notwithstanding this, plaintiff was permitted to introduce evidence in proof of the fraud alleged in his declaration; and upon the conclusion of the trial the court found there had been a conversion of plaintiff's reversionary interest in the stock, for which he "had a right to recover in trover," and that it was not such a debt as was barred by the bankruptcy act. Upon appeal to the supreme court it was held that it was not necessary to the judgment to decide whether the allegations of the declaration were admitted by the pleadings, as they were established by the proof which had been adduced *by plaintiff, "and, the propositions[186] held as law on that branch of the case being correct, judgment for plaintiff necessarily follows." That court also held that the case, being one of fraud, was not cov-

ered by the defendants' discharge in bankruptcy.

The only Federal question involved in the case is whether the supreme court of Illinois gave the proper effect to the discharge pleaded by the defendants. If plaintiff's claim was not a provable debt, or was expressly excepted from the operation of the discharge, the decision of that court was right; but if it was covered by the discharge, such discharge was a complete defense.

Section 17 of the bankruptcy act of 1898 contains, among other things, the following provisions:

"Sec. 17. A discharge in bankruptcy shall release the bankrupt from all of his provable debts, except such as . . . (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another, . . . or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer, or in any fiduciary capacity." [30 Stat. at L. 550, chap. 541, U. S. Comp. Stat. 1901, p. 3428.]

Under this section, whether the discharge of the defendants in bankruptcy shall operate as a discharge of plaintiff's debt, it not having been reduced to judgment, depends upon the fact whether that debt was "provable" under the bankruptcy act,—that is, susceptible of being proved; second, whether it was or was not created by defendants' fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity.

1. Provable debts are defined by § 63, a copy of which appears in the margin.† Paragraph *a* of this section includes *debts arising upon contracts, express or implied, and open accounts, as well as for judgments and costs. As to paragraph *b*, two constructions are possible: It may relate to all unliquidated demands, or only to such as may arise upon such contracts, express or implied, as are covered by paragraph *a*.

Certainly paragraph *b* does not embrace debts of an unliquidated character and which in their nature are not susceptible of

being liquidated. *Dunbar v. Dunbar*, 190 U. S. 340, 350, 47 L. ed. 1084, 1092, 23 Sup. Ct. Rep. 757. Whether the effect of paragraph *b* is to cause an unliquidated claim which is susceptible of liquidation, but is not literally embraced by paragraph *a*, to be provable in bankruptcy, we are not called upon to decide, as we are clear that the debt of the plaintiff was embraced within the provision of paragraph *a*, as one "founded upon an open account, or upon a contract, express or implied," and might have been proved under § 63*a* had plaintiff chosen to waive the tort, and take his place with the other creditors of the estate. He did not elect to do this, however, but brought an action of trover, setting up a fraudulent conversion of his property by defendants. In the first five counts of his declaration he charges a fraudulent conversion of his interest in the stock, and, in the last five counts, that the defendants had induced him to make further payments on such stock in the way of margins, by false and fraudulent representations.

*The question whether the claim thus set[188] forth is barred by the discharge depends upon the proper construction of § 17, which declares that the discharge in bankruptcy relieves the bankrupt from all of his "provable debts," except such as ". . . (2) are judgments in actions for frauds, or obtaining property by false pretenses, or false representations, or for wilful and malicious injuries to the person or property of another, . . . or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer, or in any fiduciary capacity."

Do these words apply to all debts created by the fraud, embezzlement, misappropriation of the bankrupt, or only to such as were created while he was acting as an officer or in some fiduciary capacity? The fact that the 2d subdivision of § 17 excepted from the discharge "all judgments in actions for frauds, or of obtaining property by false pretenses, or false representations," indicates quite clearly that, as to frauds in general, it was the intention of Congress only to except from the discharge such as had been re-

†Sec. 63. *Debts which may be proved.*—(a) Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date, or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was, at the time of the filing of the petition against him, plaintiff in a cause of action which would pass to the trustee, and which the trustee declines to prosecute after notice; (3) founded upon a claim

for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) *founded upon an open account, or upon a contract, express or implied*; and (5) founded upon provable debts reduced to judgments after the filing of the petition, and before the consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition, and up to the time of the entry of such judgments.

(b) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate.

duced to judgment, unless they fall within the 4th subdivision, of those created by the fraud, embezzlement, misappropriation, or defalcation of the bankrupt while acting as an officer or in a fiduciary capacity. Unless these words relate back to all the preceding words of the subdivision, namely, the frauds and embezzlements, as well as misappropriations or defalcations, it results that the exception in subd. 2 of all judgments for fraud is meaningless, since such judgments would be based upon a fraud excepted from discharge by subd. 4, whether judgment had been obtained or not.

This conclusion is fortified by reference to corresponding sections of the former bankrupt acts. Thus, by the 1st section of the act of 1841 (5 Stat. at L. 440, chap. 9), the benefits of that act were extended to all persons owing debts "which shall not have been created in consequence of a defalcation as a public officer; or as executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity." It is entirely [189] clear *that under this section a discharge was not denied to the bankrupt by reason of debts fraudulently contracted, but only to such as were created by his defalcation as an officer, or while acting in a fiduciary capacity.

We may remark here, in passing, that ever since the case of *Chapman v. Forsyth*, 2 How. 202, 11 L. ed. 236, this court has held that a commission merchant and factor who sells for others is not indebted in a fiduciary capacity within the bankruptcy acts by withholding the money received for property sold by him. This rule was made under the bankruptcy act of 1841, and has since been repeated many times under subsequent acts. *Neal v. Clark*, 95 U. S. 708, 24 L. ed. 586; *Hennequin v. Clews*, 111 U. S. 679, 28 L. ed. 567, 4 Sup. Ct. Rep. 576; *Noble v. Hammond*, 129 U. S. 68, 32 L. ed. 623, 9 Sup. Ct. Rep. 235; *Upshur v. Briscoe*, 138 U. S. 375, 34 L. ed. 934, 11 Sup. Ct. Rep. 313,—as well as in cases in the state courts, too numerous for citation.

Under the bankruptcy act of 1867 the list of debts excluded from the operation of the discharge was considerably larger. In § 33, Revised Statutes, 5117, it was declared that—

"No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this act; but the debt may be proved, and the dividend thereon shall be a payment on account of said debt." [14 Stat. at L. 533, chap. 176.]

The language of this section is so clear as to require no construction. It is plain and explicit to the effect that the fraud and

embezzlement of the bankrupt need not have been committed by him while acting as an officer or in a fiduciary character, and that this character relates only to his defalcation. But, under the act of 1898, there is no such severance in the fourth paragraph as would authorize us to say that the term "fiduciary capacity" did not extend back to the words "fraud, embezzlement, and misappropriation." It was the opinion of the supreme court of Illinois that "a mere change in phraseology, apparently for the sake of brevity, rendering the meaning somewhat obscure, cannot be regarded as showing a legislative intent to depart so radically from precedents established *by previous bank- [190] ruptcy legislation and judicial decisions as to provide that debts created by the fraud or embezzlement of the bankrupt should be released by his discharge in bankruptcy, unless such fraud or embezzlement should be committed while the bankrupt was acting as a public officer, or in a fiduciary capacity."

Our own view, however, is that a change in phraseology creates a presumption of a change in intent, and that Congress would not have used such different language in § 17 from that used in § 33 of the act of 1867, without thereby intending a change of meaning. The view generally taken by the bankruptcy courts has been that the terms "officer" and "fiduciary capacity" extend to all the claims mentioned in paragraph 4, and are not confined to cases of defalcation. *Re Rhutassel*, 2 N. B. N. Rep. 381, 96 Fed. 599; *Re Lewensohn*, 99 Fed. 73; *Re Hirschman*, 2 N. B. N. Rep. 1123, 104 Fed. 69; *Re Cole*, 3 N. B. N. Rep. 580, 106 Fed. 837; *Re Freche*, 109 Fed. 620; *Hargadine-McKittrick Dry Goods Co. v. Hudson*, 111 Fed. 361. This is the natural and grammatical reading of the clause.

The cases in the state courts are almost uniformly to the same effect. Thus in *J. C. Smith & W. Co. v. Lambert*, 69 N. J. L. 487, 55 Atl. 88, the defendant pleaded to an action on a book account his discharge in bankruptcy, to which the plaintiff replied that the cause of action was created by the fraud of the defendant. The supreme court of New Jersey held the replication to be insufficient. "We think," said the court, "that under § 17 of the bankrupt law, to which reference has been made, there is no provision that would except from the discharge the debt upon which the present suit is brought."

In *Morse v. Kaufman*, 100 Va. 218, 40 S. E. 916, it was pleaded against the discharge that the goods were procured by false pretenses. After holding that the case had not fallen within subd. 2 of § 17, as there was no judgment for fraud, the supreme court of Virginia observed:

[191] "It would seem to be equally clear that the demand of plaintiffs in error is not within the exception of subd. 4 of *§ 17. It is not pretended that the claim was created by the bankrupt's 'fraud, embezzlement, misappropriation, or defalcation while acting as an officer, or in any fiduciary capacity.'

"The contention that 'fraud' should be segregated from the qualifying language 'while acting as an officer or in any fiduciary capacity' is without merit. Such interpretation would not only destroy the grammatical construction of the sentence and contravene its plain meaning, but would likewise be inconsistent with paragraph 2 of the same section, that a creditor should have obtained a judgment in an action for fraud in order to override a discharge in bankruptcy."

A like construction was given to subd. 4 by the supreme court of Missouri in *Goodman v. Herman*, 172 Mo. 344, 60 L. R. A. 885, 72 S. W. 546, by the supreme court of Minnesota in *Gee v. Gee*, 84 Minn. 384, 87 N. W. 1116, by that of Rhode Island in *Crosby v. Miller*, 25 R. I. 172, 55 Atl. 328, and by the supreme court of New York, fourth department, in *Re Bullis*, 68 App. Div. 508, 73 N. Y. Supp. 1047. In this case the question was discussed at considerable length, the court saying:

"If any debt created by fraud, embezzlement, or misappropriation is to be excepted from the application of the statute, then there is no necessity of subd. 2, making a judgment essential to prevent the granting of the discharge under the statute."

We have not overlooked the fact that the New York supreme court of the first department reached a different conclusion in *Frey v. Torrey*, 70 App. Div. 166, 75 N. Y. Supp. 40, affirmed by the court of appeals in a *per curiam* opinion, 175 N. Y. 501, 67 N. E. 1082, but, so far as we know, this is the only case that supports the construction given to § 17 by the supreme court of Illinois.

Why an ordinary claim for fraud should be released by the discharge, while a judgment for fraud is not released, is not altogether clear, although this distinction may have been created to avoid the necessity of going into conflicting evidence upon the subject of fraud; while in cases of judgments [192] for *frauds the judgment itself would be evidence of the fraudulent character of the claim. If a creditor has a claim against a debtor for goods sold which would ordinarily be covered by a discharge in bankruptcy, he is strongly tempted to allege, and if possible to prove, that the goods were purchased under a misrepresentation of the as-

sets of the buyer, and thus to make out a claim for fraud which would not be discharged in bankruptcy. It was probably this contingency which induced Congress to enact that an alleged fraud of this kind should be reduced to judgment before it could be set up in bar of a discharge.

The intent of Congress in changing the language of the act of 1867 seems to have been to restore the act of 1841, which, as already observed, extended the benefits of the law to every debtor who had not been guilty of defalcation as a public officer or in a fiduciary capacity, the act of 1898 adding, however, to the excepted class those against whom a judgment for fraud had been obtained.

Some stress is laid by the supreme court of Illinois upon the punctuation of subd. 4, § 17, presumably upon the insertion of a comma after the word "misappropriation," thereby indicating a severance of that which precedes from that which follows. While we do not deny that punctuation may shed some light upon the construction of a statute (*Joy v. St. Louis*, 138 U. S. 1, 32, 34 L. ed. 843, 852, 11 Sup. Ct. Rep. 243), we do not think it is entitled to weight in this case. In the enumeration of persons or things in acts of Congress it has been the custom for many years to insert a comma before the final "and" or "or" which precedes the last thing enumerated, apparently for greater precision, but without special significance. So little is punctuation a part of statutes that courts will read them with such stops as will give effect to the whole. *Doe ex dem. Willis v. Martin*, 4 Term Rep. 65, 2 Revised Rep. 324; *Hammock v. Farmers' Loan & T. Co.* 105 U. S. 77, 84, 26 L. ed. 1111, 1113; *United States v. Lacher*, 134 U. S. 624, 628, 33 L. ed. 1080, 1083, 10 Sup. Ct. Rep. 625; *United States v. Isham*, 17 Wall. 496, 21 L. ed. 728.

2. But it is strenuously insisted by the plaintiff that a claim *for the conversion of [193] personal property is not within the scope of § 17, because it is not a "provable debt" within the definition of § 63a. Did the latter section stand alone, there would be some ground for saying that a claim, though "founded upon an open account, or upon a contract, express or implied," would not be a provable debt, if plaintiff elected to treat the conversion as fraudulent, and sue in trover, though he might have chosen to waive the tort, and bring an action for a balance due on account. An early English case (*Parker v. Crole*, 5 Bing. 63, 2 Moore & P. 150) is cited to the effect that the operation of the discharge is determined by the election of the creditor to sue in assumpsit or

case. A like ruling was made in certain cases under the bankruptcy acts of 1841 and 1867. *Williamson v. Dickens*, 27 N. C. (15 Ired. L.) 259; *Hughes v. Oliver*, 8 Pa. 426; *Bradner v. Strang*, 89 N. Y. 299-307.

But we think that § 63a, defining provable debts, must be read in connection with § 17, limiting the operation of discharges, in which the provable character of claims for fraud in general is recognized, by excepting from a discharge claims for frauds which have been reduced to judgment, or which were committed by the bankrupt while acting as an officer, or in a fiduciary capacity. If no fraud could be made the basis of a provable debt, why were *certain* frauds excepted from the operation of a discharge? We are, therefore, of opinion that if a debt originates or is "founded upon an open account, or upon a contract, express or implied," it is provable against the bankrupt's estate, though the creditor may elect to bring his action in trover, as for a fraudulent conversion, instead of in assumpsit, for a balance due upon an open account. It certainly could not have been the intention of Congress to extend the operation of the discharge under § 17 to debts that were not provable under § 63a. It results from the construction we have given the latter section that all debts originating upon an open account, or upon a contract, express or implied, are provable, though plaintiff elect to bring his action for fraud.

[194] *In the case under consideration defendants purchased, under the instructions of the plaintiff, certain stocks, and opened an account with him, charging him with commission and interest, and crediting him with amounts received as margins. Subsequently, and without the knowledge of the plaintiff, they sold these stocks, and thereby converted them to their own use. Without going into the details of the facts, it is evident that the plaintiff might have sued them in an action on contract, charging them with the money advanced and with the value of the stock; or in an action of trover, based upon their conversion. For reasons above given, we do not think that his election to sue in tort deprived his debt of its provable character, and that, as there is no evidence that the frauds perpetrated by the defendants were committed by them in an official or fiduciary capacity, plaintiff's claim against them was discharged by the proceedings in bankruptcy.

The judgment of the Supreme Court of Illinois is therefore reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion.

ANDREW J. AIKENS, *Plff. in Err.*,

v.

STATE OF WISCONSIN. (No. 3.)

ALBERT HUEGIN, *Plff. in Err.*,

v.

STATE OF WISCONSIN. (No. 4.)

MELVIN A. HOYT, *Plff. in Err.*,

v.

STATE OF WISCONSIN. (No. 5.)

(See S. C. Reporter's ed. 194-207.)

Constitutional law—validity of legislation punishing combining to effect malicious injury.

Rights under U. S. Const. 14th Amend. are not infringed by the provisions of Wis. Stat. 1898, § 4466a, for the punishment of combining for the purpose of wilfully or maliciously injuring another in his business, as applied to a combination of newspaper managers maliciously to injure a rival paper by agreeing to refuse space to advertisers who should pay the increased rate fixed by such rival, except at a corresponding increase, but to permit those to advertise in their papers at the old rate who should refuse to pay their rival the new rate, whatever may be the force of the constitutional objection if the statute be construed to embrace combining to effect wilful, as distinguished from malicious, injury.

[Nos. 3, 4, 5.]

Argued and submitted October 21, 22, 1903.

Ordered for reargument May 31, 1904. Re-argued and submitted October 17, 18, 1904. Decided November 7, 1904.

IN ERROR to the Supreme Court of the State of Wisconsin to review a judgment affirming convictions in the Municipal Court of Milwaukee County, in that State, of violations of a statute prohibiting combining for the purpose of wilfully or maliciously injuring another in his business. *Affirmed.* See same case below, 113 Wis. 419, 89 N. W. 1135.

The facts are stated in the opinion.

Messrs. W. H. Timlin and George D. Van Dyke argued the cause and filed a brief for plaintiff in error in Nos. 3 and 4:

The constitutionality of a statute is to be tested not only by what has been declared criminal under it, but by what may be so declared; for a criminal statute cannot be used as a drag net to ensnare the guilty and the innocent, leaving the latter to extricate themselves as they can.

Trade-Mark Cases (United States v. Stef-

NOTE.—On the effect of bad motive to make actionable what would otherwise not be—see note to *Passaic Print Works v. Elv & W. Dry-Goods Co.* 62 L. R. A. 673.

fens) 100 U. S. 82, 25 L. ed. 550; *Montana Co. v. St. Louis Min. & Mill. Co.* 152 U. S. 170, 38 L. ed. 400, 14 Sup. Ct. Rep. 506; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *Re Ah Jow*, 29 Fed. 181.

Not only does the Wisconsin statute as construed, by the Wisconsin supreme court, subject to criminal prosecution those who enter into an ordinary partnership to compete in trade and win away customers from another,—at least provided a jury find their intentions in doing so to be malicious,—but it makes criminal many agreements in trade competition, approved and found to be a lawful exercise of the right of liberty to contract, by many other eminent courts.

Niagara F. Ins. Co. v. Cornell, 110 Fed. 816; *State v. Julow*, 129 Mo. 163, 29 L. R. A. 257, 50 Am. St. Rep. 443, 31 S. W. 781; *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; *Mogul S. S. Co. v. McGregor*, L. R. 21 Q. B. Div. 544, L. R. 23 Q. B. Div. 598 [1892] A. C. 25; *Orr v. Home Mut. Ins. Co.* 12 La. Ann. 255, 68 Am. Dec. 770; *Hunt v. Simonds*, 19 Mo. 583; *Anderson v. United States*, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50; *Docter v. Riedel*, 96 Wis. 158, 37 L. R. A. 580, 65 Am. St. Rep. 40, 71 N. W. 119; *Bowen v. Matheson*, 14 Allen, 499; *West Virginia Transp. Co. v. Standard Oil Co.* 50 W. Va. 611, 56 L. R. A. 804, 88 Am. St. Rep. 895, 40 S. E. 591; *Dueber Watch-Case Mfg. Co. v. E. Howard Watch & Clock Co.* 14 C. C. A. 14, 35 U. S. App. 16, 66 Fed. 637; *Re Grice*, 79 Fed. 627; *Adler v. Fenton*, 24 How. 407-413, 16 L. ed. 696-698; *Macauley Bros. v. Tierney*, 19 R. I. 255, 37 L. R. A. 455, 61 Am. St. Rep. 770, 33 Atl. 1; *Bohn Mfg. Co. v. Hollis* (Bohn Mfg. Co. v. Northwestern Lumbermen's Asso.) 54 Minn. 223, 21 L. R. A. 337, 40 Am. St. Rep. 319, 55 N. W. 1119.

There is a proper and lawful competitive motive in imposing a burden or differential against those customers who patronize a competitor, or, what is the same thing, in offering lower prices, or any other advantage to those customers who give the associated traders their sole patronage.

People v. Gillson, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; *Anderson v. United States*, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50; *Scottish v. Glasgow Fleshers*, 35 Scot. L. R. 645; *Dueber Watch-Case Mfg. Co. v. E. Howard Watch & Clock Co.* 14 C. C. A. 14, 35 U. S. App. 16, 66 Fed. 637; *Bowen v. Matheson*, 14 Allen, 499.

Liberty to contract involves the right to make or refuse to make lawful contracts without any inquiry into the motive of their making or refusal.

Coffeyville Vitriified Brick & Tile Co. v. Perry (Kan.) 66 L. R. A. 185, 76 Pac. 848; *State ex rel. Zillmer v. Krcutzberg*, 114 195 U. S.

Wis. 530, 58 L. R. A. 748, 91 Am. St. Rep. 934, 90 N. W. 1098; *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *Cooley*, Torts, p. 278; *Wallace v. Georgia, C. & N. R. Co.* 94 Ga. 732, 22 S. E. 579; *People v. Warren*, 13 Mise. 615, 34 N. Y. Supp. 942; *Com. v. Perry*, 155 Mass. 117, 14 L. R. A. 325, 31 Am. St. Rep. 533, 28 N. E. 1126; *State v. Julow*, 129 Mo. 163, 29 L. R. A. 257, 50 Am. St. Rep. 443, 31 S. W. 781; *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350; *Godcharles v. Wigeman*, 113 Pa. 431, 6 Atl. 354; *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 25 Am. St. Rep. 863, 10 S. E. 285; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631; *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; *Gillespie v. People*, 188 Ill. 176, 52 L. R. A. 283, 80 Am. St. Rep. 176, 58 N. E. 1007; *Block v. Schwartz*, 27 Utah, 387, 65 L. R. A. 308, 76 Pac. 22; *Street v. Varney Electrical Supply Co.* 160 Ind. 338, 61 L. R. A. 154, 98 Am. St. Rep. 325, 66 N. E. 895; *Niagara F. Ins. Co. v. Cornell*, 110 Fed. 816; *Greenwich Ins. Co. v. Carroll*, 125 Fed. 121; *State v. Dalton*, 22 R. I. 77, 48 L. R. A. 775, 84 Am. St. Rep. 818, 46 Atl. 234; *State v. Santce*, 53 L. R. A. 763, and note, 111 Iowa, 1, 82 Am. St. Rep. 222, 82 N. W. 445.

The statute denies the equal protection of the law.

Cote v. Murphy, 159 Pa. 420, 23 L. R. A. 135, 39 Am. St. Rep. 686, 28 Atl. 190; *Connolly v. Union Seiver Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; *Mathews v. People*, 202 Ill. 389, 63 L. R. A. 73, 95 Am. St. Rep. 241, 67 N. E. 28; *Schoolcraft v. Louisville & N. R. Co.* (*Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.*) 14 L. R. A. 579, and note, 92 Ky. 233, 17 S. W. 567.

Mr. S. S. Gregory argued the cause, and, with *Messrs. Conrad H. Poppenhusen* and *Joseph L. McNab*, filed a brief for plaintiff in error in No. 5:

The right to do that with which the parties here accused stand charged is secured beyond state interference.

State v. Goodwill, 33 W. Va. 179, 6 L. R. A. 621, 25 Am. St. Rep. 863, 10 S. E. 285; *Godcharles v. Wigeman*, 113 Pa. 431, 6 Atl. 354; *Com. v. Perry*, 155 Mass. 117, 14 L. R. A. 325, 31 Am. St. Rep. 533, 28 N. E. 1126; *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; *Leep v. St. Louis, I. M. & S. R. Co.* 58 Ark. 407, 23 L. R. A. 264, 41 Am. St. Rep. 109, 25 S. W. 75; *Thomas v. Hot Springs*, 34 Ark. 553, 36 Am. Rep. 24; *State v. Scougal*, 3 S. D. 55, 15 L. R. A. 477, 44 Am. St. Rep. 756, 51 N. W.

858; *Slaughter-House Cases* (*Butchers' Benev. Asso. v. Crescent City L. S. L. & S. H. Co.*) 16 Wall. 36, 21 L. ed. 394; *Toledo, W. & W. R. Co. v. Jacksonville*, 67 Ill. 37, 16 Am. Rep. 611; *Intoxicating-Liquor Cases*, 25 Kan. 751, 37 Am. Rep. 284; *State v. Fisher*, 52 Mo. 174; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; *Wallace v. Georgia, C. & N. R. Co.* 94 Ga. 732, 22 S. E. 579; *State v. Julow*, 129 Mo. 163, 29 L. R. A. 257, 50 Am. St. Rep. 443, 31 S. W. 781; *Re Ah Jow*, 29 Fed. 181; *Braccville Coal Co. v. People*, 147 Ill. 66, 22 L. R. A. 340, 37 Am. St. Rep. 206, 35 N. E. 62; *Gillespie v. People*, 188 Ill. 176, 52 L. R. A. 283, 80 Am. St. Rep. 176, 58 N. E. 1007; *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; *Bailey v. People*, 190 Ill. 28, 54 L. R. A. 838, 83 Am. St. Rep. 116, 60 N. E. 98; *Allgeyer v. Louisiana*, 165 U. S. 580, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *Shaver v. Pennsylvania Co.* 71 Fed. 931.

The statute says nothing whatever about malicious injury. It does very plainly and clearly declare that two or more who "wilfully or maliciously" combine to injure shall be punished. "Wilfully" means intentionally, and is distinguished from "maliciously" in that it does not import an evil mind or intent.

2 Bouvier, Law Dict.

It is not aimed, apparently, at malicious combination, at wrongful combination, at combination such as the court holds may be prohibited; but absolutely at all concert of action or co-operation entered into knowingly to injure the business of another and build up that of those undertaking it. So the Wisconsin court below holds, and, no doubt, this court must take the statute as thus construed.

Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557-596, 30 L. ed. 244-257, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4.

If this statute, as construed by the court below, includes within its prohibitions combinations which are essentially rightful and constitutional, it cannot be sustained as to such a combination as is wrongful and might have been constitutionally forbidden by this statute had its prohibitions been limited only to such or similar combinations. This is not an instance where it is possible to say a statute is valid in part and void in part.

Baldwin v. Franks, 120 U. S. 678, 30 L. ed. 766, 7 Sup. Ct. Rep. 656, 763.

Mr. James G. Flanders argued the cause, and, with Mr. Lafayette M. Sturdevant, filed a brief for defendant in error in Nos. 3 and 4.

Plaintiffs in error can have no proper

concern with the alternative part of the statute, which was separable and distinct and was in no wise applied to them.

Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 43, 44 L. ed. 657, 663, 20 Sup. Ct. Rep. 518; *Clark v. Kansas City*, 176 U. S. 114, 44 L. ed. 392, 20 Sup. Ct. Rep. 284; *Tullis v. Lake Erie & W. R. Co.* 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136.

If the statute, as declared by the legislature and the courts, as to the class of combinations to which it was intended to apply, is constitutional, it is not made unconstitutional because improperly applied to a specific case.

Arrowsmith v. Harmoning, 118 U. S. 194, 30 L. ed. 243, 6 Sup. Ct. Rep. 1023; *Re Storti*, 109 Fed. 807.

Whether a combination like the one in question might lawfully have been entered into under the common law, or not, it is well settled that the legislature of the state has ample power to prohibit it.

State ex rel. Crow v. Firemen's Fund Ins. Co. 152 Mo. 1, 45 L. R. A. 363, 52 S. W. 595.

Any association or combination of persons organized for the purpose of regulating prices is an unlawful combination.

Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666; *Emery v. Ohio Candle Co.* 47 Ohio St. 320, 21 Am. St. Rep. 819, 24 N. E. 660; *Distilling & Cattle Feeding Co. v. People*, 158 Ill. 488, 47 Am. St. Rep. 200, 41 N. E. 188; *Jackson v. Akron Brick Asso.* 53 Ohio St. 303, 35 L. R. A. 287, 53 Am. St. Rep. 637, 41 N. E. 257; *Bishop v. American Preservers' Co.* 157 Ill. 284, 48 Am. St. Rep. 317, 41 N. E. 765; *Santa Clara Valley Mill & Lumber Co. v. Hayes*, 76 Cal. 387, 9 Am. St. Rep. 211, 18 Pac. 391; *Vulcan Powder Co. v. Hercules Powder Co.* 96 Cal. 510, 31 Am. St. Rep. 242, 31 Pac. 581; *Arnot v. Pittston & E. Coal Co.* 68 N. Y. 558, 23 Am. Rep. 100; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173, 8 Am. Rep. 159; *India Bagging Asso. v. Kock*, 14 La. Ann. 164; *Chapin v. Brown Bros.* 83 Iowa, 156, 12 L. R. A. 428, 32 Am. St. Rep. 297, 48 N. W. 1074; *People v. Milk Exchange*, 145 N. Y. 267, 27 L. R. A. 437, 45 Am. St. Rep. 609, 39 N. E. 1062; *Ford v. Chicago Milk Shippers' Asso.* 155 Ill. 166, 27 L. R. A. 298, 39 N. E. 651; *Pacific Factor Co. v. Adler*, 90 Cal. 110, 25 Am. St. Rep. 102, 27 Pac. 36; *Judd v. Harrington*, 139 N. Y. 105, 34 N. E. 790; *De Witt Wire-Cloth Co. v. New Jersey Wire-Cloth Co.* 16 Daly, 529, 14 N. Y. Supp. 277; *John D. Park & Sons Co. v. National Wholesale Druggists Asso.* 50 N. Y. Supp. 1064; *Merz Capsule Co. v. United States Capsule Co.* 67 Fed. 414; *Cravens v. Carter-Crume Co.* 34 C. C. A. 479, 92 Fed. 479.

It is not material whether the price is

increased, or whether it is reduced, or whether the price fixed is a reasonable one or an unreasonable one.

United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; *United States v. Joint Traffic Asso.* 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; *Harding v. American Glucose Co.* 182 Ill. 551, 64 L. R. A. 738, 74 Am. St. Rep. 189, 55 N. E. 577; *National Harrow Co. v. E. Bement & Sons*, 21 App. Div. 290, 47 N. Y. Supp. 462; *Richardson v. Buhl*, 77 Mich. 632, 6 L. R. A. 457, 43 N. W. 1102; *State ex rel. Watson v. Standard Oil Co.* 49 Ohio St. 137, 15 L. R. A. 145, 34 Am. St. Rep. 541, 30 N. E. 279; *People v. Milk Exchange*, 145 N. Y. 267, 27 L. R. A. 437, 45 Am. St. Rep. 609, 39 N. E. 1062.

Nor is it necessary that the purpose should be to establish a complete monopoly.

United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; *Texas Standard Oil Co. v. Adoue*, 83 Tex. 650, 15 L. R. A. 598, 29 Am. St. Rep. 690, 19 S. W. 274.

By article 5 of the Amendments to the Constitution of the United States, the Federal government is prohibited from depriving any person of life, liberty, or property without due process of law. This prohibition upon the Federal government is precisely the same in terms as the prohibition upon the states by the 14th Amendment, under which it is claimed the liberty of plaintiffs in error has been violated. So it must be admitted that the power of the state to pass laws restricting or prohibiting combinations tending to the injury of trade and commerce within the state is at least as broad as the powers of Congress with reference to interstate trade. Decisions of the Federal courts, therefore, arising under the so-called anti-trust law, entitled "An Act to Protect Trade and Commerce against Unlawful Restraint and Monopolies," with reference to the power of Congress to pass such statutes, are strictly in point on the question of the power of the state to enact the statute under consideration.

Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; *United States v. Joint Traffic Asso.* 171 U. S. 505, 571, 43 L. ed. 259, 288, 19 Sup. Ct. Rep. 25.

It may be said that one tendency of this combination was to lower the price of advertising, by making the Journal Company reduce its rates. But it may also be said that its tendency was to raise the price of

advertising by making advertisers of a class which might embrace every advertiser in the community pay an increased rate in the three papers controlled by the parties to the combination. If the object was to force the Journal Company out of business, as counsel suggest it may have been, with this object accomplished the combination might readily extend their arbitrary rates to all advertisers.

People v. Milk Exchange, 145 N. Y. 267, 27 L. R. A. 437, 45 Am. St. Rep. 609, 39 N. E. 1062. See also *Gibbs v. McNeeley*, 60 L. R. A. 152, 55 C. C. A. 70, 118 Fed. 120; *United States v. Addyston Pipe & Steel Co.* 46 L. R. A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96.

The enactment of such statutes as the one in question falls strictly within the broad scope of the police powers of the state.

Noyes, Intercorporate Relations, § 409; *Lake View v. Rose Hill Cemetery Co.* 70 Ill. 191, 22 Am. Rep. 71; *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; *Knoxville Iron Co. v. Harbison*, 183 U. S. 20, 46 L. ed. 60, 22 Sup. Ct. Rep. 1; *Davis v. Massachusetts*, 167 U. S. 43, 42 L. ed. 71, 17 Sup. Ct. Rep. 731; *Jones v. Brim*, 165 U. S. 180, 41 L. ed. 677, 17 Sup. Ct. Rep. 282; *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 592, 41 L. ed. 565, 17 Sup. Ct. Rep. 198; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357.

It is not necessary, in order to uphold the validity of the statute, to demonstrate that combinations of the character of the one in question were illegal at common law; for the power of the legislature to prohibit combinations of this character, in the interest of public policy, goes much further than the common law. But that such combinations were illegal at common law is established beyond question.

Olive v. Van Patten, 7 Tex. Civ. App. 630, 25 S. W. 428; *Van Horn v. Van Horn*, 52 N. J. L. 284, 10 L. R. A. 184, 20 Atl. 485; *Jackson v. Stanfield*, 137 Ind. 592, 23 L. R. A. 588, 36 N. E. 345, 37 N. E. 14; *Old Dominion S. S. Co. v. McKenna*, 24 Blatchf. 244, 30 Fed. 48; *Cassey v. Cincinnati Typographical Union No. 3*, 12 L. R. A. 193, 45 Fed. 135; *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* 19 L. R. A. 387, 5 Inters. Com. Rep. 522, 54 Fed. 730; *Thomas v. Cincinnati, N. O. & T. P. R. Co.* 4 Inters. Com. Rep. 788, 62 Fed. 803; *Hopkins v. Oxley Stave Co.* 28 C. C. A. 99, 49 U. S. App. 709, 83 Fed. 912; *Walker v. Cronin*, 107 Mass. 555; *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 30 Atl. 881; *Graham v. St. Charles Street R. Co.* 47 La. Ann. 214,

27 L. R. A. 416, 49 Am. St. Rep. 366, 16 So. 806; *Arthur v. Oakes*, 25 L. R. A. 414, 4 Inters. Com. Rep. 744, 11 C. C. A. 209, 24 U. S. Ap. 239, 63 Fed. 323; *Ertz v. Produce Exchange*, 79 Minn. 140, 48 L. R. A. 90, 79 Am. St. Rep. 433, 81 N. W. 737; *Deltz v. Winfree*, 80 Tex. 400, 26 Am. St. Rep. 755, 16 S. W. 111; *Dorcunus v. Hennessy*, 176 Ill. 608, 43 L. R. A. 797, 68 Am. St. Rep. 203, 52 N. E. 924, 54 N. E. 524; *Inter-Ocean Pub. Co. v. Associated Press*, 184 Ill. 438, 48 L. R. A. 568, 75 Am. St. Rep. 184, 56 N. E. 822.

This court will not undertake to anticipate an erroneous or mistaken application of the statute by declaring it unconstitutional in advance of such application.

State v. Smiley, 65 Kan. 240, 69 Pac. 199.

Mr. **Lafayette M. Sturdevant** submitted the cause for defendant in error in No. 5.

Mr. Justice **Holmes** delivered the opinion of the court:

These are three writs of error to the supreme court of Wisconsin, brought to set aside convictions and sentences of the plaintiffs in error, the defendants below, upon informations filed by the district attorney. 113 Wis. 419, 89 N. W. 1135. The ground of the writs is that the proceedings violated the rights of the plaintiffs in error under the 14th Amendment of the Constitution of the United States. The informations were brought under the Wisconsin statutes of 1898, § 4466a, which impose imprisonment or fine on "any two or more persons who shall combine . . . for the purpose of wilfully or maliciously injuring another in his reputation, trade, business, or profession, by any means whatever," etc. The plaintiffs in error were severally charged [202] with unlawfully combining together *with the intent of wilfully and maliciously injuring The Journal Company, a corporation, and certain persons named, stockholders and officers of the company, in their trade and business. It was alleged that the company was publisher of a newspaper in Milwaukee, and had notified an increase of about 25 per cent in its charges for advertising, and that thereupon the plaintiffs in error, who were managers of other newspapers in the same place, in pursuance of their combination, and with the intent of wilfully, maliciously, and unlawfully injuring The Journal Company and the others named, agreed as follows: If any person should agree to pay the increased rate to The Journal Company, then he should not be permitted to advertise in any of the other three newspapers except at a corresponding increase of rate; but if he should refuse to pay the Journal Com-

pany the increased rate, then he should be allowed to advertise in any of the other three papers at the rate previously charged. It was alleged that this conspiracy was carried out, and that much damage to the business of The Journal Company ensued.

The defendant Hoyt demurred to this information, setting up the 14th Amendment. Aikens and Iluegin filed pleas which admitted the combination and intent of injuring The Journal Company, and the resulting damage, but alleged that the combination was entered into in trade competition, and that the parties had the right to make it under the 14th Amendment. The state demurred to the pleas. The demurrer of Hoyt was overruled; those of the state were sustained. The defendants were sentenced and the judgment of the trial court was affirmed by the supreme court of the state on the authority of an earlier decision between the same parties, reported in 110 Wis. 189, 62 L. R. A. 700, 85 N. W. 1046.

The statute, it will be observed, punishes combining for the purpose of wilfully or maliciously injuring another in his business. If it should be construed literally, the word "wilfully" would embrace all injuries intended to follow from the parties' acts, although they were intended only as the necessary means *to ulterior gain for the parties [203] themselves. Taken in that way the word would hit making a new partnership, if it was intended thereby to hurt someone's else business by competition. We shall not consider whether that branch of the statute, so construed, could be sustained, and express no opinion about it. The supreme court of Wisconsin has intimated that a narrower interpretation will be adopted, and in the present case we have to deal only with the other branch, depending on the word "maliciously," as we shall explain in a moment. The last-quoted word we must take as intended to add something to the word "wilfully," and we can do so only by taking it in its true sense. We interpret "maliciously injuring" to import doing a harm malevolently, for the sake of the harm as an end in itself, and not merely as a means to some further end legitimately desired. Otherwise the phrase would be tautologous, since a wilful injury is malicious in the sense familiar to declarations and indictments, where, indeed, the word means no more than foreseen, or even less than that. A death is caused of malice aforethought if, under the circumstances, known to the actor, the probability of its ensuing from the act done is great and manifest according to common experience. *Com. v. Pierce*, 138 Mass. 165, 178, 52 Am. Rep. 264; 1 East, P. C. 262. See also *Mogul S. S. Co. v. McGregor*, L. R. 23 Q. B. Div. 598, 613.

The informations alleged a combination for the purpose of wilfully and maliciously injuring others, and therefore brought the case within the latter branch of the statute, if there are two, and if "or" in the act is not taken to mean "and." It is true that the plan is set forth, and some argument was spent on whether that plan might or might not be an instrument of ultimate gain. But while that question may have been open when the state court was discussing the evidence warranting a commitment, in 110 Wis. 189, 62 L. R. A. 700, 85 N. W. 1046, none such is open here. The malevolent purpose is alleged, it is admitted by the demurrer, it is not sufficiently denied by the pleas, whatever we may conjecture would [204] have been done if counsel had had this *decision before them. A purely malevolent act may be done even in trade competition.

We come, then, to the question whether there is any constitutional objection to so much of the act as applies to this case. It has been thought by other courts as well as the supreme court of Wisconsin that such a combination, followed by damage, would be actionable even at common law. It has been considered that, prima facie, the intentional infliction of temporal damages is a cause of action, which, as a matter of substantive law, whatever may be the form of pleading, requires a justification if the defendant is to escape. *Mogul S. S. Co. v. McGregor*, L. R. 23 Q. B. Div. 598, 613, [1892], A. C. 25, 61 L. J. Q. B. N. S. 295, 66 L. T. N. S. 1, 40 Week. Rep. 337, 7 Asp. Mar. L. Cas. 120, 56 J. P. 101. If this is the correct mode of approach, it is obvious that justifications may vary in extent, according to the principle of policy upon which they are founded, and that while some—for instance, at common law, those affecting the use of land—are absolute (*Bradford v. Pickles* [1895], A. C. 587), others may depend upon the end for which the act is done. *Moran v. Dunphy*, 177 Mass. 485, 487, 52 L. R. A. 115, 83 Am. St. Rep. 289, 59 N. E. 125; *Plant v. Woods*, 176 Mass. 492, 51 L. R. A. 339, 79 Am. St. Rep. 330, 57 N. E. 1011; *Squires v. Wason Mfg. Co.* 182 Mass. 137, 140, 141, 65 N. E. 32. See cases cited in 62 L. R. A. 673. It is no sufficient answer to this line of thought that motives are not actionable, and that the standards of the law are external. That is true in determining what a man is bound to foresee, but not necessarily in determining the extent to which he can justify harm which he has foreseen. *Quinn v. Leathem* [1901], A. C. 495, 524, 70 L. J. P. C. N. S. 76, 85 L. T. N. S. 289, 50 Week. Rep. 139, 65 J. P. 708.

Whether, at common law, combination would make conduct actionable which would be lawful in a single person, it is unnecessary
195 U. S.

to consider. *Quinn v. Leathem* [1901], A. C. 495, 70 L. J. P. C. N. S. 76, 85 L. T. N. S. 289, 50 Week. Rep. 139, 65 J. P. 708. We are aware, too, that a prevailing opinion in England makes motives immaterial, although it is probable that in *Allen v. Flood* [1898], A. C. 1, 94, 67 L. J. Q. B. N. S. 119, 77 L. T. N. S. 717, 46 Week. Rep. 258, 62 J. P. 595, the jury were instructed, as in *Temperton v. Russell* [1893], 1 Q. B. 715, 719, 62 L. J. Q. B. N. S. 412, 4 Reports, 376, 69 L. T. N. S. 78, 41 Week. Rep. 565, 57 J. P. 676, in such a way that their finding of malice meant no more than that the defendant had acted with foresight of the harm which he would inflict, *as a means to an [205] end. *Quinn v. Leathem* [1901], A. C. 495, 514. However these things may be, we have said enough to show that there is no anomaly in a statute, at least which punishes a combination such as is charged here. It has been held that even the free use of land by a single owner for purely malevolent purposes may be restrained constitutionally, although the only immediate injury is to a neighboring landowner. *Rideout v. Knox*, 148 Mass. 368, 2 L. R. A. 81, 12 Am. St. Rep. 560, 19 N. E. 390. Whether this decision was right or not, when it comes to the freedom of the individual, malicious mischief is a familiar and proper subject for legislative repression. *Com. v. Walden*, 3 Cush. 558. Still more are combinations for the purpose of inflicting it. It would be impossible to hold that the liberty to combine to inflict such mischief, even upon such intangibles as business or reputation, was among the rights which the 14th Amendment was intended to preserve. The statute was assumed to be constitutional in *Arthur v. Oakes*, 25 L. R. A. 414, 4 Inters. Com. Rep. 744, 11 C. C. A. 209, 24 U. S. App. 239, 63 Fed. 310, 325, 326.

But if all these general considerations be admitted, it is urged, nevertheless, that the means intended to be used by this particular combination were simply the abstinence from making contracts; that a man's right so to abstain cannot be infringed on the ground of motives; and further, that it carries with it the right to communicate that intent to abstain to others, and to abstain in common with them. It is said that if the statute extends to such a case it must be unconstitutional. The fallacy of this argument lies in the assumption that the statute stands no better than if directed against the pure nonfeasance of singly omitting to contract. The statute is directed against a series of acts, and acts of several,—the acts of combining, with intent to do other acts. "The very plot is an act in itself." *Mulcahy v. Queen*, L. R. 3 H. L. 306, 317. But an act which, in itself, is merely a voluntary

muscular contraction, derives all its character from the consequences which will follow it under the circumstances in which it was done. When the acts consist of making a combination calculated to cause temporal [206] damage, the power to punish such acts, when done maliciously, cannot be denied because they are to be followed and worked out by conduct which might have been lawful if not preceded by the acts. No conduct has such an absolute privilege as to justify all possible schemes of which it may be a part. The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot, neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law.

It was urged farther that to make a right depend upon motives is to make it depend upon the whim of a jury, and to deny the right. But it must be assumed that the constitutional tribunal does its duty, and finds facts only because they are proved. The power of the legislature to make the fact of malice material we think sufficiently appears from what we already have said.

Finally, it is argued that the supreme court of Wisconsin would hold that the statute extends to acts of which the motives were mixed, and which were done partly from disinterested malevolence and partly from a hope of gain. If so, it is said, the statute would be open to all the objections at which we have hinted in dealing with the word "wilfully." The supreme court did use some language which looked that way, but we consider it to have decided that the statute would be confined to combinations with intent to do wrongful harm. 110 Wis. 193, 260, 62 L. R. A. 700, 85 N. W. 1046. Thus limited, on whatever ground, the statute would punish only combinations of a kind for which no justification could be offered and those which were taken out of the justification by the motive with which they were made. We see no sufficient reason to believe that the court will go farther, or construe the act in such a way as to raise questions which we need not go into here. Therefore it is unnecessary to consider whether, on a more literal construction, the portion dealing with malicious intent could be separated from that which deals with the purpose of merely wilful injury, and saved, [207] even if the latter were held to go too far. Probably the two phrases will be read together and the statute made unquestionable as a whole.

Judgment affirmed.

Mr. Justice **White**, dissenting:

Not being able to concur in the conclusion of the court that the opinion of the

supreme court of Wisconsin has affixed to the statute of that state a much narrower meaning than the text of the statute imports, and thinking, on the contrary, that not only such text, but the construction of the statute adopted by the supreme court of Wisconsin, operates to deprive the citizen of a lawful right to contract, protected by the 14th Amendment, I dissent.

MARIA F. THOMAS and George Folsom
v.

BOARD OF TRUSTEES OF THE OHIO
STATE UNIVERSITY.

(See S. C. Reporter's ed. 207-218.)

Federal courts—jurisdiction—sufficiency of allegations to show diverse citizenship.

1. An allegation that the defendant, the Board of Trustees of the Ohio State University, is a citizen of and domiciled in that state, and was created by and exists under certain designated laws of that state, with power to sue and be sued, will be held not sufficiently to aver that such body is an Ohio corporation, within the jurisdictional rule of the Federal courts imputing to the members of a corporation citizenship in the state creating it, where the statute creating the board has been upheld by the highest court of the state as not conferring and not intended to confer corporate powers in violation of a prohibition in the state Constitution against conferring corporate powers by special act.
2. The citizenship of the individual members of the Board of Trustees of the Ohio State University does not sufficiently appear for the purpose of conferring jurisdiction on a Federal circuit court of a suit against such board, from averments that show that the board, while not an Ohio corporation, was created by and exists as an organized body under the laws of that state, although, under the Ohio Constitution, no person can be elected or appointed to any office in the state unless he possesses the qualifications of an elector, and an elector must be a citizen of the state.
3. The jurisdiction of a Federal circuit court on the ground of diverse citizenship over a suit between a citizen of Michigan and the Board of Trustees of the Ohio State University will sufficiently appear, so far as the pleadings are concerned, without bringing the several persons constituting the board before the court as defendants, where it is averred that the board was created by and exists as an organized body under the laws

NOTE.—As to sufficiency of averments of citizenship to show jurisdiction in Federal courts—see note to *Shipp v. Williams*, 10 C. C. A. 261.

On citizenship of corporations for purposes of Federal jurisdiction—see notes to *Stephens v. St. Louis & S. F. R. Co.* 14 L. R. A. 184; *St. Louis, I. M. & S. R. Co. v. Newcom*, 6 C. C. A. 172; *National S. S. Co. v. Tugman*, 27 L. ed. U. S. 87; *Hope Ins. Co. v. Boardman*, 3 L. ed. U. S. 36.

of Ohio, with power to sue and be sued by its collective name, if it is also alleged that each individual trustee is a citizen of that state.

[No. 43.]

Argued and submitted November 3, 1904.
Decided November 14, 1904.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Sixth Circuit, presenting questions relating to the jurisdiction of the Circuit Court for the Southern District of Ohio, Eastern Division, on the ground of diverse citizenship, of a suit in which the Board of Trustees of the Ohio State University was a defendant. Answered by holding that the Circuit Court was without jurisdiction, with a grant to the Circuit Court of Appeals of leave to authorize such amendment of the bill in the Circuit Court as will show jurisdiction.

The facts are stated in the opinion.

Mr. Lawrence Maxwell, Jr., argued the cause, and, with Mr. Joseph Olds, filed a brief for the University:

The real character of an association does not depend upon the name by which it is called.

1 Morawetz, Priv. Corp. § 18; *Liverpool & L. Life & F. Ins. Co. v. Massachusetts (Liverpool & L. Life & F. Ins. Co. v. Oliver)* 10 Wall. 566, 19 L. ed. 1029, 100 Mass. 531; *Thomas v. Dakin*, 22 Wend. 9, 103.

The board of trustees has all the qualities possessed by corporations generally in this country.

Williams, Real Prop. 17th ed. 347; 1 Morawetz, Priv. Corp. § 1; *Thomas v. Dakin*, 22 Wend. 9, 101; 1 Dill. Mun. Corp. 4th ed. § 18.

The jurisdictional rule in the Federal courts extends to all corporations, public as well as private (*Cowles v. Mercer County*, 7 Wall. 118, 19 L. ed. 86; *Ysleta v. Canda*, 67 Fed. 6); nor does it matter how the corporation is created, managed, or terminated.

A citizen of the United States, residing in any state of the Union, is a citizen of that state.

Gassies v. Ballou, 6 Pet. 761, 8 L. ed. 573; *Boyd v. Nebraska*, 143 U. S. 135, 36 L. ed. 103, 12 Sup. Ct. Rep. 375; *Lehman v. McBride*, 15 Ohio St. 600.

The members of the board of trustees are officers appointed in the state of Ohio.

State ex rel. Atty. Gen. v. Wilson, 29 Ohio St. 349; *State ex rel. Rupp v. Rust*, 4 Ohio C. C. 329; *State ex rel. Atty. Gen. v. Adams*, 58 Ohio St. 613, 41 L. R. A. 727, 65 Am. St. Rep. 792, 51 N. E. 135; *State ex rel. Atty. Gen. v. Kennon*, 7 Ohio St. 547.

195 U. S. U. S., Book 49.

All things are presumed to be rightly done until the contrary is proved.

22 Am. & Eng. Enc. Law, 2d ed. pp. 1266, 1267, 1270; 14 Am. & Eng. Enc. Law, 2d ed. p. 1099; *Hayes v. United States*, 170 U. S. 637, 42 L. ed. 1174, 18 Sup. Ct. Rep. 735; *Nofire v. United States*, 164 U. S. 660, 41 L. ed. 589, 17 Sup. Ct. Rep. 212.

The governor could not have regularly or legally appointed as a member of said board any person who was not a citizen of Ohio. It was the duty of the senate to refuse to confirm the appointment of anyone not having that qualification. The presumption is that the governor and the senate performed their respective duties, and that the members of the board are citizens of Ohio.

After the amendment to the bill, setting up further jurisdictional facts, no objection to the jurisdiction was made by plea in abatement, or otherwise. Before the court can now hold that there was want of jurisdiction in the circuit court, it must be legally certain of that fact.

Deputron v. Young, 134 U. S. 241, 252, 33 L. ed. 923, 929, 10 Sup. Ct. Rep. 539.

If the defendant had, by pleading, objected to the jurisdiction, the burden of showing that there was not a diversity of citizenship would have rested upon it.

Adams v. Shirk, 55 C. C. A. 25, 117 Fed. 801.

A corporation is not, strictly speaking, a citizen. But for the purposes of suing and being sued in the Federal courts, it is treated as a citizen of the state under whose laws it was created.

Cowles v. Mercer County, 7 Wall. 118, 19 L. ed. 86; *Bank of United States v. Deveaux*, 5 Cranch, 87, 3 L. ed. 45; *St. Louis & S. F. R. Co. v. James*, 161 U. S. 545, 562, 40 L. ed. 802, 16 Sup. Ct. Rep. 621.

The board was properly sued under its statutory designation.

Great Southern Fire Proof Hotel Co. v. Jones, 177 U. S. 449, 44 L. ed. 842, 20 Sup. Ct. Rep. 690.

If the suit was not instituted in proper form; still, it might be maintained in such defective form unless the defendant objected thereto on that ground.

St. Louis S. W. R. Co. v. Henson, 7 C. C. A. 349, 19 U. S. App. 169, 58 Fed. 531; *Tootle v. Coleman*, 57 L. R. A. 120, 46 C. C. A. 132, 107 Fed. 41; *Story v. Livingston*, 13 Pet. 359, 10 L. ed. 200; *Carey v. Brown*, 92 U. S. 171, 23 L. ed. 469.

The case having been removed to the Federal court upon the defendant's petition, it does not lie in its mouth to claim that that court had no jurisdiction of the case, unless the court from which it was removed had no jurisdiction.

Cowley v. Northern P. R. Co. 159 U. S.

569, 40 L. ed. 263, 16 Sup. Ct. Rep. 127; *Tootle v. Coleman*, 57 L. R. A. 120, 46 C. A. 132, 107 Fed. 41.

Mr. J. E. Sater submitted the cause for Thomas and Folsom. *Mr. L. F. Sater* was with him on the brief:

The act to establish and maintain an agricultural and mechanical college in Ohio (now the Ohio State University) does not constitute the board of trustees therein provided for a corporation.

Neil v. Ohio Agricultural & Mechanical College, 31 Ohio St. 15.

Corporate existence must be positively averred, or must be, as a fact, brought affirmatively into the record.

Desty, Fed. Proc. 9th ed. p. 378; *Shiras*, Eq. Pr. 2d ed. p. 32; *Bates*, Fed. Eq. Proc. p. 146, § 125; *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. ed. 451; *Piquignot v. Pennsylvania R. Co.* 16 How. 104, 14 L. ed. 863; *Pennsylvania v. Quicksilver Min. Co.* 10 Wall. 553, 19 L. ed. 998; *Muller v. Dows*, 94 U. S. 444, 24 L. ed. 207; *United States Exp. Co. v. Kountze Bros.* 8 Wall. 342, 19 L. ed. 457; *Manufacturers' Nat. Bank v. Baack*, 2 Abb. U. S. 232, Fed. Cas. No. 9,052. See also 2 Garland & R. Fed. Pr. p. 929; 1 Loveland, Forms on Fed. Proc. p. 230.

Decisions of the highest courts of the state construing its statutes are binding on the Federal courts, although they would put a different construction on them were they first called upon to construe them.

Brannon, 14th Amendment, 397; *Burgess v. Seligman*, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10; *New York L. Ins. Co. v. Cravens*, 178 U. S. 389, 395, 44 L. ed. 1116, 1122, 20 Sup. Ct. Rep. 962; *O'Brien v. Wheelock*, 95 Fed. 883; *Bucher v. Cheshire R. Co.* 125 U. S. 555, 31 L. ed. 795, 8 Sup. Ct. Rep. 974; *Randolph v. Quidnick Co. (Jencks v. Quidnick Co.)* 135 U. S. 457, 34 L. ed. 200, 10 Sup. Ct. Rep. 655; *Brown v. New Jersey*, 175 U. S. 172, 44 L. ed. 119, 20 Sup. Ct. Rep. 77; *Sutherland-Innes Co. v. Evart*, 30 C. C. A. 305, 58 U. S. App. 335, 86 Fed. 597; *Andrews v. National Foundry & Pipe Works*, 36 L. R. A. 139, 22 C. C. A. 110, 46 U. S. App. 281, 76 Fed. 166; *Saux City Terminal R. & Warehouse Co. v. Trust Co. of N. A.* 173 U. S. 99, 107, 43 L. ed. 628, 631, 19 Sup. Ct. Rep. 341; *Missouri, K. & T. R. Co. v. McCann*, 174 U. S. 580, 43 L. ed. 1093, 19 Sup. Ct. Rep. 755; *New York, L. E. & W. R. Co. v. Pennsylvania*, 158 U. S. 431, 39 L. ed. 1043, 15 Sup. Ct. Rep. 896; *Clarke v. Clarke*, 178 U. S. 186, 44 L. ed. 1028, 20 Sup. Ct. Rep. 873; *Nobles v. Georgia*, 168 U. S. 398, 42 L. ed. 515, 18 Sup. Ct. Rep. 87; *First Nat. Bank v. Chehalis County*, 166 U. S. 440, 41 L. ed. 1069, 17 Sup. Ct. Rep. 629; *Merchants' &*

M. Nat. Bank v. Pennsylvania, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829; *Yazoo & M. Valley R. Co. v. Adams*, 181 U. S. 580, 45 L. ed. 1011, 21 Sup. Ct. Rep. 729.

A quasi corporation cannot maintain a suit in the Federal courts.

Great Southern Fire Proof Hotel Co. v. Jones, 177 U. S. 449, 44 L. ed. 842, 20 Sup. Ct. Rep. 690.

The board of trustees of the Ohio State University does not possess the essential attributes of a corporation.

Walsh v. New York & B. Bridge, 96 N. Y. 427; *Liverpool & L. Life & F. Ins. Co. v. Massachusetts (Liverpool & L. Life & F. Ins. Co. v. Oliver)* 10 Wall. 566, 19 L. ed. 1029.

If the court finds the board of trustees to be a corporation, it must declare the act of its creation unconstitutional.

School Dist. No. 56 v. St. Joseph F. & M. Ins. Co. 103 U. S. 707, 26 L. ed. 601.

This court should not disturb the policy of Ohio as determined by an unbroken line of legislation and decisions extending over more than half a century.

Chestnut v. Shane, 16 Ohio, 599, 47 Am. Dec. 387; *M'Keen v. Delancy*, 5 Cranch, 22, 3 L. ed. 25.

Only corporations or natural persons can sue or be sued by their respective names in the United States courts.

Great Southern Fire Proof Hotel Co. v. Jones, 177 U. S. 449, 44 L. ed. 842, 20 Sup. Ct. Rep. 690; *Beatty v. Kurtz*, 2 Pet. 566, 7 L. ed. 521; *Ebbinghaus v. Killian*, 1 Mackey, 247; *American Steel & Wire Co. v. Wire Drawers' Die Makers' Unions Nos. 1 & 3*, 90 Fed. 598; *Greer v. Stoller*, 77 Fed. 1.

An unincorporated society or company, association or board, has no legal entity distinct from that of its members.

Haskins v. Alcott, 13 Ohio St. 216; *Maitoon v. Wentworth*, 7 Ohio Dec. Reprint, 639; 22 Enc. Pl. & Pr. 230, 242; *Higdon v. Gardner*, 2 Ohio C. C. 340; *Story*, Eq. Pl. § 497; *Cooper*, Ch. Pl. pp. 164, 165; 1 Chitty, Pl. pp. 18, 19, note; *Mitford*, Ch. Pl. pp. 40, 41; *Lloyd v. Loaring*, 6 Ves. Jr. 773. See also *Gurd v. Wallace*, 7 Dana, 190, 32 Am. Dec. 85; 2 Cook, Corp. 4th ed. p. 947.

If the corporate name is used without an averment of the corporate existence, the citizenship of all the members must be averred, and the suit will then be regarded as the joint suit of the individual persons united together in a corporate body and acting under its corporate name.

Lafayette Ins. Co. v. French, 18 How. 404, 15 L. ed. 451; *Piquignot v. Pennsylvania R. Co.* 16 How. 104, 14 L. ed. 863; *Ohio & M.*

R. Co. v. Wheeler, 1 Black, 295, 296, 17 L. ed. 130.

It is not sufficient that jurisdiction may be inferred argumentatively from the averment.

Wolfe v. Hartford Life & Annuity Ins. Co. 148 U. S. 389, 37 L. ed. 493, 13 Sup. Ct. Rep. 602.

There must appear upon the record, not that the board is composed of a citizen, but of citizens; not that the single individual entity, the board, is or consists of a single citizen, but that it is composed of a number of citizens.

Covington Drawbridge Co. v. Shepherd, 20 How. 227, 15 L. ed. 896.

The members of the association must be brought into the record as parties by positive averment.

Great Southern Fire Proof Hotel Co. v. Jones, 177 U. S. 449, 44 L. ed. 842, 20 Sup. Ct. Rep. 690.

Mr. Justice **Harlan** delivered the opinion of the court:

This case is before us upon certified questions relating to the jurisdiction of the circuit court.

The suit is in equity, and the plaintiff is a citizen of Michigan. The defendants are George Folsom, a citizen of California, and the Board of Trustees of the Ohio State University.

The object of the bill was to effect the partition of certain lands claimed by the plaintiff and the defendant Folsom as tenants in common, but held adversely by the defendant board of trustees. The plaintiff sought to have the title determined as preliminary to partition.

The board of trustees appeared and demurred to the bill as not making a case entitling the plaintiff to any relief against it.

[209] *The demurrer was sustained, and the bill dismissed,—the decree reciting that neither the plaintiff nor the defendant Folsom had any title or interest in the lands described in the bill, or in the rents or profits thereof, but that the same belonged to the Board of Trustees of the Ohio State University. Folsom entered his appearance in circuit court, but made no defense, nor was any decree taken by default against him.

From that decree the plaintiff and the defendant Folsom prayed and perfected an appeal.

It is certified that the jurisdiction of the circuit court was wholly dependent upon diversity of citizenship, and that neither defendant objected in the circuit court that the case was not of equitable cognizance, or that the court, as a Federal court, was without jurisdiction to determine it. But in the

circuit court of appeals Folsom insisted, among other things, that the circuit court "had no cognizance of the cause because the requisite diversity of citizenship does not exist, the Board of Trustees of the Ohio State University not being a corporation of Ohio within the jurisdictional rule imputing to the members of that board citizenship of the state under whose law it is organized."

The circuit court of appeals propound the following questions:

1. Does the bill sufficiently aver that the Board of Trustees of Ohio State University is a corporation of the state of Ohio, or does it aver facts which, in legal intendment, constitute said body a corporation of the state of Ohio, within the rule that a suit by or against a corporation in a court of the United States is conclusively presumed, for the purpose of litigation, to be one by or against citizens of the state creating the corporation?

2. If the said board of trustees be not such a corporation as is required by the jurisdictional rule referred to, may this suit be maintained against it as "The Board of Trustees of the Ohio State University" without bringing the persons constituting the board before the court as defendants?

*3. If the said board may sue or be sued [210] in a Federal court by the name of "The Board of Trustees of the Ohio State University," although not constituting a corporation of the state of Ohio, within the jurisdictional rule referred to in the first question, do the facts stated on the face of the bill sufficiently show that the persons composing said board of trustees are citizens of Ohio, or should the court take notice of the law creating said board of trustees, and of other laws of Ohio defining the qualification of such trustees, and by legal intendments find that the persons constituting said board when this bill was filed were in fact citizens of Ohio, and that the requisite diversity of citizenship existed to give jurisdiction to the circuit court?

That the jurisdiction of a circuit court of the United States is limited in the sense that it has no jurisdiction except that conferred by the Constitution and laws of the United States; that a cause is presumed to be without its jurisdiction unless the contrary affirmatively appears; that such jurisdiction, or the facts upon which, in legal intendment, it rests, must be distinctly and positively averred in the pleadings, or should appear affirmatively and with equal distinctness in other parts of the record, it not being sufficient that jurisdiction may be inferred argumentatively; and that, for the purposes of suing and being sued in a circuit court of the United States, the mem-

bers of a local "corporation" are conclusively presumed to be citizens of the state by whose laws it was created, and in which alone the corporate body has a legal existence,—are propositions so firmly established that further discussion of them would be both useless and inappropriate. *Brown v. Keene*, 8 Pet. 112, 115, 8 L. ed. 885, 886; *Louisville, C. & O. R. Co. v. Letson*, 2 How. 497, 11 L. ed. 353; *Marshall v. Baltimore & O. R. Co.* 16 How. 314, 14 L. ed. 953; *Lafayette Ins. Co. v. French*, 18 How. 404, 405, 15 L. ed. 451; *Covington Drawbridge Co. v. Shepherd*, 20 How. 227, 15 L. ed. 896; *Ohio & M. R. Co. v. Wheeler*, 1 Black, 286, 296, 17 L. ed. 130, 133; *Merchants' Ins. Co. v. Ritchie*, 5 Wall. 541, 18 L. ed. 540; *Robertson v. Cease*, 97 U. S. 646, 648, 24 L. ed. 1057, 1058; *National S. S. Co. v. Tugman*, 106 U. S. 118, 120, 27 L. ed. 87, 88, 1 Sup. Ct. [211] Rep. 58; **King Bridge Co. v. Otoc County*. 120 U. S. 226, 30 L. ed. 623, 7 Sup. Ct. Rep. 552; *Parker v. Ormsby*, 141 U. S. 81, 35 L. ed. 654, 11 Sup. Ct. Rep. 912; *Continental Nat. Bank v. Buford*, 191 U. S. 120, 48 L. ed. 119, 24 Sup. Ct. Rep. 54.

It is equally well established that when jurisdiction depends upon diverse citizenship the absence of sufficient averments or of facts in the record showing such required diversity of citizenship is fatal and cannot be overlooked by the court, even if the parties fail to call attention to the defect, or consent that it may be waived. *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U. S. 379, 28 L. ed. 462, 4 Sup. Ct. Rep. 510; *Martin v. Baltimore & O. R. Co.* 151 U. S. 673, 689, 38 L. ed. 311, 317, 14 Sup. Ct. Rep. 533; *Powers v. Chesapeake & O. R. Co.* 169 U. S. 92, 98, 42 L. ed. 673, 675, 18 Sup. Ct. Rep. 264. As late as in *Minnesota v. Northern Securities Co.* 194 U. S. 48, 62-3, 48 L. ed. 870, 877, 878, 24 Sup. Ct. Rep. 598, 601, we said, both parties insisting upon the jurisdiction of the circuit court: "Consent of parties can never confer jurisdiction upon a Federal court. If the record does not affirmatively show jurisdiction in the circuit court, we must, upon our own motion, so declare and make such order as will prevent that court from exercising an authority not conferred upon it by statute."

So that the fact stated in the certificate, that neither party in the circuit court objected to its jurisdiction, is of no consequence.

Two other cases illustrating the above rules may be specially referred to.

In *Chapman v. Barney*, 129 U. S. 677, 682, 32 L. ed. 800, 801, 9 Sup. Ct. Rep. 426, 428, which was a suit in the circuit court for the northern district of Illinois, by the United States Express Company against a citizen of Illinois, the declaration alleged

that the company was organized under and by virtue of the laws of New York, and was a citizen of that state. The court said: "On looking into the record we find no satisfactory showing as to the citizenship of the plaintiff. The allegation of the amended petition is, that the United States Express Company is a joint-stock company, organized under a law of the state of New York, and is a citizen of that state. But the express company cannot be a citizen of New York, within the meaning of the statutes regulating jurisdiction, unless it be a corporation. The allegation that the company *was organized under the laws of New York [212] is not an allegation that it is a corporation. In fact, the allegation is, that the company is not a corporation, but a joint-stock company,—that is, a mere partnership. And, although it may be authorized by the laws of the state of New York to bring suit in the name of its president, that fact cannot give the company power, by that name, to sue in a Federal court. The company may have been organized under the laws of the state of New York, and may be doing business in that state, and yet all the members of it may not be citizens of that state. The record does not show the citizenship of Barney or of any of the members of the company."

In *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S. 449, 456, 457, 44 L. ed. 842, 845, 20 Sup. Ct. Rep. 690, 693, the bill alleged that the plaintiffs Jones and others were members of a limited partnership association, doing business, by their firm name, under the authority of a Pennsylvania statute, and that such association was a citizen of that state. Although the Constitution of Pennsylvania provided that the term "corporation," as used in a certain article of that instrument, should be construed as including all joint-stock companies or associations having any of the powers or privileges of corporations not possessed by individuals or partnerships, and although the supreme court of Pennsylvania had held that it would not be improper to call a limited partnership, created under its statutes, a quasi corporation, having some of the characteristics of a corporation, this court, without considering the merits of the case, said: "When the question relates to the jurisdiction of a circuit court of the United States as resting on the diverse citizenship of the parties, we must look, in the case of a suit by or against a partnership association, to the citizenship of the several persons composing such association. . . . That a limited partnership association created under the Pennsylvania statute may be described as a 'quasi corporation,' having some of the characteristics of a corporation, or as a 'new artificial person,' is not a sufficient reason for regarding it as

a corporation within the jurisdictional rule [213]*heretofore adverted to. That rule must not be extended. We are unwilling to extend it so as to embrace partnership associations. . . We therefore adjudge that, as the bill does not make a case arising under the Constitution and laws of the United States, it was necessary to set out the citizenship of the individual members of the partnership association of Jones & Laughlins, Limited, which brought this suit." The judgment was reversed upon the ground that the jurisdiction of the circuit court did not affirmatively appear from the record. Upon the return of the cause to the court of original jurisdiction the bill was amended, and it was alleged that each member of the partnership was a citizen of Pennsylvania. The case was then heard upon its merits and was again brought here and determined. *Great Southern Fire Proof Hotel Co. v. Jones*, 193 U. S. 532, 48 L. ed. 778, 24 Sup. Ct. Rep. 576.

In the light of these decisions we come to the question whether the jurisdiction of the circuit court affirmatively appears in this case. If it does not, it must be held that that court had no authority to take cognizance of it.

The bill alleges that the defendant the Board of Trustees of the Ohio State University "was created by, and exists under and by virtue of, a law duly passed and enacted by the legislature of said state of Ohio, on March 22d, 1870, and now known and designated as §§ 4105-9 and following, of the Revised Statutes of said state of Ohio, and the subsequent acts amendatory of and supplementary thereto;" that said board, "under and by virtue of the aforesaid laws and enactments, and at all times since its creation and establishment, is fully authorized and empowered to sue and be sued, to contract and be contracted with, to make and use a common seal, and to alter the same at its pleasure, and to adopt by-laws, rules, and regulations for the government of said college, and to have the general supervision of all lands, buildings, and other property belonging to said college, and of receiving by gift, devise, or bequest, moneys, lands, and other properties for its benefit and for the benefit of those under its charge, subject, [214]*however, to the provisions, exceptions, and restrictions contained in section twenty and five thousand nine hundred and fifteen of the Revised Statutes of the state of Ohio;" and is "a citizen of and domiciled in the state of Ohio." 67 Ohio Laws, 20; 75 Ohio Laws, 126; Ohio Rev. Stat. §§ 4105 *et seq.*

Do those averments, taken in connection with the statutes of Ohio relating to the defendant board,—of the provisions of which statutes judicial notice may be taken (*Hanley v. Donoghue*, 116 U. S. 1, 6, 29 L. ed. 195 U. S.

535, 537, 6 Sup. Ct. Rep. 242),—sufficiently show that the circuit court was entitled to take cognizance of this case?

If the defendant board had been specifically averred to be, and was in fact, a corporation created by and existing under the laws of Ohio, then, within the meaning of the adjudged cases, the controversy would have been one between citizens of different states, and consequently within the jurisdiction of the circuit court; for, in that case, the legal presumption would be that the trustees were citizens of the state by which the corporation was brought into existence, and no averment or evidence to the contrary would be admissible for the purpose of withdrawing the suit from the jurisdiction of the circuit court. *Ohio & M. R. Co. v. Wheeler*, 1 Black, 286, 296, 17 L. ed. 130. Here the averment is only that the defendant board of trustees is a citizen of and domiciled in Ohio; not that the trustees themselves are citizens of that state. That averment alone is not sufficient. In *Lafayette Ins. Co. v. French*, 18 How. 404, 405, 15 L. ed. 451, 452, which was a suit brought in the circuit court of the United States for the district of Indiana, the declaration alleged that the plaintiffs were citizens of Ohio, and that the defendant, the Lafayette Insurance Company, was a citizen of Indiana. This court, speaking by Justice Curtis, said: "This averment is not sufficient to show jurisdiction. It does not appear from it that the Lafayette Insurance Company is a corporation, or, if it be such, by the law of what state it was created. The averment that the company is a citizen of the state of Indiana can have no sensible meaning attached to it. This court does not hold that either a voluntary association of *persons, or an association [215] into a body politic, created by law, is a citizen of a state within the meaning of the Constitution." It is vital that the corporate character of the collective body should be averred or shown.

The fundamental inquiry, therefore, is whether the defendant board of trustees is a "corporation" within the jurisdictional rule that admits of a corporation being regarded, for purposes of suing and being sued in the courts of the United States, as a citizen of the state under and by the laws of which it was created. The pleadings, we have seen, do not in terms aver the board to be a corporation; only that it is a citizen of and domiciled in Ohio, and to have been created as a collective body by the laws of that state, with power to sue and be sued by the name of the Board of Trustees of the Ohio State University. Those laws must therefore be examined in order to ascertain whether, for purposes of suit in the circuit court of the United States, the board may be

deemed a corporation of Ohio within the meaning of the above cases.

In determining this question we are confronted with the fact that the statute creating the defendant board was clearly a special, as distinguished from a general, act, and that the Constitution of Ohio forbade the passage of any special act conferring corporate powers. Ohio Const. art. 13, § 1. So that the board of trustees cannot be held to have been made a corporation or endowed with corporate powers without holding that the act by which it was created was invalid under the Constitution of Ohio; whereas, the supreme court of Ohio have adjudicated that the act was valid, as not conferring, and as not intended to confer, corporate powers on the board.

This question was presented in *Neil v. Ohio Agricultural & Mechanical College* (1876) 31 Ohio St. 15, 21, which was the original name of the Ohio State University. The validity of the act creating the board was there brought in question as having, to all intents and purposes, created a corporation, and clothed it with corporate powers and privileges. But the supreme court of [216] Ohio said: **"We are not able to yield our assent to this construction of the statute. The act is entitled 'An Act to Establish and Maintain an Agricultural and Mechanical College in Ohio.'* It creates a board of trustees, to be appointed by the governor, by and with the advice and consent of the senate; and commits to such board the government, control, and general management of the affairs of the institution; and while the statute authorizes the board to make contracts for the benefit of the college, and to maintain actions, if necessary, to enforce them, and to exercise other powers similar to those conferred on bodies corporate, it does not assume to, nor does it in fact, create or constitute such board of trustees a corporation; and hence does not clothe it with corporate functions or powers. *State ex rel. Atty. Gen. v. Davis*, 23 Ohio St. 434. The college is a state institution, designed and well calculated to promote public educational interests, established for the people of the whole state, to be managed and controlled by such agencies as the legislature, in its wisdom, may provide. Similar powers, but perhaps less extensive, because less required, are conferred on the trustees of the various hospitals for the insane (73 Ohio Laws, 80), and on the board of managers of the Ohio Soldiers' and Sailors' Orphans' Homes (67 Ohio Laws, 53), and other institutions of the state. The powers thus conferred are essentially necessary to accomplish the objects for which these institutions were established. The power to establish

them is found clearly granted in the 7th article of the Constitution." The article here referred to gave the legislature power to establish benevolent and other state institutions.

Thus, upon an issue distinctly made, the supreme court of Ohio has adjudged that the defendant board is not, and was not intended to be made, a corporation of the state, but only an agency to manage and control a state institution as the state may direct or provide. And the interpretation of the state Constitution upon which that judgment rests has never been modified by that court.

While the state court may not conclusively determine for *this court what is and [217] what is not a corporation within the meaning of the jurisdictional rule that a corporation, for purposes of suing and being sued in the courts of the United States, is, under the Constitution and laws of the United States, to be deemed a citizen of the state by whose laws it is created, nevertheless, this court should accept the judgment of the highest court of a state upon the question whether a particular body created by its laws is or is not a corporation, by virtue of those laws, unless a contrary view is demanded by most cogent reasons involving or affecting the constitutional and statutory jurisdiction of the Federal courts. No such reasons exist in this case; and, accepting the above decision of the supreme court of Ohio as correctly interpreting the Constitution and laws of that state, we hold that while the defendant board is clothed with some, it is not clothed with all, of the functions belonging to technical corporations, and is not such a corporation as may sue and be sued in a circuit court of the United States as a citizen of Ohio. A contrary ruling would, we apprehend, produce confusion and embarrassment in litigation relating to those public state institutions or agencies in Ohio which, according to the decision of its highest court, were not endowed, nor intended to be endowed, with corporate powers.

It is contended, however, that the bill sufficiently shows that the persons constituting the Board of Trustees of the Ohio State University were in fact citizens of Ohio, and therefore, as the board had power to sue and be sued, and to contract and be contracted with, in its collective name, the requisite diversity of citizenship sufficiently appeared from the pleadings. This contention is not warranted by any distinct averments in the bill. The bill contains no such averment. As already stated, it alleges that the board is a citizen of Ohio; not that the trustees are citizens of that state. As already stated, the bill does not, in terms, even allege that the board is a corporation, although it shows that it possesses some of

the characteristics of corporations. The Constitution of Ohio provides *that no person shall be elected or appointed to any office in the state unless he possesses the qualifications of an elector; and an elector must be a citizen of the state (Const. art. 15, § 4, art. 5, § 1); therefore it must be taken, not only that each trustee of the Ohio State University holds an office within the meaning of the state Constitution, but is in fact a citizen of that state; and the allegation that the board was created by, and existed as, an organized body under the laws of Ohio, was equivalent to an allegation that the trustees are each and all citizens of Ohio. Such is the process of reasoning by which it is attempted to support the jurisdiction of the circuit court in the present case. But it is settled that the jurisdiction of a court of the United States must appear from distinct allegations, or from facts clearly proven, and is not to be established argumentatively or by mere inference. The presumption is that a cause is without the jurisdiction of a circuit court of the United States unless the contrary affirmatively and distinctly appears. *Brown v. Keene*, 8 Pet. 115, 8 L. ed 886, and other cases above cited.

For the reasons stated the first question must be answered in the negative. To the second question our answer is that as the board was entitled to sue and be sued by their collective name, and would be bound by any judgment rendered against it in that name, the jurisdiction of the circuit court would have sufficiently appeared, so far as the pleadings were concerned, without bringing the several persons constituting the board before the court as defendants, provided the bill had contained the additional allegation that each individual trustee was a citizen of Ohio. Each branch of the third question must be answered in the negative. These answers will be certified to the circuit court of appeals, with liberty to that court to authorize such amendment of the bill in the circuit court as will show jurisdiction.

It is so ordered.

[219] *WILLIAM A. WRIGHT, Comptroller General, *Petitioner*,

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY and Atlantic Coast Line Company.

(See S. C. Reporter's ed. 219-223.)

Taxation—of shares of stock in foreign corporation.

Shares of stock in a foreign corporation, held

NOTE.—On the taxation of capital stock of corporations in the United States—see note to State Bd. of Equalization v. People, 58 L. R. A. 513.

195 U. S.

by a domestic corporation, are taxable as the property of the latter, under the mandate of the Georgia Constitution that "all taxation shall be uniform upon the same class of subjects, and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws," which is carried out in Ga. Laws 1898, No. 150, §§ 1, 2, authorizing a tax on all the taxable property of the state, and § 16, which requires taxpayers to return the number of shares of stock in foreign corporations which they own.

[No. 20.]

Argued October 25, 1904. Decided November 14, 1904.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review a decree which affirmed a decree of the Circuit Court for the Northern District of Georgia enjoining the comptroller general of that state from collecting a tax on shares of stock in a foreign corporation. *Reversed*.

See same case below, 54 C. C. A. 672, 117 Fed. 1007.

The facts are stated in the opinion.

Messrs. Boykin Wright and John C. Hart argued the cause and filed a brief for petitioner.

Messrs. Joseph B. Cumming and Alexander C. King argued the cause, and, with *Messrs. Joseph B. & Bryan Cumming and King, Spalding, & Little*, filed a brief for respondents.

Mr. Justice **Holmes** delivered the opinion of the court:

This case comes here on certiorari to the circuit court of appeals, that court having affirmed, *per curiam*, a decree of the circuit court enjoining the comptroller general of Georgia from collecting a tax for the year 1900. 116 Fed. 669, 54 C. C. A. 672, 117 Fed. 1007. In view of the conclusion to which we have been driven, it is enough to say that the question presented is whether shares of stock in the Western Railway of Alabama, an Alabama corporation, held by the Georgia Railroad & Banking Company, a Georgia corporation, are taxable as property of the latter, by the state of Georgia, under its Constitution and statutes. The defendants in error, the plaintiffs below, are lessees of the Georgia corporation, and are bound to reimburse the latter for the tax, if it has to be paid. Taking into account the decision in *Kidd v. Alabama*, 188 U. S. 730, 47 L. ed. 669, 23 Sup. Ct. Rep. 401, *the power of the state to tax [220] the shares is not denied, so far as the Constitution of the United States is concerned, but it is argued that the state has not attempted

to use that power by its present Constitution and laws.

The Constitution of Georgia provides that "all taxation shall be uniform upon the same class of subjects, and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws." Code of 1895, § 5883. The words "within the territorial limits" plainly qualify "subject to be taxed." The Constitution further makes void all laws exempting property from taxation, other than the property therein enumerated, which does not include this stock. § 5886. Following these requirements the general tax act for 1899 and 1900, Laws of 1898, No. 150, §§ 1, 2, p. 22, authorizes a tax on all of the taxable property of the state.

The natural inference from the foregoing language is that the comptroller general was bound to collect this tax. It is true that it was said, in a case decided before the date of the present Constitution, that stock in railroads outside the state was not taxable in Georgia, the reason offered being that such stock is really but so many shares of the railroad's property, and that that property is real estate, for the most part at least, and taxable by the state in which the road lies. *Wright v. Southwestern R. Co.* 64 Ga. 783, 799. This reason is shown by later decisions to be an insufficient ground for a claim of constitutional right, and the language of the case probably does not represent adequately the present opinion of the supreme court, although the passage is cited in the later of the two following cases: *Georgia State Bldg. & L. Asso. v. Savannah*, 109 Ga. 63, 69, 35 S. E. 67; *People's Nat. Bank v. Cleveland*, 117 Ga. 908, 913, 915, 44 S. E. 20.

If we look to the construction adopted by the legislature, there is no doubt as to that. The Code, after defining personalty as property movable in its nature, continues: "[221] "Stocks representing shares in an incorporated company holding lands, *or a franchise in or over lands, are personalty." § 3070. The act of 1884-1885, touching returns of property for taxation, No. 457, § 2, p. 30, enacted in terms "that personal property shall be construed, for purposes of taxation, to include . . . all stocks and securities, whether in corporations within this state or in other states, owned by citizens of this state, unless exempt," etc. It is argued on one side and denied on the other that this section was repealed by the Code; but whether it was or not, it equally may be invoked for the purpose of interpretation, at least. We do not understand and cannot believe that the supreme court of the state would deny the power of the legislature under the present Constitution to tax stock.

The argument against the tax is that the Constitution of Georgia is satisfied if all the lands and goods in the state are taxed once, and that the appearance of the same capital in two forms, technically distinct, ought not to be laid hold of as an excuse for two taxes. It is admitted that no such double taxation is enforced with regard to corporations of which the property is taxed within the state, and it hardly would be contended that this wise moderation is unconstitutional. It even has been thought that a similar constitution forbade taxation of both capital and stock. *People ex rel. Burke v. Badlam*, 57 Cal. 594, 601. But, from the point of view of the taxpayer, it does not matter whether all of his double taxation is done in one state or half in one and half in another. He suffers the same injustice. And, as manifestly the clearest right to tax belongs to the state where the railroad has its tracks, every principle of justice and patriotism would require the same abstinence from taxing stocks of the railroads of neighboring states that is practised with regard to those of the taxing state—in this case Georgia—itsself.

The difficulty with this argument is that the Georgia Constitution requires the taxation of all property subject to be taxed in Georgia. And while it may be that the constitutional requirement is sufficiently complied with when the land and *chattels which [222] give value to the stock pay a tax, without another tax on the stock, there is much more difficulty in saying that the words are satisfied if stock is left untaxed when the land and chattels cannot be reached. Probably the Constitution does not go further than to require one tax on all attainable sources of value, even if it permits more. *People ex rel. Burke v. Badlam*, 57 Cal. 594, 601. But it certainly seems intended to tax once, at least, all property which can be come at in any way. *San Francisco v. Fry*, 63 Cal. 470. A tax in another state is no tax for the purposes of the state of Georgia. *Kidd v. Alabama*, 188 U. S. 730, 732, 47 L. ed. 669, 672, 23 Sup. Ct. Rep. 401; *Dwight v. Boston*, 12 Allen, 316; *Seward v. Rising Sun*, 79 Ind. 351; *Dyer v. Osborne*, 11 R. I. 321, 23 Am. Rep. 460; *McKeen v. Northampton*, 49 Pa. 519, 88 Am. Dec. 515.

Putting the case at the lowest, the above-cited section of the Constitution was adopted in the interest of the state as a tax-collector, and authorizes, if it does not require, a tax on the stock. In pursuance of the Constitution, the law of 1898, under which this tax is demanded, contains the following: "In addition to the questions now propounded to taxpayers by the tax-receivers, questions shall be framed by the comptroller general to reach all property upon which a tax is imposed by this act, and especially the follow-

ing questions: . . . Thirtieth—How many shares of stock did you own on the day fixed for the return of property for taxation issued by corporations located without this state? Thirty-first—What was the gross nominal value thereof? Thirty-second—What was the fair market value thereof?" Laws of 1898, No. 150, § 16, p. 36. This plainly contemplates that the mandate of the Constitution shall be carried out, and in view of §§ 1, 2, of the same act, referred to above, and of the facts that legislation could not make the requirement to tax more explicit, and that the Constitution seems to be regarded by the supreme court of the state as self-executing (*Georgia State Bldg. & L. Asso. v. Savannah*, 109 Ga. 63, 35 S. E. 67), we think it impossible to escape from the words. The [223] distinction intended *between stock in corporations of which the property is taxed by the state and that in corporations otherwise untaxed is emphasized by the thirty-third question: "How many shares of stocks did you own, . . . issued by corporations within this state, the capital stock of which or the property of which is not returned by such corporation for taxation?" We think the distinction consistent with the Constitution, if not required by it, as held in *People ex rel. Burke v. Badlam*, 57 Cal. 594, 601.

Decree reversed.

CAROLINE W. DOBBINS, *Plff. in Err.*,
v.

CITY OF LOS ANGELES.

(See S. C. Reporter's ed. 223-242.)

Constitutional law—interference with property rights—police power—municipal limits for gasworks — equity — injunction against criminal proceedings.

1. An arbitrary interference with property rights protected by U. S. Const., 14th Amend., which cannot be justified as an exercise of the police power, results from the narrowing,

NOTE.—On municipal power over buildings and other structures as nuisances—see note to *Evansville v. Miller*, 38 L. R. A. 161.

As to municipal power over nuisances relating to trade or business—see note to *Ex parte Lacey*, 38 L. R. A. 640.

Municipal power over nuisances affecting safety, health, and personal comfort is the title of a note to *Harrington v. Providence*, 38 L. R. A. 305.

Injunction against criminal prosecutions under void municipal ordinances affecting property rights or franchises.

"It is settled," said the court in *Southern Exp. Co. v. Ensley*, 116 Fed. 756, "that a court of equity should enjoin the enforcement of a municipal ordinance, though violations of it are punished criminally, when its enforcement will

by municipal ordinance, of the limits within which gasworks may be erected and maintained, so as to include within the prohibited territory property purchased for that purpose within the district wherein the erection of such works was then permitted, and on which such erection was then proceeding in compliance with an existing ordinance and a permit of the board of fire commissioners, where such change was not demanded by the public welfare, and seems rather to have been actuated by a purpose to perpetuate a monopoly enjoyed by a gas company whose works were still within the privileged district.

2. Equity will enjoin criminal proceedings under a void municipal ordinance, where property rights will be destroyed by its enforcement.

[No. 107.]

Argued October 11, 12, 1904. Decided November 14, 1904.

IN ERROR to the Supreme Court of the State of California to review a judgment which affirmed a judgment of the Superior Court in and for the County of Los Angeles in that state dismissing a bill to enjoin the enforcement of a municipal ordinance prohibiting the erection or maintenance of gasworks except within certain prescribed limits. *Reversed* and remanded for further proceedings.

See same case below, 139 Cal. 179, 96 Am. St. Rep. 95, 72 Pac. 970.

Statement by Mr. Justice Day:

This is a writ of error to the supreme court of the state of California, seeking a reversal of the judgment of that court, affirming the judgment of the superior court, dismissing the complaint of the plaintiff in error against the city of Los Angeles.

Plaintiff in error filed a bill of complaint against the city of Los Angeles, seeking an injunction to restrain the enforcement of certain ordinances prohibiting the erection or maintenance of gasworks except within prescribed limits in said city.

The case was decided upon demurrer to the bill. The complaint sets forth, in substance:

effect the illegal destruction of, or a grave interference with, a corporate franchise in the operation of which the public had an interest."

Hence a bill alleging that a city is attempting by an ordinance unlawfully to arrest complainant's employees, and to destroy the franchise of a railroad company, will not be dismissed, although it may appear that the ordinance is quasi-criminal. *Mobile v. Louisville & N. R. Co.* 84 Ala. 115, 5 Am. St. Rep. 342, 4 So. 106.

An injunction was granted against prosecution under a building ordinance, where arrest was threatened, and the chancellor held that the addition to the depot in course of construction was not included in the ordinance. *Montgomery v. Louisville & N. R. Co.* 84 Ala. 127, 4 So. 626.

Equity will grant an injunction against a criminal proceeding where it is necessary to

That on August 26, 1901, the city council of Los Angeles adopted an ordinance making it unlawful to erect and maintain gasworks outside of a certain district described in the ordinance, and fixing penalties for the violation thereof. While this ordinance was in force the plaintiff in error made a contract with the Valley Gas & Fuel Company for the erection of certain gasworks upon territory to be thereafter designated by her, and on September 28, 1901, purchased lands with-

in the limits of the privileged district as fixed by the ordinance. That on the 22d of November, 1901, upon application to the board of fire commissioners of the city of Los Angeles, that body granted to the plaintiff in error the privilege to erect the gasworks upon the territory aforesaid. Thereupon the plaintiff in error directed the Valley Gas & Fuel Company to proceed with the erection of the works upon the premises so purchased. That the foundations were con-

protect property rights, and threatened prosecution and arrest is for the sole purpose of preventing the exercise of civil rights conferred directly by law, as in case of a city ordinance preventing the laying of pipes in the streets without permission, where the gas company has a contract, but permission is refused. *Atlanta v. Gate City Gaslight Co.* 71 Ga. 106.

The principle underlying the case just cited is thus explained by the same court in a later case: "When the damages would be irreparable if the threatened injury is not prevented, equity, if properly appealed to, will not permit valuable vested corporate franchises granted by the state to be seriously impaired or practically destroyed by prosecution instituted under color of municipal ordinances which are wrested from their legitimate purposes, and fraudulently used, in a matter to which they cannot apply, as a means with which to prevent the exercise of these franchises." *Paulk v. Sycamore*, 104 Ga. 24, 41 L. R. A. 772, 69 Am. St. Rep. 128, 30 S. E. 417.

Directly within the ruling in *Atlanta v. Gate City Gaslight Co.* 71 Ga. 126, *supra*, is the case of *Georgia R. & Bkg. Co. v. Atlanta*, 118 Ga. 486, 45 S. E. 256, where the court held that injunctive relief against criminal proceedings to enforce a municipal ordinance against obstructing streets should have been granted on behalf of a railway company, because such proceedings were threatened for the purpose of preventing the company from building a fence with a view to inclosing land which it had permitted the public to use without intent to dedicate it as a street.

An injunction was granted against prosecution by a city under an ordinance, where the defendant claimed title to the land that he was prosecuted for using. The criminal action was stayed until the right to possession could be determined. *Shinkle v. Covington*, 83 Ky. 420; *Louisville Trustees v. Gray*, 1 Litt. (Ky.) 147.

An injunction may be granted to prevent a city from enforcing an ordinance void as to complainant, by continued arrests and prosecutions, where the complainant has a valuable franchise and has expended large sums of money under a city ordinance, and thereafter another ordinance is passed imposing great restrictions and penalties. *Rushville v. Rushville Natural Gas Co.* 132 Ind. 575, 15 L. R. A. 321, 28 N. E. 853.

In *Platte & D. Canal & Mill Co. v. Lee*, 2 Colo. App. 184, 29 Pac. 1036, a court of equity was held to have power to enjoin threatened criminal proceedings to enforce a municipal ordinance regulating a ditch constructed to furnish water for milling, manufacturing, and irrigation purposes, where vested rights of the corporate owner of such ditch would be impaired by such enforcement.

A prosecution under a city ordinance, not in-

volving morals, health, or safety, but to enforce the views of the city as to the construction of its contract, will be enjoined, where the enforcement would not be a valid exercise of police power. *Newport v. Newport & C. Bridge Co.* 90 Ky. 193, 8 L. R. A. 484, 13 S. W. 720.

The rule forbidding a court of equity to stay criminal proceedings does not apply to a suit for an injunction to restrain the enforcement of an ordinance imposing an unlawful license fee on an express company engaged in interstate commerce, under penalty of fine or imprisonment for noncompliance. *Southern Exp. Co. v. Ensley*, 116 Fed. 756.

But a bill to restrain a prosecution under a city ordinance prohibiting unloading cars in the streets does not state a cause of action where no irreparable damages are shown, and no franchise is involved. The invalidity of the ordinance must first be established in a judgment of a court of law. *Forchheimer v. Mobile*, 84 Ala. 127, 4 So. 112.

Criminal proceedings to enforce a municipal ordinance requiring an electric railway company to maintain flagmen at street crossings cannot be enjoined on the theory that an invasion of property rights results, because of the grant to the company to operate its lines over the city streets, without any reservation of the right to impose such a burden. *Camden Interstate R. Co. v. Catlettsburg*, 129 Fed. 421.

Under Ark. Const. art. 16, § 12, providing that any citizen may sue to protect inhabitants against illegal exactions, a court of equity will not enjoin a prosecution under a city ordinance to punish or prohibit acts. Yet, as the ordinance in question was an illegal exaction of 25 cents a bale for weighing cotton, when it should be about 15 cents, the decree of the court declared "void all existing ordinances of the city imposing fines or penalties upon any persons who refuse to weigh their cotton at the city scales." *Taylor v. Pine Bluff*, 34 Ark. 603.

A subcontractor who has contracted to erect gasworks on certain premises is not entitled to injunctive relief to prevent the enforcement, by criminal proceedings against his employees, of municipal ordinances prohibiting the erection or maintenance of such structures within certain limits, which are alleged to infringe the obligation of the contract of the owner of the land with the municipality under prior ordinances; since his remedy, if any, is by action against the principal contractor, who is presumed to be able to respond in damages for all such as the subcontractor may have suffered by the interruption of the contract. *Davis & F. Mfg. Co. v. Los Angeles*, 189 U. S. 207, 47 L. ed. 778, 23 Sup.Ct. Rep. 498.

On the general subject of injunction against criminal proceedings, see note to *Crichto v. Dahmer*, 21 L. R. A. 84,

structed at a cost of upwards of \$2,500. After the foundations had been nearly completed the city council, on November 25, [225] *1901, passed a second ordinance, amending the first ordinance, and thereby so limiting the boundaries of the territory within which the erection of gasworks was permitted in said city as to include the premises of the plaintiff in error within the prohibited territory. The work of constructing the works was continuously prosecuted until the latter part of February, 1902, when the plaintiff in error alleges that the city of Los Angeles, combining and confederating with one James R. C. Burton and other persons unknown, caused certain employees of the company engaged in the erection of said works to be arrested, charged with the violation of the said city ordinance. Other arrests were made on the 1st and 3d of March, 1902. On the 3d of March, 1902, the city council passed a third ordinance, amending the ordinance of November 25, 1901, in respect to the description of the district within which gasworks could be erected. On March 6, 1902, the city caused the arrest of certain persons employed by the company in charge of the erection of the works, charged with the violation of the amended city ordinance.

It is averred that the adoption by the city council of the ordinances aforesaid, and the attempted enforcement thereof, were instigated by officers and agents of the Los Angeles Lighting Company, a corporation engaged in manufacturing and supplying gas in said city, and having a monopoly of said business therein. It is further averred that the action of the municipal authorities complained of was taken for the purpose of protecting the said Los Angeles Lighting Company in the enjoyment of its monopoly. It is also claimed that the territory surrounding the premises of the plaintiff in error, and within which, under the ordinance of August 26, in force when the complainant made her purchase and located and began the erection of the gasworks, it was lawful so to do, and which, by the amending ordinances, was added to the prohibited territory, was and is a district devoted almost exclusively to manufacturing enterprises. Within its boundaries there is a large amount of vacant and [226] unoccupied land which is and *will continue to be useless except for the erection of manufacturing establishments; within which were located at that time a soap factory, a wool-pulling factory, three wineries, numerous oil wells in operation, iron foundry, brass foundry, oil refinery; immediately east of said tract, railroads and an extensive tannery; immediately north, the oil tanks and refinery of the Standard Oil Company. That the works being constructed for the plaintiff

195 U. S.

in error are to be built upon concrete foundations with a superstructure of noncombustible material, so that there can be no danger from explosion, bursting, or leaking. The machinery is to be of the most approved pattern; and that there can be no leakage or escape of odors or any interference with the health, comfort, or safety of the inhabitants of the city.

The plaintiff in error, relying upon the protection of the 14th Amendment to the Constitution of the United States, prays that the permit granted by the board of fire commissioners be declared to be a valid and subsisting contract between the city of Los Angeles and herself, and that all ordinances passed by the city council in contravention thereof be declared void; that the defendant be enjoined from enforcing said ordinances against the plaintiff, from delaying or interfering with the action of the plaintiff in erecting the said works, from interfering with the maintenance and operation of the same, and for general relief.

Messrs. Lynn Helm and Edward C. Bailey argued the cause, and, with *Messrs. Henry T. Lee, J. R. Scott, and Charles W. Chase*, filed a brief for plaintiff in error:

In passing upon a municipal ordinance it is necessary to its validity that its provisions should be determined to be reasonable.

Oxanna v. Allen, 90 Ala. 468, 8 So. 79; *Tugman v. Chicago*, 78 Ill. 405; *Chicago v. Rumpff*, 45 Ill. 90, 92 Am. Dec. 200; *Toledo, W. & W. R. Co. v. Jacksonville*, 67 Ill. 37, 16 Am. Rep. 611; *Lake View v. Tate*, 130 Ill. 247, 6 L. R. A. 268, 22 N. E. 791.

The determination, by the legislative body, of what is a proper exercise of the police power, is not final or conclusive, but is subject to the supervision of the courts; and what is a reasonable ordinance is a judicial, and not a legislative, question.

Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 592, 41 L. ed. 560, 565, 17 Sup. Ct. Rep. 198; *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Re Smith*, 143 Cal. 368, 77 Pac. 180; *Ex parte Whitwell*, 98 Cal. 73, 19 L. R. A. 727, 35 Am. St. Rep. 152, 32 Pac. 870; *Ex parte Sing Lee*, 96 Cal. 354, 24 L. R. A. 195, 31 Am. St. Rep. 218, 31 Pac. 245; 1 Tiedeman, *State & Federal Control*, p. 238; *Jew Ho v. Williamson*, 103 Fed. 10; *Weil v. Ricord*, 24 N. J. Eq. 169; *Yates v. Milwaukee*, 10 Wall. 497, 19 L. ed. 984; *People v. Budd*, 117 N. Y. 1, 15 Am. St. Rep. 460, 22 N. E. 670; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Maxwell v. Fulton County*, 119 Ind. 23, 21 N. E. 453; *Whittington v. Polk*, 1 Harr

& J. 236; Cooley, Const. Lim. 6th ed. pp. 247 *et seq.*

The legislature is distinguished from a municipal council in enacting its police provisions, and is not subject to review by the courts merely because its laws may be unreasonable.

In determining the validity of an ordinance, the objects and purposes sought to be accomplished are always scrutinized by the courts; and in so doing they are not limited to those matters which appear upon the face of the ordinance, or of which they may take judicial notice, but may consider all the circumstances in the light of existing conditions.

Oxanna v. Allen, 90 Ala. 468, 8 So. 79; *Tugman v. Chicago*, 78 Ill. 405; *Chicago v. Rumpff*, 45 Ill. 90, 92 Am. Dec. 200; *Toledo, W. & W. R. Co. v. Jacksonville*, 67 Ill. 37, 16 Am. Rep. 611; *Lake View v. Tate*, 130 Ill. 247, 6 L. R. A. 268, 22 N. E. 791; *Ex parte Patterson*, 42 Tex. Crim. Rep. 256, 51 L. R. A. 654, 58 S. W. 1011; *People v. Armstrong*, 73 Mich. 288, 2 L. R. A. 721, 16 Am. St. Rep. 578, 41 N. W. 275; *Wreford v. People*, 14 Mich. 41; *Cleveland, C. C. & St. L. R. Co. v. Connersville*, 147 Ind. 277, 37 L. R. A. 175, 62 Am. St. Rep. 418, 46 N. E. 579; *State v. Boardman*, 93 Me. 73, 46 L. R. A. 750, 44 Atl. 118; *Corrigan v. Gage*, 68 Mo. 541; *Pieri v. Shieldsboro*, 42 Miss. 493; *Kosciusko v. Slomberg*, 68 Miss. 469, 12 L. R. A. 528, 24 Am. St. Rep. 281, 9 So. 297; *Crowley v. West*, 52 La. Ann. 526, 47 L. R. A. 652, 78 Am. St. Rep. 355, 27 So. 53.

The motives which actuate a municipal council in the adoption of ordinances are material as showing the objects and purposes for which the ordinances are adopted.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Re Ho Ah Kow*, 5 Sawy. 552, Fed. Cas. No. 6,546; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 234, 41 L. ed. 983, 17 Sup. Ct. Rep. 581; Dil. Mun. Corp. 4th ed. § 311; *State ex rel. Atty. Gen. v. Cincinnati Gaslight & Coke Co.* 18 Ohio St. 262.

The business of erecting or maintaining gasworks is a lawful occupation.

Re Johnston, 137 Cal. 115, 69 Pac. 973; *People v. Stephens*, 62 Cal. 209.

A municipality has not the power or right to impose additional burdens, terms, or conditions on the exercise of rights created by the sovereign authority of the state in its Constitution. Restrictions in the exercise of these rights are not regulations, and at least impair, if they do not deny, the exercise of the right.

Re Johnston, 137 Cal. 115, 69 Pac. 973; *Summit Twp. v. New York & N. J. Teleph. Co.* 57 N. J. Eq. 123, 41 Atl. 146; *Atlanta*

v. Gate City Gaslight Co. 71 Ga. 106; *Michigan Teleph. Co. v. Benton Harbor*, 121 Mich. 512, 47 L. R. A. 104, 80 N. W. 386; *Wiseonsin Teleph. Co. v. Oshkosh*, 62 Wis. 32, 21 N. W. 828; *Pittsburgh's Appeal*, 115 Pa. 4, 7 Atl. 778; *Millvale v. Evergreen R. Co.* 131 Pa. 1, 7 L. R. A. 369, 18 Atl. 993; *Harrisburg City Pass. R. Co. v. Harrisburg*, 149 Pa. 465, 24 Atl. 56; *State ex rel. Bell Teleph. Co. v. Flad*, 23 Mo. App. 185; *Hodges v. Western U. Teleg. Co.* 72 Miss. 910, 29 L. R. A. 770, 18 So. 84.

Gasworks are not, either in their erection or their maintenance, a nuisance *per se*, and it is not within the power of the city council of the city of Los Angeles to pass an ordinance making that a nuisance which is not a nuisance *per se*; nor could such a declaration make it a nuisance unless it in fact had that character.

Yates v. Milwaukee, 10 Wall. 497, 19 L. ed. 984; *Chicago, R. I. & P. R. Co. v. Joliet*, 79 Ill. 39; *Everett v. Council Bluffs*, 46 Iowa, 66; *Ex parte Sing Lee*, 96 Cal. 354, 24 L. R. A. 195, 31 Am. St. Rep. 218, 31 Pac. 245; *Los Angeles County v. Hollywood Cemetery Asso.* 124 Cal. 344, 71 Am. St. Rep. 75, 57 Pac. 153; *Grossman v. Oakland*, 30 Or. 478, 36 L. R. A. 593, 60 Am. St. Rep. 832, 41 Pac. 5; *Re Tie Loy*, 26 Fed. 611; *Re Sam Kee*, 31 Fed. 680; *Re Hong Wah*, 82 Fed. 623; *Ex parte Whitwell*, 98 Cal. 73, 19 L. R. A. 727, 35 Am. St. Rep. 152, 32 Pac. 870; *Wood, Nuisances*, § 744.

The power granted in the city charter to abate nuisances does not give power to prevent except in cases of nuisances *per se*; and those things which only become nuisances because of the method of their operation cannot be prevented and stopped under the power to abate until it has been demonstrated that they are nuisances.

Lake View v. Lctz, 44 Ill. 81.

The rights acquired by plaintiff in error were vested rights.

Calder v. Bull, 3 Dall. 394, 1 L. ed. 651; *Farrington v. Tennessee*, 95 U. S. 679, 24 L. ed. 558; *Pacific Mail S. S. Co. v. Joliffe*, 2 Wall. 457, 17 L. ed. 807; *Wirth v. Branson*, 98 U. S. 118, 25 L. ed. 86; *Classen v. Chesapeake Guano Co.* 81 Md. 258, 31 Atl. 808; *Roberts v. Brooks*, 71 Fed. 914; *Baltimore Trust & G. Co. v. Baltimore*, 64 Fed. 153; *Levis v. Newton*, 75 Fed. 884; *Cleveland City R. Co. v. Cleveland*, 94 Fed. 385; *City R. Co. v. Citizens' Street R. Co.* 166 U. S. 562, 41 L. ed. 1116, 17 Sup. Ct. Rep. 653.

The ordinance is void as depriving the plaintiff in error of property without due process of law.

Chicago v. Netcher, 183 Ill. 104, 48 L. R. A. 261, 75 Am. St. Rep. 93, 55 N. E. 707; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.

S. 234, 41 L. ed. 983, 17 Sup. Ct. Rep. 581; *Froerer v. People*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; *Ramsey v. People*, 142 Ill. 380, 17 L. R. A. 853, 32 N. E. 364; *Braeerville Coal Co. v. People*, 147 Ill. 66, 22 L. R. A. 340, 37 Am. St. Rep. 206, 35 N. E. 62; *Cooley*, Const. Lim. 393.

The police power has reference to those things which affect the public health, the public safety, the public comfort, or the public morals.

Noel v. People, 187 Ill. 587, 52 L. R. A. 287, 79 Am. St. Rep. 238, 58 N. E. 616; *Chicago v. Neteher*, 183 Ill. 104, 48 L. R. A. 261, 75 Am. St. Rep. 93, 55 N. E. 707; *State v. Donaldson*, 41 Minn. 74, 42 N. W. 781; *Indianapolis v. Consumers Gas Trust Co.* 140 Ind. 107, 27 L. R. A. 514, 49 Am. St. Rep. 183, 39 N. E. 433; *Barthet v. New Orleans*, 24 Fed. 564; *Buffalo v. Chadeayne*, 134 N. Y. 163, 31 N. E. 443; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77.

The provision of § 11 of art. 11 of the Constitution of the state of California is not a grant of the police power. It is simply an extension to counties, cities, and towns of the right to exercise powers that are inherent in the legislature as the representative of the people; but it is in no sense an enlargement of that power.

Ex parte Campbell, 74 Cal. 20, 5 Am. St. Rep. 418, 15 Pac. 318; *Ex parte Roach*, 104 Cal. 272, 37 Pac. 1044; *Los Angeles County v. Hollywood Cemetery Asso.* 124 Cal. 344, 71 Am. St. Rep. 75, 57 Pac. 153.

A court of equity has power to restrain by injunction a municipality from instituting criminal proceedings, threatened under color of an invalid ordinance, for the purpose of compelling the relinquishment of a property right.

Davis & F. Mfg. Co. v. Los Angeles, 189 U. S. 207, 47 L. ed. 778, 23 Sup. Ct. Rep. 498; *Central Trust Co. v. Citizens' Street R. Co.* 80 Fed. 225, 82 Fed. 1; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Southern Exp. Co. v. Ensley*, 116 Fed. 756; *Louisiana State Lottery Co. v. Fitzpatrick*, 3 Woods, 222, Fed. Cas. No. 8,541; *Springhead Spinning Co. v. Riley*, L. R. 6 Eq. 558; *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. ed. 204; *Wood v. Brooklyn*, 14 Barb. 425; *Manhattan Iron Works Co. v. French*, 12 Abb. N. C. 446; *Rushville v. Rushville Natural Gas Co.* 132 Ind. 575, 15 L. R. A. 321, 28 N. E. 853; *Davis v. Fasig*, 128 Ind. 271, 27 N. E. 726; *Platte & D. Canal & Mill. Co. v. Lee*, 2 Colo. App. 184, 29 Pac. 1036; *Smith v. Bangs*, 195 U. S.

15 Ill. 399; *Baltimore v. Radecke*, 49 Md. 218, 33 Am. Rep. 239; *Cape May & S. L. R. Co. v. Cape May*, 35 N. J. Eq. 419; *Los Angeles City Water Co. v. Los Angeles*, 103 Fed. 711; *Atlanta v. Gate City Gaslight Co.* 71 Ga. 106; *Austin v. Austin City Cemetery Asso.* 87 Tex. 330, 47 Am. St. Rep. 114, 28 S. W. 528; *Mobile v. Louisville & N. R. Co.* 84 Ala. 115, 5 Am. St. Rep. 342, 4 So. 105; *Smyth v. Ames*, 169 U. S. 466, 517, 42 L. ed. 819, 838, 18 Sup. Ct. Rep. 418; *Detroit v. Detroit Citizens' Street R. Co.* 184 U. S. 368, 378, 46 L. ed. 592, 600, 22 Sup. Ct. Rep. 410.

The plaintiff in error has no remedy against the defendant in error for damages for the wrongful arrest of her employees, or for the destruction of her business and property rights.

Stedman v. San Francisco, 63 Cal. 193; *Chope v. Eureka*, 78 Cal. 588, 4 L. R. A. 325, 12 Am. St. Rep. 113, 21 Pac. 364; *Doeg v. Cook*, 126 Cal. 213, 77 Am. St. Rep. 171, 58 Pac. 707.

It is not enough that the plaintiff has a remedy at law. It must be as efficient and as prompt in its administration as the remedy in equity.

Boyce v. Grundy, 3 Pet. 210, 7 L. ed. 655; *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 12, 43 L. ed. 341, 346, 19 Sup. Ct. Rep. 77; *Phoenix Mut. L. Ins. Co. v. Bailey*, 13 Wall. 616, 621, 20 L. ed. 501, 503; *Kilbourn v. Sunderland*, 130 U. S. 505, 514, 32 L. ed. 1005, 1008, 9 Sup. Ct. Rep. 594; *Tyler v. Savage*, 143 U. S. 79, 95, 36 L. ed. 82, 88, 12 Sup. Ct. Rep. 340; 2 Story, Eq. Jur. § 928.

Mr. W. B. Mathews argued the cause, and, with **Mr. Herbert J. Goudge**, filed a brief for defendant in error:

The enactment of the ordinance drawn in question was fully within the police powers of the city of Los Angeles.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; *Westfield Gas & Mill. Co. v. Mendenhall*, 142 Ind. 538, 41 N. E. 1033; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; 2 Tiedeman, Pol. Power, p. 740; *Jamieson v. Indiana Natural Gas & Oil Co.* 128 Ind. 555, 12 L. R. A. 652, 3 Inters. Com. Rep. 613, 28 N. E. 76; *Lanigan v. New York Gaslight Co.* 71 N. Y. 29; *Ex parte Lacey*, 108 Cal. 326, 38 L. R. A. 640, 49 Am. St. Rep. 93, 41 Pac. 411; *Crowley v. Christensen*, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13.

The allegations of the complaint as to the unreasonableness of this ordinance are not sufficient to sustain a decision against its validity.

Slack v. Jacob, 8 W. Va. 612; *Harrison v. Lewistown*, 153 Ill. 313, 46 Am. St. Rep.

893, 38 N. E. 628; *Danielly v. Cabaniss*, 52 Ga. 212; *Wells v. Atlanta*, 43 Ga. 67; *State v. Schlenker*, 112 Iowa, 642, 51 L. R. A. 351, 84 Am. St. Rep. 360, 84 N. W. 698; *People v. Cipperly*, 101 N. Y. 634, 4 N. E. 108; *Re Wilshire*, 103 Fed. 620; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357.

All rights in contracts and property are held subject to such regulations as may be made from time to time by the state for the protection of public health, comfort, and safety.

Cooley, Const. Lim. 6th ed. 707; *Mugler v. Kansas*, 123 U. S. 669, 31 L. ed. 213, 8 Sup. Ct. Rep. 273; *Knoxville v. Bird*, 12 Lea, 121, 47 Am. Rep. 326; *Salem v. Maynes*, 123 Mass. 372; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *New Orleans v. Stafford*, 27 La. Ann. 417, 21 Am. Rep. 563; 2 Story, Const. § 1954; *Jamieson v. Indiana Natural Gas & Oil Co.* 128 Ind. 555, 12 L. R. A. 652, 3 Inters. Com. Rep. 613, 28 N. E. 76.

A municipality cannot in any manner barter away, part with, or abridge its right to exercise the police powers delegated to it by the state.

Cooley, Const. Lim. 6th ed. p. 341; Russell, Pol. Power, p. 88; *Davenport v. Richmond City*, 81 Va. 636, 59 Am. Rep. 694; *Newson v. Galveston*, 76 Tex. 559, 7 L. R. A. 797, 13 S. W. 368; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. ed. 1036.

A bill in equity will not lie to restrain the enforcement of a municipal ordinance by criminal prosecution, upon the mere ground of its alleged invalidity.

Re Sawyer, 124 U. S. 200, 31 L. ed. 402, 8 Sup. Ct. Rep. 482; *Fitts v. McGhee*, 172 U. S. 528, 43 L. ed. 541, 19 Sup. Ct. Rep. 269; *Davis & F. Mfg. Co. v. Los Angeles*, 115 Fed. 537, 189 U. S. 207, 47 L. ed. 778, 23 Sup. Ct. Rep. 498; *Hemsley v. Myers*, 45 Fed. 283; *Wagner v. Drake*, 31 Fed. 849; *Minneapolis Brewing Co. v. McGillivray*, 104 Fed. 272.

The motives of a legislative body in enacting a law cannot be inquired into by the courts.

Fletcher v. Peck, 6 Cranch, 87, 3 L. ed. 162; *Dodge v. Woolsey*, 18 How. 371, 15 L. ed. 417; *United States v. Des Moines Nav. & R. Co.* 142 U. S. 545, 35 L. ed. 1109, 12 Sup. Ct. Rep. 308; *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730.

[234] *Mr Justice Day delivered the opinion of the court:

As this case was decided upon demurrer to the complaint, the allegations thereof must be taken as true. The question presented involves the right of the plaintiff in error to

invoke the protection of the 14th Amendment against alleged infraction of her rights by the action of the city council in passing and enforcing the ordinances which prevent the carrying on of the business of making and selling gas to the people of the city.

Before entering upon a consideration of the case it is essential to examine briefly the extent to which constitutional and legislative control have been exercised by authority of the state of California in reference to the erection and maintenance of gasworks in cities. The Constitution of the state, § 19, article 11, provides that "in any city where there are no public works owned and controlled by the municipality for supplying the same with water or artificial light, any individual, or any company duly incorporated for such purpose under and by authority of the laws of this state, shall, under the direction of the superintendent of streets, or other officer in control thereof, and under such general regulations as the municipality may prescribe for damages and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gaslight or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof." By the act of the state legislature of April 4, 1870 (Stat. 1869-70, p. 815), it was provided that cities may control the location and construction of works so that they may be erected in suitable localities to give the least discomfiture or annoyance to the public. By the Constitution *of the state of California it is provided (art. [235] 12, § 11) that any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, or other regulations as are not in conflict with the general laws. In these provisions may be found a grant of power to the city of Los Angeles to control the location and erection of gasworks within the city limits. In the grant of such control the fact is recognized that while the erection and maintenance of such works is a lawful business pursuit, and one essential to the welfare and comfort of the community, its prosecution requires the use of materials of such a character, and such construction and maintenance of the works, as not to be dangerous or offensive when carried on within thickly populated parts of the city; and such rights are consequently justly subject to regulation in such manner as to protect the public health and safety. The supreme court of California, as may be gathered from its opinion in this case, based its decision upon

the proposition that, as the exercise of the right to control the location and construction of gasworks is within the power conferred by the legislature upon the city, the act of the municipality in question cannot be reviewed, because so to do would be a substitution of the judgment of the court for that of the council upon a matter left within the exclusive control of the legislative body. To support this conclusion a citation is made from the opinion of this court in the case of *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77, to the effect that the legislature is the exclusive judge of the propriety of police regulation when the matter is within the scope of its power. The observations of Mr. Chief Justice Waite in that connection had reference to the facts of the particular case and were certainly not intended to declare the right of either the legislature or a city council to arbitrarily deprive the citizen of rights protected by the Constitution, under the guise of exercising the police powers reserved to the states. It may be admitted that every intendment is to be made in favor of the lawfulness of the exercise of municipal power, making regulations to promote the public

[236] health and *safety, and that it is not the province of courts, except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people in the community. But notwithstanding this general rule of the law, it is now thoroughly well settled by decisions of this court that municipal by-laws and ordinances, and even legislative enactments undertaking to regulate useful business enterprises, are subject to investigation in the courts with a view to determining whether the law or ordinance is a lawful exercise of the police power, or whether, under the guise of enforcing police regulations, there has been an unwarranted and arbitrary interference with the constitutional rights to carry on a lawful business, to make contracts, or to use and enjoy property. In *Lawton v. Steele*, 152 U. S. 133-137, 38 L. ed. 385-388, 14 Sup. Ct. Rep. 499-501, Mr. Justice Brown, speaking for the court, said upon this subject:

"To justify the state in thus interposing its authority in behalf of the public it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its

195 U. S.

determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

And, again, in *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383, the same justice, again speaking for the court, said:

"The question in each case is whether the legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression or spoliation of a particular class."

And in *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 558, 46 L. ed. 679, 689, 22 Sup. Ct. Rep. 431, 438, Mr. Justice Harlan, delivering the opinion of the court, said:

*"The question of constitutional law to [237] which we have referred [the equal protection of the laws] cannot be disposed of by saying that the statute in question may be referred to what are called the police powers of the state, which, as often stated by this court, were not included in the grants of power to the general government, and therefore were reserved to the states when the Constitution was ordained. But, as the Constitution of the United States is the supreme law of the land, anything in the Constitution or statutes of the states to the contrary notwithstanding, a statute of a state, even when avowedly enacted in the exercise of its police powers, must yield to that law. No right granted or secured by the Constitution of the United States can be impaired or destroyed by a state enactment, whatever may be the source from which the power to pass such enactment may have been derived. 'The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law.' The state has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health, and the public safety; but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void. *Gibbons v. Ogden*, 9 Wheat. 1, 210, 6 L. ed. 23, 73; *Sinnot v. Davenport*, 22 How. 227, 243, 16 L. ed. 243, 247; *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 626, 42 L. ed. 878, 882, 18 Sup. Ct. Rep. 488."

This principle was recognized and applied in the supreme court of California in a case decided later than the one under consideration (*Re Smith*, decided May 31, 1904, 143 Cal. 368, 77 Pac. 180), in which it was held that a county ordinance making it a misdemeanor to maintain a gasworks within a sparsely settled district was unreasonable

and void. In that case the court, after again quoting from *Munn v. Illinois*, to the effect that the courts will not interfere with laws which are within the scope of legislative power, well said:

[238] "But running current with this principle, and to be read with it, is one of equal importance,—namely, that when the *police power is exerted to regulate a useful business or occupation, the legislature is not the exclusive judge as to what is a reasonable and just restraint upon the constitutional right of the citizen to pursue any trade, business, or vocation which in itself is recognized as innocent and useful to the community. It is always a judicial question if any particular regulation of such right is a valid exercise of police power, though the authority of the courts to declare such regulation invalid will be exercised with the utmost caution, and only when it is clear that the ordinance or law declared void passes the limits of the police power, and infringes upon rights guaranteed by the Constitution."

Applying the principles settled by these decisions to the allegations of the bill, admitted by the demurrer, we think a case is made which called for the protection of the courts against arbitrary interference with the rights of the plaintiff in error. Complying with the terms of the ordinance which was in force when the plaintiff in error was about to begin the erection of the gasworks in controversy, a tract of land was purchased within the district wherein the erection of such works was permitted, a contract was entered into for the construction of the works, a considerable sum of money was expended. It may be admitted as being a correct statement of the law as held by the California supreme court that, notwithstanding the grant of the permit, and even after the erection of the works, the city might still, for the protection of the public health and safety, prohibit the further maintenance and continuance of such works, and the prosecution of the business, originally harmless, may become, by reason of the manner of its prosecution or a changed condition of the community, a menace to the public health and safety. In other words, the right to exercise the police power is a continuing one, and a business lawful to-day may, in the future, because of the changed situation, the growth of population, or other causes, become a menace to the public health and welfare, and be required to yield to the public good. *North Western Fer-*

[239] *tilizing Co. v. Hyde *Park*, 97 U. S. 659, 24 L. ed. 1036; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 672, 29 L. ed. 524, 6 Sup. Ct. Rep. 252. But the exercise of the police power is subject to judicial review, and property rights cannot be wrongfully destroyed by arbitrary

enactment. It was averred that the works would be so constructed as not to interfere with the health or safety of the people. No reasonable explanation for the arbitrary exercise of power in the case is suggested. The narrowing of the limits within which the plaintiff in error, in compliance with the ordinance of the city and the permit of the board of fire commissioners, was proceeding to erect the gasworks, to the smaller and more limited section, was not demanded by the public welfare, and, taking the facts as alleged in the bill, seems rather to have been actuated by the purpose to exclude the plaintiff in error from further prosecution of the enterprise. The limits of the privileged district were fixed late in August. In September the complainant began the construction of the works. In November, without changed conditions or adequate reason, the council, by an amended ordinance, draw a line embracing a part of the district including the complainant's property, and declare that, too, shall be prohibited territory. This action is strongly corroborative of the allegations of the bill that the purpose was not police regulation in the interest of the public, but the destruction of the plaintiff's rights, and the building up of another company still within the privileged district after the passage of the amendment. Being the owner of the land, and having partially erected the works, the plaintiff in error had acquired property rights, and was entitled to protection against unconstitutional encroachments which would have the effect to deprive her of her property without due process of law. It is averred in the bill of complaint that the district within which the works were being erected was one given over to manufacturing enterprises, some of which were fully as obnoxious as gasworks possibly could be; that it contained large spaces of unoccupied lands, worthless except for manufacturing purposes, and, by clear inference, that there was *nothing in the situation [240] which rendered it necessary, in order to protect the city from a noisome and unhealthy business, to decrease the area within which gasworks could lawfully be erected.

It is urged that, where the exercise of legislative or municipal power is clearly within constitutional limits, the courts will not inquire into the motives which may have actuated the legislative body in passing the law or ordinance in question. Whether, when it appears that the facts would authorize the exercise of the power, the courts will restrain its exercise because of alleged wrongful motives inducing the passage of an ordinance, is not a question necessary to be determined in this case; but where the facts as to the situation and conditions are such

as to establish the exercise of the police power in such manner as to oppress or discriminate against a class or an individual, the courts may consider and give weight to such purpose in considering the validity of the ordinance. This court in the case of *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064, held that, although an ordinance might be lawful upon its face, and apparently fair in its terms, yet, if it was enforced in such a manner as to work a discrimination against a part of the community, for no lawful reason, such exercise of power would be invalidated by the courts.

In some of the states, perhaps in most, the right to build and maintain gasworks is derived from the state, but subject to municipal control as to the use of the streets and the prices to be charged to consumers. In Ohio this price is regulated for stated periods. Could it be successfully maintained that, after the erection of the works, and the fixing of prices for a term of ten years, at the expiration thereof, and exercising the right to fix prices for a new term, the council could arbitrarily, and with a view of compelling the sale of the works to the municipality or a rival company, fix the rate at a price below the cost of gas to the producer, and at such a rate as to be ruinous to the business? In *State ex rel. Atty. Gen. v. Cincinnati Gaslight & Coke Co.* 18 Ohio St. [241] 262, it was *held to be the legislative intention, in empowering city councils to regulate the price of gas, to limit such companies to fair and reasonable prices, and if, in the colorable exercise of this power, a majority of the members of the council, for a fraudulent purpose, combine to pass an ordinance fixing the price of gas at a rate at which they well know it cannot be manufactured and sold without loss, such an ordinance would impose no obligation on the company. This case was cited with apparent approval by Mr. Justice Matthews in delivering the opinion of this court in *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; and see Dill. Mun. Corp. 4th ed. § 311.

In this case we think the allegations of the bill disclose such character of territory, such sudden and unexplained change of its limits after the plaintiff in error had purchased the property and gone forward with the erection of the works, as to bring it within that class of cases wherein the court may restrain the arbitrary and discriminatory exercise of the police power which amounts to a taking of property without due process of law and an impairment of property rights protected by the 14th Amendment to the Federal Constitution.

It is also urged by the defendants in error
195 U. S. U. S., Book 49.

that a court of equity will not enjoin prosecution of a criminal case; but, as we have seen, the plaintiff in error in this case had acquired property rights which, by the enforcement of the ordinances in question, would be destroyed and rendered worthless. If the allegations of the bill be taken as true, she had the right to proceed with the prosecution of the work without interference by the city authorities in the form of arrest and prosecution of those in her employ.

It is well settled that, where property rights will be destroyed, unlawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by a decree of a court of equity. *Davis & F. Mfg. Co. v. Los Angeles*, 189 U. S. 207-218, 47 L. ed. 778-780, 23 Sup. Ct. Rep. 498, and cases therein cited.

Upon the whole case, we are of opinion that the demurrer *should have been over-[242] ruled and the city of Los Angeles put upon its answer.

For the reasons herein stated, *the judgment of the Supreme Court of California is reversed*, and the cause remanded to that court for further proceedings not in conflict with this opinion.

MARTIN DALY, *Plff. in Err.*,
v.

CHARLES ELTON, Chief of Police of the
City of Los Angeles.

(See S. C. Reporter's ed. 242, 243.)

Constitutional law—interference with property rights—police power—municipal limits for gasworks.

This case is governed by the decision in *Dobbins v. Los Angeles*, ante, 169.

[No. 108.]

Argued October 11, 12, 1904. Decided November 14, 1904.

IN ERROR to the Supreme Court of the State of California to review a judgment which denied a petition for a writ of habeas corpus to discharge from custody a person convicted of a violation of a municipal ordinance prohibiting the erection and maintenance of gasworks except within certain prescribed limits. *Reversed* and remanded for further proceedings.

See same case below, 139 Cal. 216, 72 Pac. 1097.

The facts are stated in the opinion.

Messrs. Lynn Helm and Edward C. Bailey argued the cause, and, with *Messrs. Henry T. Lee, J. R. Scott, and Charles W. Chase*, filed a brief for plaintiff in error:

Where a law under which a prisoner is held has been declared unconstitutional, and the unreasonableness and oppression of the ordinance is not apparent upon the face thereof, evidence will be admitted by a court of general jurisdiction upon habeas corpus, showing existing conditions, and for the purpose of determining whether a public offense has been committed.

Re Smith, 143 Cal. 368, 77 Pac. 180; *Re Nielson*, 131 U. S. 176, 33 L. ed. 118, 9 Sup. Ct. Rep. 672; *Ex parte Lang*, 18 Wall. 163, 21 L. ed. 872; *Ex parte Siebold*, 100 U. S. 376, 25 L. ed. 719; *Re Coy*, 127 U. S. 731, 758, 32 L. ed. 274, 280, 8 Sup. Ct. Rep. 1263; *Re Mayfield*, 141 U. S. 107, 35 L. ed. 635, 11 Sup. Ct. Rep. 939; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064.

Mr. W. B. Mathews argued the cause, and, with *Mr. Herbert J. Goudge*, filed a brief for defendant in error:

In reviewing a judgment upon a petition for writ of habeas corpus, discharging the writ and remanding the petitioner, the only question reviewable by this court is the question whether the plaintiff in error has been denied a right in violation of the Constitution, laws, or treaties of the United States.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Re Wright*, 29 Hun, 361; *Ex parte Sternes*, 77 Cal. 156, 11 Am. St. Rep. 251, 19 Pac. 275; *Ex parte McCullough*, 35 Cal. 97; *Ex parte Granice*, 51 Cal. 315; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; *Cooley*, Const. Lim. 6th ed. p. 425; *Re Coy*, 127 U. S. 732, 32 L. ed. 275, 8 Sup. Ct. Rep. 1263; *Re Lennon*, 166 U. S. 548, 41 L. ed. 1110, 17 Sup. Ct. Rep. 658; *Andrews v. Swartz*, 156 U. S. 272, 39 L. ed. 422, 15 Sup. Ct. Rep. 389; *Re Bell*, 159 U. S. 95, 40 L. ed. 88, 15 Sup. Ct. Rep. 987.

For further contentions of counsel, see their respective briefs as reported in *Dobbins v. Los Angeles*, ante, 169.

Mr. Justice Day delivered the opinion of the court:

This case is practically determined by views expressed in *Dobbins v. Los Angeles*, 195 U. S. 223, ante, 169, 25 Sup. Ct. Rep. 18. It was a petition for a writ of habeas corpus to discharge Daly from custody, in a prosecution under the ordinance under consideration in the *Dobbins Case*. The prayer of the petition was denied and the writ discharged. *Re Daly*, 139 Cal. *216, 72

178

Pac. 1097. Under the California practice, in the absence of issue joined the allegations of the petition are taken as true and the facts alleged therein are taken as admitted. *Re Smith*, 143 Cal. 368, 77 Pac. 180. The petition made allegations attacking the ordinance, which, if true, would render it invalid for the reasons stated in the *Dobbins Case*, supra, and the petitioner upon the record made should have been discharged from custody.

It is therefore ordered that the judgment of the Supreme Court of California be reversed and the cause remanded for further proceedings not inconsistent with the views announced in the Dobbins Case, supra.

MAGGIE A. BRADFORD

v.

SOUTHERN RAILWAY COMPANY.

(See S. C. Reporter's ed. 243-252.)

Appeal—necessity of security for costs.

1. The right to prosecute a writ of error from a circuit court of appeals without giving security for costs is not given by the act of July 20, 1892 (27 Stat. at L. 252, chap. 209, U. S. Comp. Stat. 1901, p. 706), providing for the prosecution of suits or actions *in forma pauperis*, as that act does not apply to appellate proceedings.
2. A circuit court of appeals cannot, without statutory authority, permit the prosecution *in forma pauperis* of a writ of error sued out of that court.

[No. 151.]

Submitted October 19, 1904. Decided November 28, 1904.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Sixth Circuit, presenting the question whether the right exists to prosecute a writ of error from that court *in forma pauperis*, and whether, in the absence of such right, the court may permit such prosecution of the writ of error. *Both questions answered in the negative.*

Statement by *Mr. Chief Justice Fuller*:

This case is brought here on the following certificate:

"This was an action of tort. The plaintiff was a citizen of Tennessee, and the defendant a corporation organized under the laws of Virginia. The jurisdiction of the court below was wholly dependent upon

NOTE.—On the practice and procedure governing the transfer of causes to the Federal Supreme Court on writ of error or appeal—see note to *Wedding v. Meyler*, 66 L. R. A. 833.

195 U. S.

diversity of citizenship. There was a jury and verdict against the plaintiff in error and a judgment accordingly.

[244] "The plaintiff in error sued out this writ of error, and has lodged with the clerk of this court, within the time required by law, a full transcript of the record in the court below. The *clerk refusing to docket same unless the plaintiff would deposit with him the sum of \$35, as security for taxable costs, as required by rule 16 of this court, the plaintiff has filed her petition, duly verified, praying to be allowed to prosecute her writ *in forma pauperis*, and that the clerk be required to docket said transcript, and that the rule requiring a deposit to cover costs be dispensed with. The petition shows a state of facts which entitle the plaintiff to prosecute her writ of error as a poor person, provided the act of July 20, 1892, 27 Stat. at L. 252, chap. 209, U. S. Comp. Stat. 1901, p. 706, applies to appellate proceedings.

"Because this court has doubts as to whether the act of Congress above mentioned applies to appellate proceedings, it is ordered that the foregoing statement be certified to the Supreme Court, and the instruction of that court be requested for the proper decision of the following questions which arise upon the petition and motion of the plaintiff in error:

"1. Does the act of July 20, 1892 (27 Stat. at L. 252, chap. 209, U. S. Comp. Stat. 1901, p. 706), providing when a plaintiff may sue as a poor person, apply to the prosecution of a writ of error from this court?

"2. If that act of Congress does not apply to appellate proceedings, has this court any authority to permit the prosecution of a writ of error *in forma pauperis*?"

The act of July 20, 1892, above referred to, reads:

"An Act Providing When Plaintiff May Sue as a Poor Person and When Counsel Shall Be Assigned by the Court.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any citizen of the United States, entitled to commence any suit or action in any court of the United States, may commence and prosecute to conclusion any such suit or action without being required to prepay fees or costs, or give security therefor before or after bringing suit or action, upon filing in said court a statement under oath, in writing, that, because of his poverty, he is unable to pay the costs of said suit or action which he is about to commence, or to give security for the same, and that he believes

[245] he is entitled to the redress he seeks *by
195 U. S.

such suit or action, and setting forth briefly the nature of his alleged cause of action.

"Sec. 2. That after any such suit or action shall have been brought, or that is now pending, the plaintiff may answer and avoid a demand for fees or security for costs by filing a like affidavit, and wilful false swearing in any affidavit provided for in this or the previous section shall be punishable as perjury is in other cases.

"Sec. 3. That the officers of the court shall issue, serve all process, and perform all duties in such cases, and witnesses shall attend as in other cases, and the plaintiff shall have the same remedies as are provided by law in other cases.

"Sec. 4. That the court may request any attorney of the court to represent such poor person, if it deems the cause worthy of a trial, and may dismiss any such cause so brought under this act if it be made to appear that the allegation of poverty is untrue, or if said court be satisfied that the alleged cause of action is frivolous or malicious.

"Sec. 5. That judgment may be rendered for costs at the conclusion of the suit, as in other cases: *Provided*, That the United States shall not be liable for any of the costs thus incurred."

Mr. Frederic D. McKenney submitted the cause for Bradford. Mr. James Gallagher was on his brief:

Inasmuch as the case at bar was removed to the circuit court, it is to be considered, for all purposes, as having originated in said court, thus distinguishing it from the *Galloway Case*, which arose in a state court. The former case is within the equity of the act of Congress.

Fuller v. Montague, 53 Fed. 206.

The only case to the contrary is *The Presto*, 35 C. C. A. 394, 93 Fed. 522.

The Tennessee statute which authorized the commencement of this case *in forma pauperis*, in the state court, is narrower in its terms and seemingly more restricted in scope than the act of Congress upon the same subject; nevertheless it has been construed by the supreme court of that state to extend to the prosecution of appellate proceedings.

Philips v. Rudle, 1 Yerg. 121; *Brumley v. Hayworth*, 3 Yerg. 421; *Mowry v. Davenport*, 6 Lea, 80; *Andrews v. Page*, 2 Heisk. 634.

Independent of any statute, the circuit court of appeals possesses inherent power to allow the prosecution of a writ of error *in forma pauperis* in any case wherein there might otherwise be a failure of justice.

Bland v. Lamb, 2 Jac. & W. 402; *Brinkley v. Louisville & N. R. Co.* 95 Fed. 345.

Mr. Frank P. Poston submitted the cause for the Southern Railway Company. Mr. W. A. Henderson was on his brief:

An appeal or writ of error is a statutory proceeding, and is not a common-law right. The mere fact that the appellant is a pauper does not, of itself, relieve him of the necessity of giving an appeal bond; and the general rule is that express statutory authority must be had for an appeal *in forma pauperis*.

The Presto, 35 C. C. A. 394, 39 Fed. 523; *McClain v. Williams*, 10 S. D. 332, 43 L. R. A. 287, 73 N. W. 72; *Sullivan v. Haug*, 82 Mich. 548, 10 L. R. A. 263, 46 N. W. 795; *Bailey v. Kincaid*, 57 Hun, 516, 11 N. Y. Supp. 294; *Butler v. Jarvis*, 117 N. Y. 115, 22 N. E. 561; *Halloran v. Texas & N. O. R. Co.* 40 Tex. 465; *Fite v. Black*, 85 Ga. 413, 11 S. E. 782.

In *Sage v. Central R. Co.* 96 U. S. 714, 24 L. ed. 643, it was held that there can be no appeal without the taking of security for costs, or costs and damages, and this must be done by the court, or judge, or justice.

In *Ex parte Parks*, 93 U. S. 21, 23 L. ed. 788, this court held that the regulation of the appellate power of this court was conferred upon Congress, and Congress having given an appeal or writ of error only in certain specified cases, the implication is irresistible that those errors and irregularities which can be reviewed only by appeal or writ of error cannot be reviewed in this court in any other cases than those in which those processes are given.

In *Woods v. Davidson*, 57 Miss. 206, the supreme court of Mississippi held, under a statute of that state similar to the act of Congress, that a litigant who has commenced a suit *in forma pauperis* in a justice's court cannot appeal without bond from an adverse decision,—basing this rule upon the proposition that the right to appeal is statutory, and not a common-law one, and that he is deprived of no constitutional right, because he has had his day in court.

In the case of *Galloway v. State Nat. Bank*, 186 U. S. 178, 46 L. ed. 1111, 22 Sup. Ct. Rep. 811, which involved an application for leave to prosecute a writ of error to a state court without giving security, as required by § 1000 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 712), under the act of Congress of July 20, 1892, this court held that that act had no application to proceedings in the Supreme Court.

Mr. Chief Justice Fuller delivered the opinion of the court:

After the passage of the act of July 20, 1892, many applications were made to this court for leave to prosecute writs of error or appeals *in forma pauperis*, and were

uniformly denied, as we were of opinion that the act had no relation to proceedings in this court. And we so stated in *Galloway v. State Nat. Bank*, 186 U. S. 177, 46 L. ed. 1111, 22 Sup. Ct. Rep. 811, where leave was asked to prosecute a writ of error to a state court without giving security as required by § 1000 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 712). The ruling would have been the same if the review of the judgment or decree of a court of the United States had been sought; because, in our view, the statute refers only to the court of original jurisdiction. And the same ruling must necessarily obtain in the circuit courts of appeals.

The act consists of five sections. Of these, §§ 3 and 4 obviously relate to the trial or hearing. By § 5 "judgment may be rendered for costs at the conclusion of the suit, as in other cases," which we take to mean judgment at the close of the trial or hearing, and not judgment then and also judgment in appellate proceedings, or, in case of such proceedings, no judgment for costs below until judgment rendered above.

*The first section relates to the commence-[248]ment and carrying forward of a suit or action without plaintiff being required to prepay fees or costs or to give security therefor, whether the fees or costs accrue at the beginning or during the progress of the suit or action. The application is to be made at the outset, and the order, if granted, covers the fees or costs accruing when or after the suit or action is commenced. And this result is secured by the words "and its prosecution to conclusion." That conclusion is the termination of the suit or action in the court where it is commenced. The second section provides for a similar application after the suit or action has been brought.

The words "suit or action" are used in both sections, and the applicant is required to set forth "his alleged cause of action," and by § 4 the case may be dismissed "if it be made to appear that the allegation of poverty is untrue, or if said court be satisfied that the alleged cause of action is frivolous or malicious."

Lord Coke defined "action" to be "a legal demand of one's right," and cause of action comprises every fact a plaintiff is obliged to prove in order to obtain judgment; or, conversely, every fact the defendant would have the right to traverse (*Chesapeake & O. R. Co. v. Dixon*, 179 U. S. 131, 139, 45 L. ed. 121, 125, 21 Sup. Ct. Rep. 67). The words "action" and "cause of action" are not ordinarily applicable to writs of error, and, in our opinion, were obviously not so applicable here, but used *diverso intuitu*. And this is so whether a writ of error be considered a new proceeding or a continua-

tion of the original proceeding, as it is usually regarded in the Federal courts. *Cohen v. Virginia*, 6 Wheat. 410, 5 L. ed. 292; *Nations v. Johnson*, 24 How. 205, 16 L. ed. 632; *Re Chetwood*, 165 U. S. 443, 461, 41 L. ed. 782, 788, 17 Sup. Ct. Rep. 385.

A leading case on the subject is *Moore v. Cooley*, 2 Hill, 412. The statute of New York under consideration in that case was as follows (2 Rev. Stat. N. Y. 2d ed. 1836, p. 362):

[249] "Every poor person, not being of ability to sue, who shall have a cause of action against any other, may petition the *court in which such action is depending, or in which it is intended to be brought, for leave to prosecute as a poor person, and to have counsel and attorneys assigned to conduct his suit."

After quoting the statute Judge Cowen said:

"Strictly speaking, an error on which a writ lies is not a cause of action; for, as Lord Coke says, there is a distinction between writs and actions; and under this distinction he instances actions and writs of error. 2 Inst. 39, 40. And yet, a release of all actions extends to writs of error, when anything may be recovered or taken by way of restitution under or in consequence of the writ of error. Co. Litt. 288, b; Bacon, Abr. *Release*, I. 2. This, however, I take it, proceeds rather upon an equitable, and therefore extended, construction of the words in the release, beyond their strict meaning; for they generally reach the original matter out of which the error arose, that being the direct subject of an action if the matter be thrown open by the writ of error. The original matter being released, therefore, the words are very properly construed as reaching indirectly and in liberal construction to the writ of error itself, because that depends upon the original matter. Yet, in strictness, no book holds the word 'action,' or words 'cause of action,' to be identical with a writ of error or cause of a writ of error.

"There can be little doubt that the statute under which this motion is made should be construed strictly; for the pauper comes to litigate entirely at the expense of others. He is neither to pay his own attorneys or counsel, nor is he liable to his adversary should the suit prove to be groundless. He thus enjoys a great privilege and exemption from the common lot of men, whereby, in respect to causes of action proper, he becomes, as Lord Bacon says, rather able to vex than unable to sue. Hist. of Hen. VII."

Lord Bacon was referring to the statute 11 Hen. VII., chap. 12, and his language is elsewhere translated or explained to mean "that the charity of the legislature thought

it better that the *poor man should be able[250] to vex than that he should not be able to sue." 6 Bacon's Works, 161.

So in *Bristol v. United States*, 129 Fed. 87, where the circuit court of appeals for the seventh circuit held that the act of Congress of July 20, 1892, did not entitle a defendant in a criminal case to prosecute a writ of error out of the circuit court of appeals *in forma pauperis*, Jenkins, J., delivering the opinion, said:

"We do not think it can properly be said that a writ of error is a suit or action within the statute so far as respects a writ of error in a criminal case. Were it not for the words 'prosecute to conclusion,' we doubt if any court would hold that the act applied to an appeal or writ of error in a civil cause. The applicant, by the statute, must declare the nature of his cause of action. Surely an erroneous ruling by the trial court cannot be held to furnish a 'cause of action,' as that phrase is commonly understood. The statute, by that term, in our judgment, refers to a legal demand by one against another, not to the rulings of a trial court. Under a somewhat similar statute of the state of New York, its supreme court, speaking through Judge Cowen, held that the provisions of the statute do not extend to writs of error. *Moore v. Cooley*, 2 Hill, 412."

We adhere to the view that the act, on its face, does not apply to appellate proceedings, and that it does not is sustained by other considerations.

The act of July 20, 1892, does not purport to grant the right to prosecute a writ of error or an appeal, and that right depends on a statute, and not on the common law. *United States v. More*, 3 Cranch, 171, 2 L. ed. 401. Errors can be reviewed only in the cases in which those processes are given by statute. *Ex parte Parks*, 93 U. S. 21, 23 L. ed. 788.

Section 11 of the judiciary act of March 3, 1891, creating the circuit court of appeals, provides:

"And all provisions of law now in force regulating the methods and system of review, through appeals or writs of *error,[251] shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the circuit courts of appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error, and any judge of the circuit courts of appeals, in respect of cases brought or to be brought to that court, shall have the same powers and duties as to the allowance of appeals or writs of error, and the conditions of such allowance, as now by law belong to the justices or judges in respect of the existing

courts of the United States respectively." [26 Stat. at L. 829, chap. 517, U. S. Comp. Stat. 1901, p. 552.]

There are several such provisions, and, among others, § 1000 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 712) reads:

"Every justice or judge signing a citation on any writ of error shall, except in cases brought up by the United States, or by direction of any department of the government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect; and, if he fails to make his plea good, shall answer all damages and costs, where the writ is a supersedeas and stays execution, or all costs only where it is not a supersedeas as aforesaid."

Clearly, an act giving the right to prosecute *in forma pauperis* cannot be extended by implication beyond its terms, in conflict with existing provisions in relation to writs of error and appeals.

The result is that the first question must be answered in the negative.

2. The second question is whether, if the act of July 20, 1892, does not apply to appellate proceedings, the court of appeals has "any authority to permit the prosecution of a writ of error *in forma pauperis*."

We answer that that court has no such power unless derived from statute, and we find no statute authorizing any order to that effect.

Costs are the creatures of statute, and it is settled that authority to permit prosecution *in forma pauperis* must be given by statute.

[252] *By § 2 of the judiciary act of March 3, 1891, the costs and fees in the Supreme Court are made the costs and fees in the circuit courts of appeals, and the latter courts are empowered to establish all rules and regulations for the conduct of the business of the court.

And it appears that on November 21, 1898, rule 16 of the circuit court of appeals for the sixth circuit was so amended as to read that, "at the time of filing the record, the plaintiff in error or appellant shall deposit with the clerk the sum of \$35 as security for costs, except in cases in which the proper showing is made, and an order of this court is entered thereon, allowing the cause to proceed *in forma pauperis*."

But the exception must be assumed to have been framed on a construction of the act of July 20, 1892, which we have been constrained to hold it does not bear, and the exception falls in the absence of a statute authorizing such an order.

We need not advert to the distinction between costs and fees, but it should be noted that the power of the circuit courts of ap-

peals, in respect of the distribution of costs, or in dealing with its officers in respect of their fees, under special circumstances, is not here involved.

Both questions answered in the negative.

JOHN T. NEW, *Plff. in Err.*,
v.

TERRITORY OF OKLAHOMA.

(See S. C. Reporter's ed. 252-256.)

*Appeal—from Oklahoma supreme court—
not maintainable in capital cases—stare
decisis.*

1. Lack of statutory authority precludes a review in the Federal Supreme Court of judgments of the supreme court of the territory of Oklahoma in capital cases.
2. The Federal Supreme Court will not consider itself bound on the question of its jurisdiction by a prior case in which jurisdiction was entertained without any suggestion as to the want of it.

[No. 226.]

Argued October 14, 17, 1904. Decided November 28, 1904.

IN ERROR to the Supreme Court of the Territory of Oklahoma to review a judgment which affirmed a conviction of murder in the District Court of Washita County, in that Territory. *Dismissed* for want of jurisdiction.

See same case below, 12 Okla. 172, 70 Pac. 198.

The facts are stated in the opinion.

Mr. Hugh T. Taggart argued the cause, and, with **Messrs. Culp & Giddings** and **John J. Weed**, filed briefs for plaintiff in error.

Mr. Percy C. Simons argued the cause and filed a brief for defendant in error.

Mr. Chief Justice Fuller delivered the opinion of the court:

John T. New was tried on an indictment for murder in the district court of Washita county, Oklahoma territory, found guilty, and his punishment fixed by the jury at imprisonment for life.

The crimes act of Oklahoma provided that every person convicted of murder should "suffer death or imprisonment at hard labor in the territorial penitentiary for life, at the discretion of the jury." Okla. Stat. 1893, chap. 25, § 13, p. 456; Okla. Stat. 1890, chap. 25, art. 17, § 13.

Judgment was entered on the verdict, and New was sentenced accordingly. He carried

NOTE.—On review of decisions of territorial courts by the Federal Supreme Court—see note to *Miners' Bank v. Iowa*, 13 L. ed. U. S. 867.

the case to the supreme court of the territory, and the judgment was affirmed. This writ of error was then allowed, and the objection is made that this court has no jurisdiction to review the judgments of the supreme court of Oklahoma in criminal cases, for want of statutory provision to that effect.

By the "Act to Provide a Temporary Government for the Territory of Oklahoma," approved May 2, 1890 (26 Stat. at L. 81, chap. 182), "the legislative power and authority of said territory" was vested in the governor and legislative assembly, and the power extended "to all rightful subjects of [254] legislation not *inconsistent with the Constitution and laws of the United States."

Section 28 provided: "That the Constitution and all the laws of the United States not locally inapplicable shall, except so far as modified by this act, have the same force and effect as elsewhere within the United States; and all acts and parts of acts in conflict with the provisions of this act are, as to their effect in said territory of Oklahoma, hereby repealed;" and by a proviso § 1850 of the Revised Statutes, requiring the submission of territorial laws to Congress, was made inapplicable to Oklahoma.

By § 11 certain enumerated "chapters and provisions of the Compiled Laws of the state of Nebraska, in force November 1, 1889, in so far as they are locally applicable, and not in conflict with the laws of the United States or with this act, are hereby extended to and put in force in the territory of Oklahoma until after the adjournment of the first session of the legislative assembly of said territory, namely: . . . and of part three thereof, entitled 'Criminal Code.'"

This temporary provision was supplanted some months subsequently by laws passed by the Oklahoma legislative assembly. Okla. Stat. 1890. These statutes were elaborate and comprehensive, and embraced a crimes act, with due provision for procedure.

Section 9 of the organic act reads as follows:

"Sec. 9. That the judicial power of said territory shall be vested in a supreme court, district courts, probate courts, and justices of the peace.

". . . and the said supreme and district courts, respectively, shall possess chancery as well as common-law jurisdiction and authority for redress of all wrongs committed against the Constitution or laws of the United States or of the territory, affecting persons or property. . . . Writs of error, bills of exception, and appeals shall be allowed in all cases from the final decisions of said district courts to the *supreme [255] 195 U. S.

court, under such regulations as may be prescribed by law, but in no case removed to the supreme court shall trial by jury be allowed in said court. Writs of error and appeals from the final decisions of said supreme court shall be allowed and may be taken to the Supreme Court of the United States in the same manner and under the same regulations as from the circuit courts of the United States, where the value of the property or the amount in controversy, to be ascertained by oath or affirmation of either party or other competent witness, shall exceed \$5,000."

So far as review by this court is concerned, this is the usual provision, and is limited to civil cases. We are then brought to inquire whether any other statute may be invoked to sustain our jurisdiction.

Section 5 of the judiciary act of March 3, 1891 (26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549), provided that appeals or writs of error might be taken from the district and circuit courts directly to this court in certain enumerated classes of cases, among which were "cases of conviction of a capital or otherwise infamous crime." By amendment the words "or otherwise infamous" were stricken out, and it was declared that cases of convictions for an infamous crime not capital might be carried to the circuit courts of appeals. 29 Stat. at L. 492, chap. 68, U. S. Comp. Stat. 1901, p. 556.

By § 6, the judgments of the circuit courts of appeals are made final in cases arising under the criminal laws.

And § 15 provides: "That the circuit court of appeal in cases in which the judgments of the circuit courts of appeal are made final by this act shall have the same appellate jurisdiction, by writ of error or appeal, to review the judgments, orders, and decrees of the supreme courts of the several territories as by this act they may have to review the judgments, orders, and decrees of the district court and circuit courts; and for that purpose the several territories shall, by orders of the Supreme Court, to be made from time to time, be assigned to particular circuits."

But the case before us is a capital case, and not included in *the criminal cases to [256] which the jurisdiction of the circuit courts of appeals extends. It is suggested that, as it follows that if this court has no jurisdiction, convictions for crimes not capital are reviewable on a second appeal, while convictions for a capital crime are not, this involves an absurdity, hardship or injustice presumably not intended. We held, however, in *Folsom v. United States*, 160 U. S. 121, 40 L. ed. 363, 16 Sup. Ct. Rep. 222,

that the intention was plain, and that the statute must be taken as it read.

There remains the act of February 6, 1889 (25 Stat. at L. 655, chap. 113, U. S. Comp. Stat. 1901, p. 569), by the 6th section of which it was provided that "in all cases of conviction of crime, the punishment of which provided by law is death, tried before any court of the United States, the final judgment of such court against the respondent shall, upon the application of the respondent, be re-examined, reversed, or affirmed by the Supreme Court of the United States upon a writ of error." As to this, however, it was ruled in *Cross v. United States*, 145 U. S. 571, 36 L. ed. 821, 12 Sup. Ct. Rep. 842, that, in view of the terms of the whole section, the allowance of a writ of error to any appellate tribunal was not contemplated, but merely to review the judgment of the trial court.

It is thus seen that there is no statute giving appellate jurisdiction to this court over the judgments of the supreme court of Oklahoma in capital cases.

Reference is made to *Queenan v. Oklahoma*, 190 U. S. 548, 47 L. ed. 1175, 23 Sup. Ct. Rep. 762, in which we entertained jurisdiction in the absence of any suggestion as to the want of it. *United States v. Simms*, 1 Cranch, 252, 2 L. ed. 98, is an instance of similar inadvertence, and when cited in *United States v. More*, 3 Cranch, 159, 172, 2 L. ed. 397, 401, Chief Justice Marshall disposed of it in these words: "No question was made, in that case, as to the jurisdiction. It passed *sub silentio*, and the court does not consider itself as bound by that case."

Writ of error dismissed.

[257]*NATIONAL EXCHANGE BANK OF Tiffin, OHIO, *Plff. in Err.*,

v.

SOLOMON L. WILEY.

(See S. C. Reporter's ed. 257-270.)

Constitutional law—full faith and credit—collateral attack on foreign judgment—due process of law.

1. A judgment taken under a warrant of attorney annexed to a promissory note, authorizing confession of judgment "in favor of the holder," is not protected by the Federal

NOTE.—As to the validity of personal judgments rendered upon constructive service of process—see note to *Moyer v. Bucks*, 16 L. R. A. 231.

On the effect of a judgment obtained upon an unauthorized appearance by an attorney—see note to *Williams v. Johnson*, 21 L. R. A. 848.

Constitution and laws, when sued on in another state, from collateral attack upon the ground that the party in whose behalf it was rendered was not in fact the holder, because not the real owner of the note.

2. Due process of law is wanting in proceedings by which judgment is taken in a state court under a warrant of attorney annexed to a promissory note, authorizing confession of judgment "in favor of the holder," if the party in whose favor the judgment was rendered has ceased, before the commencement of the suit, to own the note, or to be entitled to receive the proceeds to its own use, since such judgment is, in legal effect, a personal judgment without service of process upon the defendants, and without their appearance in person or by an authorized attorney.

[No. 53.]

Argued November 4, 7, 1904. Decided November 28, 1904.

IN ERROR to the Supreme Court of the State of Nebraska to review a judgment which affirmed a judgment of the District Court of Douglas County, of that State, in favor of defendant in an action on a foreign judgment. *Affirmed.*

See same case below (Neb.) 92 N. W. 582.

The facts are stated in the opinion.

Mr. J. J. Boucher argued the cause, and, with Messrs. Constantine J. Smyth and Thomas D. Crane, filed a brief for plaintiff in error:

It appears by the answer itself that the defendant executed and delivered to the plaintiff a note and warrant of attorney authorizing any attorney at law to appear for him without process, in any court of record, and confess judgment against him; that pursuant to such authority an attorney did appear for him in an action by the plaintiff against him on the note, in a court of general jurisdiction, and confess judgment against him; and that such judgment constituted the cause of action set up in the petition. The answer thus brings this case clearly within the case of *Tcel v. Yost*, 128 N. Y. 387, 13 L. R. A. 796, 28 N. E. 353.

Under the full faith and credit clause of the Constitution of the United States, the judgment of the Ohio court is conclusive that the plaintiff therein was the holder of the note.

Richtmeyer v. Remsen, 38 N. Y. 206; *Reid v. Spoon*, 66 N. C. 415; *Fisher v. Williams*, 56 Vt. 586.

Whether or not the plaintiff was the holder of the note is not a jurisdictional question, but is, instead, a quasi-jurisdictional question, and the judgment of the Ohio court is conclusive thereon.

12 Enc. Pl. & Pr. 211; *Reinach v. Atlantic*
184 195 U. S.

& *G. W. R. Co.* 58 Fed. 43; *Betts v. Bagley*, 12 Pick. 572; *Holcomb v. Phelps*, 16 Conn. 132; *Wright v. Douglass*, 10 Barb. 97; *Ex parte Sternes*, 77 Cal. 156, 11 Am. St. Rep. 251, 19 Pac. 275; *Bostwick v. Skinner*, 80 Ill. 153; *Wing v. Dodge*, 80 Ill. 564; *Young v. Lorain*, 11 Ill. 624, 52 Am. Dec. 463.

The case of *Simmons v. Saul*, 138 U. S. 439, 34 L. ed. 1054, 11 Sup. Ct. Rep. 369, is decisive of the case at bar.

A statute of Ohio provides that, in any action in that state on a contract of insurance made therein with a foreign insurance company, service of process on the resident agent of such company shall be as effectual as though the same were served on the principal. Judgment was rendered in Ohio, in an action against an Indiana insurance company, the only service of process being upon its resident agent, there being no appearance by the company. This court held in the case of *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. ed. 451, that such judgment, when sued on in Indiana, was entitled to the same faith and credit in Indiana as in Ohio, under the Constitution and laws of the United States. It is impossible to distinguish that case from the case at bar.

This judgment has the same force and effect as a judgment on adversary proceedings.

Snyder v. Critchfield, 44 Neb. 66, 62 N. W. 306.

Mr. James H. McIntosh argued the cause and filed a brief for defendant in error:

The jurisdiction of the court and the facts upon which jurisdiction is based may always be questioned, whether the findings formally recite that the court has acquired jurisdiction, or not.

Thompson v. Whitman, 18 Wall. 457, 21 L. ed. 897; *Knowles v. Logansport Gaslight & Coke Co.* 19 Wall. 58, 22 L. ed. 70; *Hall v. Lanning*, 91 U. S. 160, 23 L. ed. 271; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Cole v. Cunningham*, 133 U. S. 107, 33 L. ed. 538, 10 Sup. Ct. Rep. 269; *Simmons v. Saul*, 138 U. S. 439, 34 L. ed. 1054, 11 Sup. Ct. Rep. 369; *Thormann v. Frame*, 176 U. S. 356, 44 L. ed. 503, 20 Sup. Ct. Rep. 446; *Bell v. Bell*, 181 U. S. 175, 45 L. ed. 804, 21 Sup. Ct. Rep. 551.

The right to question collaterally the jurisdiction of the court opens inquiry into all the facts upon which the jurisdiction is based.

Simmons v. Saul, 138 U. S. 439, 34 L. ed. 1054, 11 Sup. Ct. Rep. 369; *Thormann v. Frame*, 176 U. S. 350, 44 L. ed. 500, 20 Sup. Ct. Rep. 446; *Bell v. Bell*, 181 U. S. 175, 45 L. ed. 804, 21 Sup. Ct. Rep. 551.

An authority given by warrant of attorney to confess judgment against the maker

195 U. S.

of the note must be clear and explicit and strictly pursued, and the courts cannot supply any supposed omissions of the parties.

Spence v. Emerine, 46 Ohio St. 433, 15 Am. St. Rep. 634, 21 N. E. 866; *Cushman v. Welsh*, 19 Ohio St. 536; *Cowie v. Allaway*, 8 T. R. 257; *Henshall v. Matthew*, 1 Dowl. P. C. 217; *Foster v. Clagget*, 6 Dowl. P. C. 524; *Manufacturers' & M. Bank v. St. John*, 5 Hill, 497; *Kahn v. Lesser*, 97 Wis. 217, 72 N. W. 739; *Morris v. Bank of Commerce*, 67 Tex. 602, 4 S. W. 246.

The holder of the note is the owner thereof,—one who in good faith acquired the same for a valuable consideration.

1 Randolph, Com. Paper, § 14, and note.

The following cases, on the one hand, involved strictly jurisdictional questions:

Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565, as to whether or not service of process within the state was essential to the validity of a personal judgment.

Griffith v. Frazier, 8 Cranch, 9, 3 L. ed. 471, as to the validity of the appointment of an administrator of the estate of a living person.

Wise v. Withers, 3 Cranch, 331, 2 L. ed. 457, as to the validity of a sentence by a court-martial against a person not in the military service.

Rose v. Himely, 4 Cranch, 241, 2 L. ed. 608, as to the validity of a judgment in proceedings *in rem*, where the *res* was not seized within the bailiwick.

Galpin v. Page, 18 Wall. 350, 21 L. ed. 959, as to the validity of a decree charging the property of an absent defendant, where publication has not been made in strict accordance with the statute.

Clarke v. Clarke, 178 U. S. 186, 44 L. ed. 1028, 20 Sup. Ct. Rep. 873, as to the validity of title claimed, under the inheritance laws of one state, to lands lying in another state.

Examples of quasi-jurisdictional questions, on the other hand, questions, namely, constituting merely preliminary facts necessary to be proved, not for the purpose of giving the court authority to bind the person or the thing, but to set the machinery of the law in motion, and authorize the court to act after jurisdiction of the person or of the thing has been acquired, are the following:

Averments of citizenship necessary to give the Federal courts jurisdiction.

Des Moines Nav. & R. Co. v. Iowa Homestead Co. 123 U. S. 552, 31 L. ed. 202, 8 Sup. Ct. Rep. 217.

The existence and amount of the debt of a petitioning debtor in an involuntary bankruptcy.

Michaels v. Post, 21 Wall. 398, 22 L. ed. 520.

The fact that there is sufficient personal property to pay the debts of a decedent when application is made to sell his real estate.

Comstock v. Crawford, 3 Wall. 396, 18 L. ed. 34.

The fact that one of the heirs of an estate had reached his majority, when the act provided that the estate should not be sold if all the heirs were minors.

Thompson v. Tolmie, 2 Pet. 157, 7 L. ed. 381.

The question as to whether or not a contract gave certain trustees the powers the court found it gave them.

Reinach v. Atlantic & G. W. R. Co. 58 Fed. 43.

The question as to whether or not the courts of another state were right in discharging a contract there made.

Betts v. Bagley, 12 Pick. 572.

The question as to whether or not the domicile of a decedent was within the state so as to authorize the issuance of letters of administration, the property itself being within the state.

Holcomb v. Phelps, 16 Conn. 132.

When the parties are in court, and the jurisdiction depends on a fact litigated in the suit, and is adjudged in favor of that party who avers the jurisdiction.

Wright v. Douglass, 10 Barb. 97.

Simmons v. Saul, 138 U. S. 439, 34 L. ed. 1054, 11 Sup. Ct. Rep. 369, which the plaintiff declares is decisive of the case at bar, is a good illustration of the distinction between strictly jurisdictional and quasi-jurisdictional questions. In that case the property in question, as well as the domicile of the decedent, was within the jurisdiction of the court. The court had jurisdiction over the thing. Thereupon, having acquired jurisdiction over the thing, its subsequent acts in disposing of it were, at most, quasi-jurisdictional. And such was the ground of the court's decision.

These quasi-jurisdictional questions bear no resemblance to the question involved in this suit. The question involved here is, Did the court have jurisdiction over Wiley? Was Wiley ever in court? Did the facts exist essential to the court's jurisdiction over the person? This, therefore, was not a quasi-jurisdictional, but a strictly jurisdictional, question.

Mr. Justice **Harlan** delivered the opinion of the court:

This is an action upon a judgment rendered in one of the courts of Ohio, and the question to be considered is whether the final judgment under review gave to the proceedings in the Ohio court such faith and

credit as are required by the Constitution and laws of the United States.

The Constitution, art. 4, § 1, provides that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof." The statute enacted in execution of that power (Rev. Stat. § 905, U. S. Comp. Stat. 1901, p. 677) provides for the authentication of the records and judicial proceedings of the several states and territories and any country subject to the jurisdiction of the United States, and declares that "the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."

The Wiley Construction Company, a Massachusetts corporation, and Wiley, the defendant in error, executed and delivered to the National Exchange Bank, the plaintiff in error, a written instrument,—being a note with warrant of attorney annexed,—dated Tiffin, Ohio, April 26th, 1884, in which, for value received, they jointly and severally promised to pay to that bank, or order, on the 1st day of October, 1884, at its office in that city, \$10,000, with 8 per cent interest after maturity. The instrument authorized N. L. Brewer, or any attorney at law in the United States, or elsewhere, to appear before any court of record, after such obligation became due, waive the issuing and service of process, and confess judgment against the obligors or either of them "in favor of the holder" for the amount then appearing to be due, together with the cost of suit; and thereupon to release all errors and writs of error, and, in behalf of the obligors or either of them, waive all right to appeal and stay of execution.

On the 31st day of July, 1899, nearly fifteen years after the maturity of the note, the National Exchange Bank instituted suit against both obligors in the court of common pleas of Seneca county, Ohio,—a court of general jurisdiction in that state,—to recover the balance due on that obligation, which was alleged to be \$5,772.70, with interest from May 9th, 1887, at 8 per cent. Upon it was credited a payment of \$6,311.75, as of May 9th, 1887.

It may be here stated that there was no indorsement on the note showing that it had ever been assigned or transferred by the original payee.

With the petition in that suit were filed copies of the paper constituting the note and warrant of attorney. With it was also

filed an answer, in which an attorney, assuming, by virtue of the above warrant, and not otherwise, to be the attorney of the construction company and of Wiley, confessed judgment against them for the full amount claimed by the bank.

On the very day of the bringing of that suit judgment was entered against the defendants therein for \$11,419.68, being the amount of the obligation with interest at 8 per cent from May 9th, 1887; the judgment reciting that the attorney who acted under the warrant of attorney, naming him in person, by virtue of that warrant, entered the appearance of the defendants, waived the issuing and service of process, confessed judgment, and released and waived all exceptions, errors, and right of appeal.

The present action was by the National Exchange Bank against Wiley on the judgment rendered in the Ohio suit. The defendant disputed the plaintiff's right to recover upon several grounds, one of which was that, prior to the institution of the Ohio suit, and more than twelve years before the commencement of the present action, the note had been fully discharged, so far as he was concerned, pursuant to an agreement between him and the holder. But on this writ of error we are concerned only with the part of the defense which distinctly raises a Federal question.

The defendant alleged that the warrant of attorney annexed to the note of April 26th, 1884, did not authorize a confession of judgment against the obligors except in favor of the "holder;" that so far from the National Exchange Bank being such holder when it brought the Ohio suit, the Tiffin National Bank, as early as March 2, 1885, purchased, received, and *became the holder of the obligation, and thereafter remained and still was the holder; that, therefore, the attorney professing to act in behalf of the defendants in the Ohio suit had no authority, in virtue of such warrant of attorney, to represent them in that suit, or to confess judgment in favor of the National Exchange Bank; that the defendant was neither served with process in the Ohio suit nor had any notice thereof; that the Ohio court was entirely without authority or jurisdiction to render judgment against him in favor of the plaintiff bank; and that its authority or jurisdiction could not be upheld consistently with the 14th Amendment of the Constitution of the United States.

The plaintiff insisted that it was the holder of the note when put in suit; further, that the court in Ohio had full power and jurisdiction to render the judgment in question, and that neither personal service of process on nor notice to the obligors was

necessary in order to give that court jurisdiction of the parties and subject-matter.

Both at the trial and in the supreme court of Nebraska the bank contended that full faith and credit, as required by the Constitution and laws of the United States, would not be given to the proceedings in the Ohio suit if the judgment in its favor was held not to be conclusive in respect of the authority of the Ohio court to render such judgment.

It is unnecessary to set out all the instructions. It is sufficient to say that the jury were, in substance, instructed that the warrant of attorney authorized a confession of judgment in favor of the holder of the note; that it was to be presumed upon the showing made by the record of the Ohio court that it had jurisdiction to render the judgment sued on; and that such presumption continued throughout this case unless the defendant, by a preponderance of evidence, proved that the plaintiff bank was not, in fact, the holder of the note when put in suit in Ohio. The jury were also instructed that if the plaintiff was found not to be such holder, the verdict should be for the defendant.

*The jury's verdict was for the defendant [263] and the judgment thereon was affirmed. Upon the issue as to the ownership of the note at the time it was sued on in Ohio there was, as the supreme court of Nebraska held, proof both ways.

Did the Ohio court have jurisdiction to render the judgment in question? It is a settled doctrine, Chief Justice Marshall said, in *Rose v. Himely*, 4 Cranch, 269, 2 L. ed. 617, that the effect of every judgment must depend upon the power of the court to render that judgment. In determining whether the Ohio court had authority to render the judgment against the obligors in the note, we must look first into the decisions of the highest court of that state.

In *Osborn v. Hawley* (1850) 19 Ohio, 130, the plaintiff declared as indorsee of a promissory note, to which was attached a power of attorney to confess judgment. The report of that case is very meager, but in the course of the opinion the court said: "The power of attorney is not negotiable, and when the legal title to the note is transferred the power of attorney becomes invalid, and no power whatever can be exercised under it, for the benefit of the indorsee; and he holds the note as if no such power had ever been attached to it."

In *Marsden v. Soper* (1860) 11 Ohio St. 503, the plaintiff declared on a note to which was attached a warrant of attorney authorizing a confession of judgment "in favor of any holder." A suit was brought on the note in one of the courts of Ohio by the in-

dorsee thereof, and judgment was confessed under a warrant of attorney annexed to the note. The question was whether the court had jurisdiction of the persons of the defendants so as to authorize a judgment affecting their rights. The supreme court of Ohio said: "It will be noticed that the plaintiff in this judgment is not the payee of the note on which judgment is taken, but an indorsee; and that the warrant of attorney under which judgment was confessed purports to authorize such confession 'in favor of any holder of this obligation,' after the same becomes due. But, it was held, in broad and general terms, in the case of Osborn v. Hawley, 19 Ohio, *130, that a warrant of attorney to confess judgment, attached to a note, and forming a part of the same instrument, is not negotiable, and when the note is transferred becomes invalid and inoperative. It is true, the report of that case does not inform us whether the warrant of attorney in that case purported to authorize the confession of a judgment in favor of the payee of the note alone, or whether its terms extended, as in this case, to any holder of the note after due. But, however this may have been in that case, we suppose that, if this judgment rested upon the confession under the warrant of attorney alone, it would be very questionable whether the court of common pleas had any rightful jurisdiction of the defendants in the judgment."

In *Cushman v. Welsh*, 19 Ohio St. 536, 539, the warrant of attorney authorized a confession of judgment "in favor of the legal holder." The note there in question was payable to order, and had not been regularly indorsed to the party who in fact purchased and owned it, and in whose name suit was brought. The question in the case was whether the confession under the warrant of attorney authorized judgment in favor of the purchaser. The court said: "Though he might, as the owner of the note in equity, have brought an action thereon, under the provisions of the Code, in his own name, against the makers of the note, it does not follow that he could obtain judgment by confession of their warrant of attorney attached to the note. That depends on the extent of the power conferred by the warrant. The attorney can do nothing more than execute the power conferred by his warrant; moreover, 'all authorities of this sort must be strictly pursued.' *Cowie v. Allaway*, 8 T. R. 257. 'Indeed, formal instruments of this sort are ordinarily subjected to a strict interpretation, and the authority is never extended beyond that which is given in terms, or which is necessary and proper for carrying the authority so given into full effect.' Story, Agency, § 68. Now,

the power conferred by the terms of the instrument in this case was, to confess judgment *only 'in favor of the legal holder' of the note. The plaintiff below was not the 'legal' holder of the note, for the note had not been indorsed to him. He could become the 'legal holder' of the note only 'by indorsement thereon,' as authorized by the statute. *Swan & C. Stat.* 862; *Avery v. Latimer*, 14 Ohio, 542. The waiving of process, and confession of judgment in favor of the plaintiff below, was not, then, within the authority conferred by the power of attorney. Under the rule of interpretation applicable to such instruments, we must conclude that the jurisdiction of the defendants below, obtained through the warrant of attorney only, and the confession of judgment by means thereof, exceeded the authority conferred by the defendants in their power of attorney, and that the court, therefore, erred in overruling their motion to set aside the judgment, irregularly obtained against them."

In *Watson v. Paine*, 25 Ohio St. 340, which was an action upon a judgment based on a warrant of attorney attached to a promissory note, and which authorized any attorney at law to confess judgment in favor of the holder of the note, the point was made that the warrant of attorney did not authorize the waiving of process or an appearance for the defendants in an action brought by an indorsee. The members of the supreme court of Ohio were divided in opinion on that point, and it was left undecided. The case went off upon another ground, but Mellvaine, J., delivering the judgment of the court, expressed his individual opinion that a power to confess judgment in favor of any holder of the note may be exerted as well in favor of an indorsee as of the payee.

But in *Clements v. Hull*, 35 Ohio St. 141-143, it was held that, under the Code of Civil Procedure, a warrant of attorney authorizing judgment to be confessed in favor of the holder of a note could be executed in favor of the equitable owner and holder, being the real party in interest. The court said: "The scope of the power is not limited in this case as it was in the case *Cushman v. Welsh*, 19 Ohio St. 536, in favor of the legal holder only. The authority here given is 'to confess *judgment in favor of the holder of said note,' and we think these words were intended, and should be construed, to embrace any holder who might lawfully prosecute an action on said note, in his own name and for his own use."

The latest case in the supreme court of Ohio is *Spence v. Emerine*, 46 Ohio St. 433, 440, 441, 15 Am. St. Rep. 634, 21 N. E. 866. There the note was payable to a named per-

son or bearer, and the warrant of attorney authorized any attorney to appear for the obligor in any court of record in Ohio, and confess judgment for the amount then due, and to release all errors and the right of appeal. The confession was in favor of one to whom the note had been transferred by delivery merely. The question was as to the power of the court to render the judgment. The supreme court of Ohio, after referring to its prior adjudications, said: "Whether the warrant of attorney can be executed for the benefit of a holder of the note other than the payee must depend upon the language of the warrant itself. But it is an established principle that an authority given by warrant of attorney to confess a judgment against the maker of the note must be clear and explicit and strictly pursued, and we cannot supply any supposed omissions of the parties. *Cushman v. Welsh*, 19 Ohio St. 536; *Cowie v. Allaway*, 8 T. R. 257; *Henshall v. Matthew*, 1 Dowl. P. C. 217; *Foster v. Claggett*, 6 Dowl. P. C. 524; *Manufacturers' & M. Bank v. St. John*, 5 Hill, 497. . . . The power of attorney attached to the note in controversy does not, in express language, authorize a confession of judgment in favor of anyone, not even of the payee; but if such authority might be implied as to the payee, we cannot, under the rule of a strict interpretation, extend that implication in favor of the defendant in error, to whom the note was transferred by delivery. . . .

[267] It will thus be seen that where it has been adjudged by the court that a power of attorney to confess a judgment may be executed in favor of a party other than the payee, it has been in cases where authority was expressly conferred to confess a judgment in favor of a *legal**holder or holder of the note.

The decisions have all been based upon a strict interpretation of the power granted, without aiding any omission or defect in its terms by liberal intendment or construction. In accordance with the views which we have expressed, our conclusion is, that the warrant of attorney attached to the note sued on did not authorize a confession of judgment in favor of defendant in error, and, there having been no summons or other notice to the plaintiff in error of the bringing of the original action, the court of common pleas acquired no jurisdiction over the person of the plaintiff in error, and erred in rendering a judgment against him."

Looking at the face of the note, the National Exchange Bank insists that, being payee, it was also the holder within the meaning of the warrant of attorney, however strictly construed; that nothing else appearing than the note and warrant, a confession of judgment in its favor was in conformity with law and usage in Ohio, as de-

clared by the highest court of that state. We incline to think that that position is justified by the above cases, when carefully considered; and assuming such to be the law as administered in Ohio,—which is the view most favorable to the plaintiff in error,—the question still remains whether the judgment, when sued on in another state, may be collaterally attacked upon the ground that the party in whose behalf it was rendered was not in fact the holder, because not the real owner of the note? This question must, we think, be answered in the affirmative. It can be so answered without doing violence to the Constitution or the laws of the United States. While the words of the warrant of attorney might be held to embrace any holder, even the equitable owner, who might rightfully prosecute an action on the note in his own name and for his own use (*Clements v. Hull*, 35 Ohio St. 141), yet if it was true, as alleged, that in 1885 the Tiffin National Bank purchased, received, and became the owner of the note, then the National Exchange Bank could not thereafter rightfully sue on it in *its name and [268] for its own use. Here, the confession of judgment was in behalf of the payee bank, which was not entitled to sue for its own use or to receive the proceeds if it sold the note in 1885, and never afterwards became the owner. The words, in the warrant of attorney, "in favor of the holder of this instrument," ought not, as between the National Exchange Bank and the obligors, to be construed as embracing the former after it ceased to be the owner of the note, but, at most, as only authorizing a confession of judgment in favor of the party who had become its real owner. It should not be supposed that the obligors intended, or that the payee bank ever understood them as intending, to authorize a confession of judgment in favor of one who was not entitled, of right, to demand payment from the obligors. That view accords with justice, and, not being inconsistent with the words in the warrant of attorney, it should be adopted.

Byles on Bills says that "*holder* is a general word, applied to anyone in actual or constructive possession of the bill, and entitled at law to recover or receive its contents from the parties to it." Sharswood's ed. 66. So in 1 Parsons on Bills & Notes it is said that "by the holder of negotiable paper is meant, in law, the owner of it; for if it be in his possession without title or interest he is, in general, considered only as the agent of the owner." p. 253. So that proof that the payee bank was not the owner of the note when it brought suit in Ohio tended to show that it was not in law the "holder" of the instrument within what must be regarded as the true meaning of the

warrant of attorney, and, therefore, that the court was without authority to enter judgment by confession in its favor against the obligor. In other words, the defendant Wiley could show collaterally that he was not legally before the court—as he was not, in any just sense—if his appearance was entered and judgment confessed by one who had, in fact, at the time, no authority to do either; and, consequently, that the court was without jurisdiction to proceed except on legal notice to him, or without his ap-
 [269]pearance in *person or by an attorney authorized to represent him. If law and usage in Ohio were to the contrary, then such law and usage would be in conflict with the Constitution of the United States; for it is thoroughly settled that a personal judgment against one not before the court by actual service of process, or who did not appear in person or by an authorized attorney, would be invalid as not being in conformity with due process of law.

This whole subject was carefully considered in *Thompson v. Whitman*, 18 Wall. 457, 463, 469, 21 L. ed. 897, 899, 901. That was an action of trespass, brought in the circuit court of the United States for the southern district of New York, for taking and carrying away a certain sloop. The defendant, a New Jersey sheriff, had seized the vessel, pursuant, as he claimed, to a statute of New Jersey relating to the raking of clams, and proceeded against it before two justices of Monmouth county, New Jersey, by whom it was condemned and ordered to be sold. Those justices had no jurisdiction, under the statute, to act in the premises, unless the seizure and the offense both occurred in that county. The record of the case recited that the offense was committed and the seizure made in Monmouth county, and the contention was that the record was conclusive, both as to the jurisdiction of the court and the merits of the case. In that case it was held to be competent for the complaining party to prove collaterally that the vessel was not seized in Monmouth county, and therefore that the facts necessary to the exercise of jurisdiction by the New Jersey justices did not exist, although their existence was recited or affirmed in the official record made by them. Speaking by Mr. Justice Bradley, this court adjudged, in the language of Story, that the Constitution “did not make the judgments of other states domestic judgments to all intents and purposes, but only gave a general validity, faith, and credit to them, as evidence;” and, upon an elaborate review of previous cases, that “the jurisdiction of the court by which a judgment is rendered in any state may be

[270]questioned in a collateral *proceeding in another state, notwithstanding the provision

of the 4th article of the Constitution and law of 1790 [Rev. Stat. § 905, U. S. Comp. Stat. 1901, pp. 677 *et seq.*], and notwithstanding the averments contained in the record of the judgment itself.” There has been no departure in the decisions of this court from the doctrines announced in *Thompson v. Whitman*, whether the question related to courts of general or to courts of limited or special jurisdiction. It has been repeatedly affirmed. *Knowles v. Logansport Gaslight & Coke Co.* 19 Wall. 58, 61, 22 L. ed. 70, 72; *Hall v. Lanning*, 91 U. S. 160, 165, 23 L. ed. 271, 273; *Pennoyer v. Neff*, 95 U. S. 714, 732, 24 L. ed. 565, 572; *Cole v. Cunningham*, 133 U. S. 107, 112, 33 L. ed. 538, 541, 10 Sup. Ct. Rep. 269; *Grover & B. Mach. Co. v. Radcliffe*, 137 U. S. 287, 295, 34 L. ed. 670, 672, 11 Sup. Ct. Rep. 92; *Thormann v. Frame*, 176 U. S. 350, 356, 44 L. ed. 500, 503, 20 Sup. Ct. Rep. 446; *Bell v. Bell*, 181 U. S. 175, 178, 45 L. ed. 804, 807, 21 Sup. Ct. Rep. 551; *Andrews v. Andrews*, 188 U. S. 14, 34, 47 L. ed. 366, 370, 23 Sup. Ct. Rep. 237. The general jurisdiction of the Ohio court undoubtedly embraced such a cause of action as was set forth in the suit on the note. But we are of opinion that that court had no authority or jurisdiction to render judgment against the obligors if the National Exchange Bank had in fact sold the note, and ceased, before the commencement of that suit, to own it or to be entitled to receive the proceeds to its own use. It was, in such case, in legal effect, a personal judgment without service of process upon the defendants, and without their appearance in person or by an authorized attorney. The proceedings were wanting in due process of law. The obligors never consented to judgment by confession in favor of one who was not the owner of the note or entitled to receive its proceeds, and the warrant of attorney cannot be held to have authorized such a confession.

Perceiving no error of law in the record the judgment must be affirmed.

It is so ordered.

*JOSEPH S. KAUFMAN, *Plff. in Err.*, [27
v.

W. T. TREDWAY, Trustee of the Estate of
Gustave Kaufman, Bankrupt.

(See S. C. Reporter's ed. 271-276.)

Error to state court—review of questions of fact — bankruptcy — preferences — evidence of creditor's knowledge—interest on preference—set-off.

1. Whether a bankrupt was insolvent at the

NOTE.—On the right of a creditor of a bankrupt to set off new credits given after receipt.

time of giving an alleged preference, and whether the creditor had reasonable cause to believe that it was intended thereby to give a preference, are questions of fact, as to which the Supreme Court of the United States is concluded by the verdict of the jury in a suit by the trustee to recover the amount of such preference.

2. Testimony of dealings between debtor and creditor some six or seven months prior to a transaction alleged to constitute a preference under the bankruptcy act of July 1, 1898 (30 Stat. at L. 544, 562, chap. 541, U. S. Comp. Stat. 1901, p. 3445), § 60, is admissible on the question of knowledge, in an action by the trustee to recover the amount of the preference.
3. The commencement by a trustee in bankruptcy of an action to recover a sum alleged to have been paid by the bankrupt to a creditor as a preference is a demand which starts the running of interest on the claim.
4. To secure the set-off in favor of a creditor who, after receiving a preference, in good faith extends further credit, without security, of property which becomes part of the debtor's estate, which is allowed by the bankruptcy act of July 1, 1898 (30 Stat. at L. 544, 562, chap. 541, U. S. Comp. Stat. 1901, p. 3445), § 60c, to the extent of "the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy." It is not necessary that such property should remain a part of the debtor's estate until his adjudication in bankruptcy, or that it should be used in payment of preferred debts.

[No. 17.]

Argued October 24, 1904. Decided November 28, 1904.

IN ERROR to the Superior Court of the State of Pennsylvania to review a judgment which affirmed a judgment of the Court of Common Pleas, No. 3, of Allegheny County, in that State, in favor of a trustee in bankruptcy in an action to recover a sum of money alleged to have been given by the bankrupt to a creditor as a preference. *Reversed* and remanded for further proceedings.

See same case below, 21 Pa. Super. Ct. 256.

Statement by Mr. Justice **Brewer**:

On August 20, 1898, Gustave Kaufman filed his petition in bankruptcy and was subsequently adjudged and decreed a bankrupt. W. T. Tredway was appointed trustee of his estate. On July 24, 1899, the trustee commenced suit in the court of common pleas, No. 3, of Allegheny county, Pennsylvania, to recover from Joseph S. Kaufman the sum of \$4,086.64, charged to have been given, on August 4, 1898, by the bankrupt to the defendant as a preference. The trial result-

ed in a judgment in favor of the trustee for \$1,086.64 and interest. This judgment was affirmed on appeal by the superior court. An application for a further appeal to the supreme court of the state was denied, and thereupon this writ of error was sued out to review the judgment of the superior court. Section 60 of the bankrupt act is as follows:

"Section 60. (a) A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the *enforce-[272]ment of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

"(b) If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

"(c) If a creditor has been preferred, and afterwards in good faith gives the debtor further credit, without security of any kind, for property which becomes a part of the debtor's estate, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him." 30 Stat. at L. 544, 562, chap. 541, July 1, 1898, U. S. Comp. Stat. 1901, p. 3445.

Messrs. Joseph A. Langfitt and William Kaufman argued the cause and filed a brief for plaintiff in error.

Mr. H. L. Castle argued the cause, and, with **Messrs. William A. Stone and Stone & Stone**, filed a brief for defendant in error.

*Mr. Justice **Brewer**, delivered the opinion-[273]ion of the court:

Whether the bankrupt was insolvent on August 4, 1898, when he paid the money to his brother, the defendant, and whether the latter had reasonable cause to believe that it was intended thereby to give a preference, are questions of fact, determined by the verdict of the jury, and not open to review in this court. *Hedrick v. Atchison, T. & S. F. R. Co.* 167 U. S. 673, 677, 42 L. ed. 320, 322, 17 Sup. Ct. Rep. 922; *E. Bement*

ing a preference—see note to *Peterson v. Nash Bros.* 55 L. R. A. 344.

195 U. S.

For set-off in bankruptcy cases generally—see note to *Morgan v. Wordell*, 55 L. R. A. 33.

& Sons v. National Harrow Co. 186 U. S. 70, 83, 46 L. ed. 1058, 1064, 22 Sup. Ct. Rep. 747; *Jenkins v. Neff*, 186 U. S. 230, 46 L. ed. 1140, 22 Sup. Ct. Rep. 905, and cases cited in opinions. It is suggested that the trial court erred in admitting testimony of transactions between the brothers some six or seven months prior to the payment by the bankrupt to the defendant; that such transactions were too remote from the time of the preference to throw light on the question of knowledge. We think that the testimony, whether of much or little value, was competent, and that it was not error for the court to admit it. *Clune v. United States*, 159 U. S. 590-592, 40 L. ed. 269, 270, 16 Sup. Ct. Rep. 125.

We see no reason to doubt the propriety of allowing interest on the claim from the commencement of the action. Such commencement is itself a demand.

The principal contention, however, is that the state court erred in ruling that the sum of \$767, loaned by the defendant to the bankrupt on August 8, could not be considered as a set-off. It appeared that four days after he had received the money paid to him in preference the defendant handed to the bankrupt \$767, on the latter's request for money to pay his employees. There was no testimony tending to show what became of this money, whether it was used in paying employees, or whether the payments, if made, were for wages earned within three months before the date of the commencement of proceedings in bankruptcy. All that appeared was the fact of the loan and the expressed purpose thereof. Under these circumstances the court instructed the jury that the defendant had not established his [274] claim to a set-off, as authorized *by paragraph c of § 60. This presents a distinct question of law.

The trial court, and its views were approved by the superior court, held that the statute required not merely that the creditor in good faith gave the debtor credit without security, and that the money or property in fact passed to the debtor, and became a part of his estate, but also that it remained such until the time of the bankruptcy, and was transferred to the trustee; or, at least, that it was used in payment of preferred debts. In its opinion, on a motion for a new trial, it said:

"Evidence that the debtor got the money for another purpose certainly is not evidence that he turned it over to the trustee.

"The most that defendant can ask—and this we would probably hold—is that money shown to have been given and used to pay a preferred debt would entitle the defendant to a set-off."

It will be noticed that the words used in paragraph c are not "the bankrupt's estate," but "the debtor's estate." "Debtor" is also found in the preceding clause as descriptive of the one to whom the credit is given. While the same person is both debtor and bankrupt, first debtor and then bankrupt, the use of the former term is suggestive of the time of the transaction as well as the status of the recipient of the credit. The paragraph further provides that "the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off." It is the nonpayment, and not the fact that the property remains still a part of the debtor's estate, which entitles to a set-off. It would seem that if Congress intended that which the trial court held to be the meaning of the statute, it would have said "which becomes a part of the bankrupt's estate" or "which becomes and remains a part of the debtor's estate until the adjudication in bankruptcy."

Further, Congress provided that the creditor act in good faith. Thus it excluded any arrangement by which the creditor, *seeking [275] to escape the liability occasioned by the preference he has received, passes money or property over to the debtor with a view to its secretion until after the bankruptcy proceedings have terminated, or with some other wrongful purpose. It meant that the creditor should not act in such a way as to intentionally defeat the bankrupt act, but should let the debtor have the money or property for some honest purpose. Requiring that it should become a part of the debtor's estate excluded cases in which the creditor delivered the property to a third person on the credit of the debtor, or delivered it to him with instructions to pass it on to some third party. The purpose was that the property which passed from the creditor should in fact become a part of the debtor's estate, and that the credit should be only for such property.

Still again, to require that the creditor should not only in good faith have extended the credit, and that the money or property should have passed into, and become a part of, the debtor's estate, but that he should also show the actual disposition thereof made by the debtor, would, in many cases, practically deny the creditor the benefit of a credit which he has extended in good faith. Suppose, three months and a half before bankruptcy, the creditor, in good faith, sells and delivers a bill of goods to the debtor, a merchant; how difficult it would be to show what had become of each particular article on that bill, or what was done with the money received for those that had been sold; and the same when, as in

this case, money was delivered to the debtor. If Congress had intended to require such proof it would seem that it would have used language more definite and certain. If the creditor has acted in good faith, extended credit without security, and the money or property has actually passed into the debtor's possession, why should anything more be required? Has the creditor not been already sufficiently punished when, having received money or property in payment of a just debt, he is compelled to refund that to the trustee because he believed, or had reason to believe, that the debtor, in [276] paying that debt, preferred him? *Why should he be punished in addition by the loss of the benefit of a credit given in good faith?

We are of opinion that the state court erred in its construction of the statute and in peremptorily denying to the creditor the benefit of the credit. For these reasons *the judgment of the Superior Court is reversed*, and the case remanded to that court for further proceedings not inconsistent with this opinion.

EMMA S. FAYERWEATHER and Mary W. Achter, *Appts.*,
v.

THOMAS G. RITCH *et al.*, Individually, and as Executors, etc., and others. (No. 157.)

JOHN B. REYNOLDS, as Sole Executor of the Last Will and Codicil of Lucy Fayerweather, Deceased, *Appt.*,
v.

THOMAS G. RITCH *et al.*, Individually, and as Executors, etc., and others. (No. 158.)

(See S. C. Reporter's ed. 276-309.)

Direct appeal to Federal Supreme Court—case involving application of Constitution—res judicata—parol testimony to limit conclusiveness of judgment.

1. The application of the due process of law clause of U. S. Const. 5th Amend. is involved so as to sustain a direct appeal to the Federal Supreme Court from a circuit court, where the latter court gave effect, as *res judicata*, to the judgment of a state court which is claimed unlawfully to have deprived the parties of their property under the forms of law, without any judicial finding of the vital fact which alone could justify such deprivation.

NOTE.—On direct appeals to the Federal Supreme Court from district or circuit courts—see note to Gwin v. United States, 46 L. ed. U. S. 741.

195 U. S. U. S., Book 49.

2. The validity of certain releases is *res judicata* as between the parties to a suit in which the question of their invalidity for fraud and undue influence was put in issue by the pleadings, where the decree of the trial court, which could not properly have been rendered without holding the releases valid, was followed by an affirmance on appeal, with an opinion declaring that there was no evidence in the record justifying the contention that they were obtained by fraud and undue influence, with a further affirmance in the court of last resort, whose opinion declared that, upon the state of the record, it was to be presumed that the validity of the releases had been affirmatively found and that there was sufficient evidence to sustain such a finding, followed by a refusal to frame its remittitur so as to send this question back to the trial court for consideration, although the trial judge made no findings of fact, made no mention in his memorandum of decision of the contention respecting the releases, and in his opinion failed in terms to pass upon this point.

3. The effect as *res judicata* of a decree in a case in which the validity of certain releases was put in issue by the pleadings, and in which no judgment could properly have been rendered without a determination of that question, cannot be limited by the oral testimony of the trial judge, some six years after his decision, to the effect that, in deciding the case, he did not consider the validity of the releases.

[Nos. 157, 158.]

Argued October 12, 13, 1904. Decided November 28, 1904.

APPEALS from the Circuit Court of the United States for the Southern District of New York to review a decree sustaining pleas of *res judicata* to, and dismissing, a bill and cross bill to set aside certain releases as fraudulently obtained. *Affirmed.*
See same case below, 118 Fed. 943.

Statement by Mr. Justice Brewer:

The controlling question in these cases arises on pleas of *res judicata*. The essential facts are as follows:

On October 6, 1884, Daniel B. Fayerweather, a citizen and resident of the state of New York, made a will, by the 9th article of which he gave to twenty colleges bequests amounting in the aggregate to \$2,100,000. By the 10th article he gave the residuary estate to his executors, as trustees, directing them to divide it equally among the twenty colleges named in the 9th article. On the same day he signed the following statement:

"This certifies that I have executed my will of this date, having been advised by my counsel of the provision and restrictions of the law of this state relative to benevolent corporations. I trust my heirs will permit

the provision of this my will to be carried into effect."

At that time, by chap. 360, Laws of 1860, of the state of New York, a testator having husband, wife, child, or parent was forbidden to give to literary or benevolent institutions more than one half of his estate. On December 13, 1884, the testator made a first codicil to his will, by which he revoked the 10th article, and gave the residuary of his estate absolutely to his executors. In other respects the will was ratified. At or about the same time a paper, bearing date December 11, 1884, headed "Private Memorandum," was signed by him, which reads as follows:

"I have made Messrs. Bulkley and Ritch my residuary legatees in the confidence that thereby my intentions as expressed in my will shall be carried into effect, and without [278] *litigations on the part of any person or persons interested. In case of my death, I trust that they will take such steps, by will or otherwise, as will protect my estate against the contingency of the death of either before my estate is settled and distributed."

By subsequent codicils minor changes were made, and Henry B. Vaughan was added as executor. The testator died on November 15, 1890, leaving a widow and three nieces, his only heirs at law and next of kin. On the day of his death he executed a codicil, which was mainly a confirmation of the provisions of the will and prior codicils.

Mr. Fayerweather's estate amounted at the date of the will to about three millions of dollars, and at the time of his death to from five to six millions of dollars, mainly in personal property.

While by the articles in the will, prior to the 9th, he had made provision for his widow and also bequests to his three nieces, yet obviously his purpose was to give the bulk of his estate to the several colleges named, and to avoid the restraining effect of the New York statute. After the death of Mr. Fayerweather the will and codicils were propounded for probate, to which the widow and nieces filed objections. A hearing was had before the surrogate, and on February 25, 1891, he entered an order admitting the will to probate, and leaving the contest of the codicils to continue. On February 24, 1891, the three executors, residuary legatees, made a deed of gift, which reads:

"Know all men by these presents, That we, Justus L. Bulkley, Thomas G. Ritch, and Henry B. Vaughan, residuary devisees and legatees under the will, meaning thereby the original will and the subsequent codicils of Daniel B. Fayerweather, late of the city of New York, deceased, prompted by

our determination that we will not retain for our own use any part of the residuary estate left to us by his will, and by the desire to make such disposition of his said residuary estate as in our judgment will best honor his memory, do dispose of so much *of the same as shall remain after the [279] payment of all lawful fees, expenses, and charges as follows:

"First, We reserve the power to make, and we retain the right to assent to, any enlargement of the \$15,000 a year by the will left to Mrs. Fayerweather, which she may desire.

"Second, We reserve the power to make, and we retain the right to assent to, any enlargement of the provisions made by the will for Mrs. Mary W. Achter and Mrs. Emma S. Drury, in case we shall be satisfied that such enlargement would not be against the wishes of Mr. Fayerweather.

"Third, We give to Lucy J. Beardsley, wife of Morris B. Beardsley, \$100,000.

"We do this because of Mr. Fayerweather's letter written to Mr. Vaughan and Mr. F. B. Myrick. If accepted, this gift is in discharge of any claim under that letter."

Then, after making gifts of several sums to individuals, hospitals, and colleges (some being those named in the will of Mr. Fayerweather, and others not so mentioned), the deed closes with these words:

"We execute this instrument, recognizing that there is pending a contest in proceedings for the probate of Mr. Fayerweather's will, and recognizing further that if such contest shall not prevail, a question may be made about our legal rights as devisees and legatees. . . . Our object is each for himself to give away whatever may come to us as residuary devisees and legatees under Mr. Fayerweather's will."

Subsequently, and on March 5, the executors, as residuary legatees, entered into an agreement with the contestants by which the amounts coming to them were increased, and thereupon the contestants executed the following paper:

"In consideration of the instrument of even date herewith executed by Justus L. Bulkley, Thomas G. Ritch, and Henry B. Vaughan, residuary devisees and legatees under the will, meaning thereby the original will and subsequent codicils of Daniel B. Fayerweather, . . . we, the undersigned, being *the widow and all of the next [280] of kin of the said Daniel B. Fayerweather, do hereby severally agree for ourselves, our, and each of our heirs, executors, and administrators, as follows:

"1. All objections to the probate of the will and four codicils of the late Daniel B. Fayerweather, offered for probate to the surrogate of the county of New York, are

hereby withdrawn, and we consent to the probate of the same.

"2. No suit shall hereafter be brought for the construction of the said will and codicils or either of them, or to set aside the will and codicils or either of them, and we further agree not to make any claim upon the said Justus L. Bulkley, Thomas G. Ritch, and Henry B. Vaughan or either of them, or against their heirs or personal representatives, or either against them, the said Bulkley, Ritch, and Vaughan, as executors, or as residuary legatees, other than for amounts left to us by the will and codicils aforesaid, and the deed of gift executed by the said Bulkley, Ritch, and Vaughan on the 24th day of February, 1891, and the instrument dated on the 5th day of March, 1891.

"3. Upon the payment to the undersigned, respectively, of the several amounts mentioned in said deed of gift and said instrument, we will severally execute a general release of all claims, except those arising under the will and codicils, both to the executors and to the donees mentioned in the deed of gift on the 24th day of February, 1891, and to the said Bulkley, Ritch, and Vaughan individually."

On March 24, 1891, the codicils were admitted to probate on written consent, signed by the attorneys for the parties to the contest. On June 12, 1891, the widow executed the following release:

"Know ye, that I, Lucy Fayerweather, widow of Daniel B. Fayerweather, of the city of New York, for and in consideration of the sum of \$225,000, lawful money of the United States, to me in hand paid *by Justus L. Bulkley, Thomas G. Ritch, and Henry B. Vaughan, as executors and trustees under the last will and testament of Daniel B. Fayerweather, deceased, and individually, and as the representatives of the persons or corporations hereinafter named, forming a class known as donees, under the deed of gift executed by the said Bulkley, Ritch, and Vaughan, on February 24th, 1891, which sum is in compromise and full settlement of any and all contests on my part of the will of said Daniel B. Fayerweather, deceased, or concerning his estate, have remised, released, and forever discharged, and by these presents do, for myself and for my heirs, administrators, and executors, remise, release, and discharge the said Justus L. Bulkley, Thomas G. Ritch, and Henry B. Vaughan, as executors and trustees aforesaid, as individuals and as representatives of the said donees constituting a class, and also the said donees, to wit, the persons and corporations mentioned in a certain deed of gift duly delivered, made by Justus L. Bulkley, Thomas G. Ritch, and Henry B. Vaughan on the 24th day of February, 1891,
195 U. S.

which deed of gift was introduced in evidence in the probate proceedings of the last will and testament of Daniel B. Fayerweather, deceased, and marked 'Exhibit No. 7, contestants,' and which said deed of gift is hereby made a part of this release, in order that the persons constituting said class of donees and to whom this release runs may be more fully known, and also the legal successors, assigns, heirs, executors, and administrators of all the aforesaid persons and corporations, of and from all and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, claims and demands whatsoever in law or in equity, which against the said persons or corporations, or any of them, I ever had or now have, or which I or my heirs, executors, or administrators hereinafter shall, can, or may have for, upon, or by reason of any matter, cause, or thing whatsoever, except my claim for the annuity given me by the will and codicils thereto of said Daniel B. Fayerweather, deceased, and also my claim for the increased annuity mentioned *in the agreement dated [282] March 5th, 1891, and made pursuant to the deed of gift above referred to."

Releases similar in form were executed by the other three contestants, the nieces and next of kin.

In January, 1893, five of the colleges named in article 9 of the will brought suit in the supreme court of the state of New York against the executors of Mr. Fayerweather's will, the executors of the will of Mrs. Fayerweather (who had died since the release), the nieces, the donees in the deed of gift, and all the colleges not joined as plaintiffs. The contention of the plaintiffs was that the codicil which gave the residue of the estate to the three executors absolutely was made in pursuance of an agreement that they should take that residue in trust for the colleges mentioned in the will, and distribute it among them. The complaint set forth the will and codicils, their admission to probate, and the issue of letters testamentary, and averred that the value of the estate left by the testator was upwards of \$6,000,000 and the residuary estate more than \$3,000,000. It alleged that the intention of the testator was to devote the principal part of his estate to the several institutions mentioned, and that the proceedings taken by him were under the advice of counsel and for the purpose of carrying into effect that intention, and upon a promise and assurance from the executors that they would dispose of the residuary estate accordingly; it averred also the fact of a contest in respect to the probate of the will and codicils, a settlement with the contestants in consideration of

the payment of \$310,000 and the execution of releases by them. The prayer was that it be adjudged and decreed that the residuary estate was devised by the testator and received by the executors in trust for the purposes set forth, that they be required to apply that estate to those purposes, and, also, "that the ultimate rights of the plaintiffs as between them and each of them and every of the other defendants herein be determined by the judgment in this action in accordance with the allegations of this complaint and the prayer hereinbefore contained."

[283] *The donees in the deed of gift answered, asserting the validity of that deed, and praying that its provisions be carried out.

The widow's executors and the nieces also appeared and filed an answer and counterclaim, in which they alleged that the agreement which the suit was brought to enforce was a secret trust to evade the New York statute by giving more than half to the several institutions, that the releases were obtained from them by concealment and fraud, and therefore of no obligation; and prayed for judgment, among other things—

"3d. That it be adjudged that the said settlements and releases made with or obtained from the said Lucy Fayerweather, Mary W. Achter, and Emma S. Fayerweather, respectively, were and are each fraudulent and void, and that the same be set aside, upon such terms as may be just and equitable, and that the sums paid for the same to said releasors or their attorneys, respectively, with the interest thereon, including the increased payments to said Lucy Fayerweather on her annuity, be charged against or allowed upon the sums payable to them respectively under the judgment herein, or be otherwise provided or accounted for as may be according to equity.

"4th. That it be adjudged that the said deed of gift, dated February 24th, 1891 (Exhibit F), was and is fraudulent and void, and that the said Thomas G. Ritch, Justus L. Bulkley, and Henry B. Vaughan be enjoined and restrained from further distributing the said residuary estate, or any part thereof, under the same, except to continue the payment of the said annuity to said Anner Amelia Reynolds, as aforesaid.

"5th. That the said defendants Ritch, Bulkley, and Vaughan may be required to account for the moneys and property received by them from the estate of the said Daniel B. Fayerweather under said last will and testament and codicils or otherwise, and for the application thereof, and to pay over the said moneys and property remaining in their hands among the parties to this action according to their several and respective

*rights thereto, as the same may be adjudged in this action.

"6th. That the ultimate rights of the parties to this action in the estate of the said Daniel B. Fayerweather be determined and enforced by the judgment in this action, in accordance with the allegations of this answer and the foregoing prayers for relief therein.

"7th. That these defendants may have such other and further relief herein as may be just and equitable, with their costs herein, to be paid as the court may direct."

The decree of the supreme court at special term, entered on December 28, 1894, adjudged and decreed that the residuary estate passed to the executors in trust for the colleges named in the ninth paragraph of the will; that the executors and trustees be restrained and enjoined from distributing the residuary estate, or any part thereof under the deed of gift, and that the plaintiffs and certain of the defendants (including therein the executors of the will of Mrs. Fayerweather and two of the nieces) recover from the trustees their costs, together with extra allowances to be paid out of the trust funds. There was no formal finding of facts and no mention made in the decree of the specific claim of the executors of Mrs. Fayerweather's will and the nieces, that the releases were fraudulently obtained. An appeal was taken by the defendants to the general term of the supreme court, which, on December 18, 1895, affirmed the judgment. A further appeal was taken to the court of appeals, which, on January 19, 1897, affirmed the judgment of the general term. 151 N. Y. 282, 37 L. R. A. 305, 45 N. E. 876. On January 28, 1897, a motion was made in the court of appeals to amend the remittitur so as to direct the justice of the supreme court before whom the action was tried at special term to consider the evidence given before him at the trial concerning the releases, and to determine whether the said releases were valid and binding or invalid and void, which motion was on March 9, 1897, denied.

After these proceedings in the state court two of the nieces *and next of kin, being [285] citizens of the state of Iowa, instituted this suit in the circuit court of the United States, making defendants substantially all the parties to the suit in the state court, the one or two omissions in no way affecting the question before us. Subsequently the remaining executor, one having resigned, of the will of Mrs. Fayerweather, filed a cross bill, the allegations and the relief asked being similar to those in the original bill.

These bills—in addition to setting forth the will and codicils executed by Mr. Fayerweather, the probate proceedings, and the

releases by the widow and nieces, and alleging that these letters were fraudulently obtained, and not binding—averred the bringing of the suit hereinbefore referred to in the supreme court of the state by the five colleges, annexing copies of the pleadings, and alleged “thereupon the issues so joined, as well as others duly raised by the answers of the several defendants, came on to be tried before said court, and these complainants gave evidence tending to prove the allegations in their said answer, and all of the said allegations, and thereupon it became and was the duty of said court to adjudge and determine whether the releases therein described were invalid, and whether these complainants were entitled to the affirmative relief prayed in respect thereto;” and further, that the defendants—

“Confederating and combining together and between themselves to prevent the entry of any judgment upon an actual determination of the invalidity of said releases so in issue, requested and induced the court to hold and decide that the right of the respective parties to said property and residuary estate did not require any consideration or decision of said issues, and said court thereupon made and rendered its decision without considering, passing upon, or including in judgment the said issues, and omitted to decide upon these complainants’ right to the affirmative relief by said answer prayed in respect to said releases.

[286] “And thereupon there was filed and entered in said action *a decision and judgment, a copy of which is hereto annexed, which complainants pray may be referred to and taken as part of this bill as if the same were herein set forth at length.

“Thereupon, by appeals taken from said judgment, in which appeals these complainants were respondents as well as appellants, said judgment was reviewed by the general term of said supreme court, sitting as a court for the correction of errors, and not exercising any original jurisdiction, and thereupon said court held and determined that the right of the respective parties to said property and residuary estate did require the consideration and decision of said issues, and thereupon, being duly informed by the record that said issues had not been in fact considered, passed upon, or included in said judgment, it became and was the duty of said court, pursuant to due process of law, the law of the land, and the provisions of the Constitutions of the state of New York and of the United States, to require and order that said issues should be in fact considered, passed upon, and included in judgment by the trial court, and until that should be done said court could not duly adjudge or determine whether any error had

195 U. S.

been committed in such determination upon said issues.

“Nevertheless, said court at said general term did not so require or order, but by various fictions of law imputed to said trial term and court below that it had determined said issues and had decided in favor of the plaintiffs in said action upon such determination, contrary to the truth and fact, and thereupon pretended to adjudge and determine, as such court for the correction of errors, that there was not sufficient preponderance of evidence to support the asserted invalidity of said releases to render such imputed determination of said trial court erroneous as matter of law, but that such imputed determination was supported by evidence sufficient to relieve the same from the assignment of error in so deciding.

“It was not competent for said general term to have exercised an original jurisdiction, and to have adjudged said issues, *and [287] thereupon to have modified said judgment so as to include the actual determination thereof; and said general term did not exercise such power, but confined its action wholly to the consideration of errors in the record.

“Thereupon said judgment was by appeals taken from the judgment of affirmance so rendered, in which appeals these complainants were respondents as well as appellants, and reviewed by the court of appeals of the state of New York.

“Said court determined that these complainants had no standing to be heard or to have their rights determined by said court of appeals, because the limitations imposed by statute upon the jurisdiction of said court precluded any inquiry into the facts, the proof, or the merits of the said issues, but the said court was bound by the formal record procured as aforesaid, and by the fictions thereby adjudged as aforesaid, and had no power to review the same.

“During the pendency of the appeals aforesaid, the control of the several courts below over said action, and the trial thereof, and the correction of any injustice arising as aforesaid, was suspended, and upon the affirmance of said judgment of affirmance, by the statutes of the state of New York any correction of the injustice arising as aforesaid was placed beyond the power of any court of said state, except as the court of appeals should, by its remittitur, confer power upon said subordinate courts to entertain and try the said issues.

“Thereupon these complainants duly made application to said court of appeals so to frame its said remittitur as to permit said subordinate courts to entertain and try the said issues, which application said court denied.”

To these bills the defendants filed pleas of *res judicata*, claiming that the controversy between the parties was finally settled by the decision of the state court. These pleas were accompanied by an answer, denying the allegations of fraud. The circuit court sustained the pleas, and dismissed the bill and cross bill on the ground that the cause [288] of action set forth *in them was barred by the prior judgment of the state court. From this decree of dismissal the plaintiffs appealed directly to this court.

Mr. Roger M. Sherman argued the cause and filed a brief for appellants:

If the course of procedure cut off the right to try the question raised by the answer, it would be as much short of due process of law as the decision of a case involving such a question without allowing an answer would be.

Castillo v. McConnico, 168 U. S. 683, 42 L. ed. 625, 18 Sup. Ct. Rep. 229.

If it be conceded that § 1022 of the New York Code allowed the general term to adjudicate the validity of the releases, although that question had been held by Judge Truax to be an immaterial issue, and he had not considered it, then we have the authority of the court of appeals of New York that such a provision is not one of procedure only, but one prescribing a tribunal unknown to the Constitution.

Benedict v. Arnoux, 154 N. Y. 726, 49 N. E. 326; *Rodgers v. Clement*, 162 N. Y. 427, 76 Am. St. Rep. 342, 56 N. E. 901; *Truesdell v. Bourke*, 145 N. Y. 616, 40 N. E. 83.

Such a decision of that issue, being without authority, and incapable of being authorized, according to the highest judicial utterances of the New York courts, cannot be collaterally upheld in the United States circuit court. Full faith and credit is accorded the five-college judgment here, when it is restrained within the limits which the court of appeals has since decided such a decision deserves.

Reynolds v. Stockton, 140 U. S. 264, 265, 35 L. ed. 467, 468, 11 Sup. Ct. Rep. 773.

The right to a trial of an essential issue by the judge of first instance is not a question of procedure; nor can any state statute make it such. That right is one of substance, with which the 14th Amendment is concerned.

Jacobs v. Marks, 182 U. S. 591, 45 L. ed. 1246, 21 Sup. Ct. Rep. 865; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 707, 708, 28 L. ed. 571, 572, 4 Sup. Ct. Rep. 663; *Truesdell v. Bourke*, 145 N. Y. 616, 40 N. E. 83.

The latest authority upon the subject in the New York court of appeals confines the jurisdiction of the general term to the functions of a court of errors, and denies that

tribunal any power to decide facts which the trial court left undetermined.

Benedict v. Arnoux, 154 N. Y. 724, 49 N. E. 326.

Complainants by this bill here contend that the success of the colleges in excluding all consideration, by Judge Truax, of the releases as immaterial, estops them from now asserting that the five-college judgment concludes that issue in another action. It was, to all intents and purposes, as if complainants' answers there had been stricken out. If their answers, or so much thereof as sought an adjudication of the invalidity of the releases, had been stricken out, then controlling authority relieves them from any consequences here of any pretended determination there of these issues.

Hovey v. Elliott, 167 U. S. 414, 417, 443, 446, 42 L. ed. 220, 221, 229, 231, 17 Sup. Ct. Rep. 841.

The contention thus presented does not relate to the principles of estoppel by judgment, but to that quite different principle of estoppel by conduct.

Bigelow, *Estoppel*, 5th ed. p. 54, note 3; *Davis v. Wakelee*, 156 U. S. 689, 39 L. ed. 584, 15 Sup. Ct. Rep. 555; *Davis v. Cornwall*, 15 C. Ct. A. 559, 26 U. S. App. 777, 35 U. S. App. 315, 68 Fed. 525.

The law of New York is settled that, when an action is brought on one theory, and that theory sustained by judgment, and upon appeal the appellate court decides that the theory of the action is erroneous in law, in its entire scope and meaning, that court is required to reverse the judgment and direct a new trial. Such obviously is the requirement of any just conception of judicial remedies.

Smith v. Platt, 96 N. Y. 637; *Crocket v. Lee*, 7 Wheat. 525, 527, 5 L. ed. 514; *Watson v. Jones*, 13 Wall. 715, 20 L. ed. 671; *Wilmington & W. R. Co. v. Alsbrook*, 146 U. S. 302, 36 L. ed. 981, 13 Sup. Ct. Rep. 72; *Hurtado v. California*, 110 U. S. 527, 528, 28 L. ed. 225, 236, 4 Sup. Ct. Rep. 111, 292; *Hobson v. M'Arthur*, 16 Pet. 195, 10 L. ed. 930; *Munday v. Nail*, 34 N. J. L. 418; *Bailey v. Knight*, 8 Tex. 61; *Romeyn v. Sickles*, 108 N. Y. 650, 15 N. E. 698; *Goodsell v. Western U. Teleg. Co.* 109 N. Y. 150, 16 N. E. 324; *Stevens v. New York*, 84 N. Y. 305; *Southwick v. First Nat. Bank*, 84 N. Y. 428; *Arnold v. Angell*, 62 N. Y. 510; *Neudecker v. Kohlberg*, 81 N. Y. 296; *Barnes v. Quigley*, 59 N. Y. 268; *Bradley v. Aldrich*, 40 N. Y. 509, 100 Am. Dec. 528; *Lewis v. Mott*, 36 N. Y. 398; *Sixth Ave. R. Co. v. Metropolitan Elev. R. Co.* 138 N. Y. 551, 34 N. E. 400; *Malloney v. Horan*, 49 N. Y. 115, 10 Am. Rep. 335.

Under the plea of *res judicata* the actual theory upon which the action was tried is

a question of fact not concluded by the formal record. It is nothing to the purpose, therefore, to meet an allegation that the issue was not decided by setting up the record in bar. A false issue is tendered thereby.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 234, 235, 41 L. ed. 983, 984, 17 Sup. Ct. Rep. 581; *Hovey v. Elliott*, 167 U. S. 444, 445, 42 L. ed. 230, 231, 17 Sup. Ct. Rep. 841; *Bissell v. Spring Valley Twp.* 124 U. S. 231, 31 L. ed. 413, 8 Sup. Ct. Rep. 495; *Jones v. Jones*, 12 Pa. 350, 51 Am. Dec. 611; *King v. Chase*, 15 N. H. 9, 41 Am. Dec. 675; *Wilson v. Deen (Milne v. Deen)* 121 U. S. 525, 30 L. ed. 980, 7 Sup. Ct. Rep. 1004; *Cunningham v. Foster*, 49 Me. 68; *Hickerson v. Mexico*, 58 Mo. 61; *Russell v. Place*, 94 U. S. 606, 24 L. ed. 214; *Wood v. Jackson*, 8 Wend. 9, 22 Am. Dec. 603; *Egan v. Hart*, 165 U. S. 188, 41 L. ed. 680, 11 Sup. Ct. Rep. 300; *Young v. Black*, 7 Cranch, 565, 567, 3 L. ed. 440, 441; *Parker v. Thompson*, 3 Pick. 429; *Wheeler v. Van Houten*, 12 Johns. 311; *Briggs v. Wells*, 12 Barb. 567; *Scott v. McNeal*, 154 U. S. 43-46, 38 L. ed. 900-902, 14 Sup. Ct. Rep. 1108; *O'Donoghue v. Boies*, 159 N. Y. 98, 53 N. E. 537.

No principle of adjudication, no rule that what might have been adjudged in the state court is concluded elsewhere, can extend so far as to conclude anything here which could not, by reason of limitations upon the jurisdiction of the court there, have been considered and determined in the five-college action.

Suppose after the five-college action, which would lie and was conducted only as a suit construing the will, the surrogate, in a proceeding under § 2481, subd. 6, of the Code, should have vacated his decrees and decided that another will was the last testamentary act of Mr. Fayerweather. All rights to this estate, arising upon the establishment of another will, would then have been a new title. No adjudication upon such new title could have been predicated against the judgment construing the will, when the will had thus become invalid.

Gaines v. Hennen, 24 How. 553, 16 L. ed. 770. See also *People ex rel. Reilly v. Johnson*, 38 N. Y. 65, 97 Am. Dec. 770; *Dawley v. Brown*, 79 N. Y. 398; *De Graaf v. Wyck-off*, 118 N. Y. 6, 22 N. E. 1118; *Canerdy v. Baker*, 55 Vt. 582; *Fisfield v. Edwards*, 39 Mich. 264; *Baker v. Rand*, 13 Barb. 152; *La Moille Valley R. Co. v. Bixby*, 57 Vt. 548; *Barker v. Belknap*, 27 Vt. 700, 39 Vt. 168; *Re Chickering*, 56 Vt. 82; *Wood v. Griffith*, 1 Meriv. 35; 3 Dan. Ch. Pr. 2d Am. ed. 1679; *Standish v. Parker*, 2 Pick. 20, 13 Am. Dec. 393; *Outram v. Morewood*, 3 East, 346; *Blakemore v. Glamorganshire* 195 U. S.

Canal Co. 2 Crompt. M. & R. 133; Hibshman v. Dullesban, 4 Watts, 190.

In the consideration of what was in fact decided in the five-college action, or what might have been there decided, regard must be had to the nature of that action and the extent to which, under the limitations upon remedies in the state courts, the parties thereto could effectually attack the probate, establish the destroyed codicil, obtain discovery of its contents, or obtain any relief incidental to and dependent upon these subjects of jurisdiction.

That action was brought under a head of jurisdiction in the court, repeatedly held to be wholly incidental to trusts. Its power to construe a will is merely incidental to its jurisdiction over trusts.

Mellen v. Mellen, 139 N. Y. 217, 34 N. E. 925; *Anderson v. Anderson (Anderson v. Appleton)* 112 N. Y. 104, 2 L. R. A. 175, 19 N. E. 427; *Chipman v. Montgomery*, 63 N. Y. 229; *Horton v. Cantwell*, 108 N. Y. 266, 15 N. E. 546.

In the distribution of remedies in the state of New York, all questions of probate and of fraud on probate courts have been confided to those courts, and denied to courts of chancery.

Brady v. McCosker, 1 N. Y. 214; *Vanderpoel v. Van Valkenburgh*, 6 N. Y. 190; *Post v. Hover*, 33 N. Y. 602; *Re Tilden*, 98 N. Y. 434; *Re Hawley*, 100 N. Y. 206, 3 N. E. 68; *Mellen v. Mellen*, 139 N. Y. 217, 34 N. E. 925.

The supreme court has no jurisdiction, either by statute or as a court of chancery, to entertain any attack upon the probate of a will for fraud in its procurement, or to entertain any suggestions against the validity of the will itself, until the probate is impugned in a direct proceeding.

Post v. Mason, 91 N. Y. 550, 43 Am. Rep. 689; *Sheridan v. Houghton*, 84 N. Y. 643; *Lewis v. Cook*, 150 N. Y. 163, 44 N. E. 778; *Broderick's Will (Kieley v. McGlynn)* 21 Wall. 503, 519, 520, 22 L. ed. 599, 605, 606; *Allen v. M'Pherson*, 1 H. L. Cas. 191; *Kalish v. Kalish*, 45 App. Div. 530, 61 N. Y. Supp. 448.

In the five-college action no allegations could be entertained not based upon the assumption of the validity of the will, its codicils, and their probate.

Chipman v. Montgomery, 63 N. Y. 229.

If the next of kin had invoked the power conferred by § 1861 to establish by action a destroyed will, the court would have replied: "The probate is conclusive until set aside by the surrogate; there can be no new will while the probate of that established remains in force; the demand is so foreign to the action as not to be within the scope of any counterclaim."

Vanderpoel v. Van Valkenburgh, 6 N. Y. 190; *Chipman v. Montgomery*, 63 N. Y. 229.

The present contention was so far independent of that made by the colleges as to entitle complainants to withhold it there, and bring a separate action upon it.

Inslee v. Hampton, 8 Hun, 232; *Gillespie v. Torrance*, 25 N. Y. 310, 82 Am. Dec. 355; *Simon v. Schurck*, 29 N. Y. 613; *Brown v. Gullaudet*, 80 N. Y. 413.

Such was the effect of Judge Truax's holding that the issues which they there tendered were immaterial.

Stark v. Starr, 94 U. S. 477, 485, 486, 24 L. ed. 276, 278, 279; *Dennison v. United States*, 168 U. S. 249, 42 L. ed. 456, 18 Sup. Ct. Rep. 57; *Bissell v. Spring Valley Twp.*, 124 U. S. 231, 31 L. ed. 413, 8 Sup. Ct. Rep. 495; *Reynolds v. Aetna L. Ins. Co.*, 160 N. Y. 651, 55 N. E. 305; *House v. Lockwood*, 137 N. Y. 259, 33 N. E. 595; *Dawley v. Brown*, 79 N. Y. 398; *Fifield v. Edwards*, 39 Mich. 264; *King v. Chase*, 15 N. H. 9, 41 Am. Dec. 675; *De Graaf v. Wyckoff*, 118 N. Y. 6, 22 N. E. 1118.

When a party succeeds in defeating an action by his pleading, by motion, or the like, he cannot defeat a second action by taking a position inconsistent with that taken in the first.

Bigelow, Estoppel, 5th ed. p. 54, note 3.

When these defendants succeeded in their contention that these issues were not in that case, it was as if they had been withdrawn. They could not, by fiction, thereafter be regarded as decided.

Davis v. Wakelee, 156 U. S. 689, 39 L. ed. 584, 15 Sup. Ct. Rep. 555; *Davis v. Cornwall*, 15 C. C. A. 559, 26 U. S. App. 777, 35 U. S. App. 315, 68 Fed. 525.

Nor is the rule which confines the operation of the judgment of the supreme court to the limits here contended for merely a principle of the general law. To conclude complainants here by that judgment, upon matters not actually decided there, but, on the contrary, there decided not to be within the issues tried, encroaches upon constitutional rights.

Reynolds v. Stockton, 146 U. S. 254, 268-270, 35 L. ed. 464, 468, 469, 11 Sup. Ct. Rep. 773; *Munday v. Vail*, 34 N. J. L. 418; *Hovey v. Elliott*, 167 U. S. 414, 417, 443, 446, 42 L. ed. 220, 221, 230, 231, 17 Sup. Ct. Rep. 841; *Jacobs v. Marks*, 182 U. S. 591, 45 L. ed. 1246, 21 Sup. Ct. Rep. 865; *Third Nat. Bank v. Cornes*, 1 Silv. Ct. App. 167; *Romeyn v. Sickles*, 108 N. Y. 652, 15 N. E. 698; *Arnold v. Angell*, 62 N. Y. 510; *Southwick v. First Nat. Bank*, 84 N. Y. 428; *Ferguson v. Crawford*, 70 N. Y. 257, 26 Am. Rep. 589; *Neudecker v. Kohlberg*, 81 N. Y. 301.

The mere fact that the complaint contained references to the releases, pleaded as inducement to a claim inconsistent with title in the releasors, the question of the validity or invalidity of the releases not having been, in fact, decided by the trial court, did not draw that question within the doctrine of estoppel.

Stowell v. Chamberlain, 60 N. Y. 275; *Barnes v. Quigley*, 59 N. Y. 268; *Third Nat. Bank v. Cornes*, 1 Silv. Ct. App. 167; *Romeyn v. Sickles*, 108 N. Y. 652, 15 N. E. 698; *Neudecker v. Kohlberg*, 81 N. Y. 301; *Brady v. Daly*, 175 U. S. 160, 44 L. ed. 114, 20 Sup. Ct. Rep. 62.

It being evident that, within the issues actually decided, the validity of the releases or of the concomitant agreements was not decided as a matter of fact, and was not material to the decision in view of the law upon which the decision was reached, it follows that their validity is here an open question.

Fairchild v. Edson, 154 N. Y. 199, 61 Am. St. Rep. 609, 48 N. E. 541, 155 N. Y. 555, 50 N. E. 265.

The state courts could not decide any facts not decided by the trial court, without departure from their own settled rules.

Benedict v. Arnoux, 154 N. Y. 715, 49 N. E. 326; *Wright v. Wright*, 51 N. J. Eq. 475, 26 Atl. 166.

To the contention that there was necessarily involved in the decision of the court of appeals, in affirming the judgment in *Amherst College v. Ritch*, 151 N. Y. 282, 37 L. R. A. 305, 45 N. E. 876, a decision that the power exercised by the general term was a valid determination by a competent tribunal of the issue of the validity of the releases as a matter of fact, it may be replied that the question of jurisdiction there passed *sub silentio*, and such a determination as this, this court has held, in the cases cited below, does not establish the jurisdiction.

Louisville Trust Co. v. Knott, 191 U. S. 236, 48 L. ed. 163, 24 Sup. Ct. Rep. 119; *United States v. Sanges*, 144 U. S. 319, 36 L. ed. 449, 12 Sup. Ct. Rep. 609; *Cross v. Burke*, 146 U. S. 87, 36 L. ed. 898, 13 Sup. Ct. Rep. 22.

And see what the court of appeals has itself declared to be the extent of its judgments, in *Colonial City Traction Co. v. Kingston City R. Co.*, 154 N. Y. 495, 48 N. E. 900.

The question of the powers upon appeal of the general term is not a rule of property.

Bolles v. Brimfield, 120 U. S. 763, 764, 30 L. ed. 788, 7 Sup. Ct. Rep. 736; *Green v. Neal*, 6 Pet. 297, 8 L. ed. 405; *Gelpcke v. Dubuque*, 1 Wall. 205-207, 17 L. ed. 525, 526.

The question of jurisdiction being always open collaterally, this court is not bound to accept an earlier decision of the court of appeals in the very case sustaining the jurisdiction, when the trend of authority, both before and after the decision in *Amherst College v. Ritch*, 151 N. Y. 282, 37 L. R. A. 305, 45 N. E. 876, is that, by the operation of the Constitution of the state of New York and its laws, no such power is or can be conferred upon the general term, or the appellate division, or any other appellate court.

Gelpcke v. Dubuque, 1 Wall. 206, 207, 17 L. ed. 525, 526; *Ohio Life Ins. & T. Co. v. Debolt*, 16 How. 432, 14 L. ed. 1003; *Carroll County v. Smith*, 111 U. S. 562, 563, 28 L. ed. 519, 520, 4 Sup. Ct. Rep. 539.

This court regards the latest case in the highest state court as the law as it was always, so far as applying the state rule is concerned.

The jurisdiction to try these issues on appeal is settled by the negation of *Benedict v. Arnoux*, 154 N. Y. 726, 49 N. E. 326, and cases cited, and not by any implications of *Amherst College v. Ritch*, 151 N. Y. 282, 37 L. R. A. 305, 45 N. E. 876.

Leffingwell v. Warren, 2 Black, 599, 603, 17 L. ed. 261, 262; *United States v. Morrison*, 4 Pet. 124, 137, 7 L. ed. 804, 808; *Green v. Neal*, 6 Pet. 291, 298, 299, 301, 8 L. ed. 402, 405, 406.

The insistence upon a trial at general term, of the counsel for the complainants in the state court, under a misapprehension of the legal effect of § 1022 of the Code of Civil Procedure, constitutes no estoppel against their clients: First, because jurisdiction cannot be conferred by consent or even by insistence (*Smith v. Platt*, 96 N. Y. 637); and second, because the estoppel rests upon a mere mistake of law, which cannot estop (*Union Bank v. Bush*, 36 N. Y. 637).

The question of due process of law is not a question of form, but of substance.

Simon v. Craft, 182 U. S. 436, 45 L. ed. 1170, 21 Sup. Ct. Rep. 836.

The appellate court should have reversed the judgment under review, and ordered a new trial.

Truesdell v. Bourke, 145 N. Y. 616, 40 N. E. 83; *Smith v. Platt*, 96 N. Y. 637; *Rodgers v. Clement*, 162 N. Y. 427, 76 Am. St. Rep. 342, 56 N. E. 901; *Iselin v. Starin*, 144 N. Y. 460, 39 N. E. 488; *Thomas v. New York L. Ins. Co.* 99 N. Y. 250, 1 N. E. 772; *Ehrichs v. De Mill*, 75 N. Y. 370; *Whitehead v. Kennedy*, 69 N. Y. 462; *Foot v. Aina L. Ins. Co.* 61 N. Y. 578; *Griffin v. Marquardt*, 17 N. Y. 28.

The question of the validity of these releases is here an open question, and has not been in anywise adjudged.

Stark v. Starr, 94 U. S. 485, 486, 24 L. ed. 278, 279.

Even if the validity of the releases be deemed to have been adjudged, so far as the residuary estate in controversy in *Amherst College v. Ritch*, 151 N. Y. 282, 37 L. R. A. 305, 45 N. E. 876, is concerned, it is nevertheless wholly at large and undetermined upon any other claim than that, and is not adjudged as involved in the assault upon the wills and probate, and has no effect upon those features of the several bills of complaint.

Wilmington & W. R. Co. v. Alsbrook, 146 U. S. 302, 36 L. ed. 981, 13 Sup. Ct. Rep. 72; *Watson v. Jones*, 13 Wall. 715, 734, 20 L. ed. 671, 678; *King v. Chase*, 15 N. H. 17, 41 Am. Dec. 675.

The constitutional question comes up substantially, as regards its importance and difficulty, as it would have done under the old practice of certifying questions here upon a division of opinion; and in that case this court would hardly do otherwise than treat the question as worthy of an answer.

Davis & F. Mfg. Co. v. Los Angeles, 189 U. S. 216, 47 L. ed. 780, 23 Sup. Ct. Rep. 498; *Press Pub. Co. v. Monroe*, 164 U. S. 110, 111, 41 L. ed. 368, 369, 17 Sup. Ct. Rep. 40.

Where the jurisdiction of this court attaches under § 5 of the act of March 3, 1891, it does not follow that a decision against the correctness of the appellant's contention upon the Federal question disposes of the appeal, or even that his abandonment of the point does so. The whole case is, none the less, here for decision.

Home L. Ins. Co. v. Fisher, 188 U. S. 727, 47 L. ed. 668, 23 Sup. Ct. Rep. 380; *Chappell v. United States*, 160 U. S. 509, 40 L. ed. 513, 16 Sup. Ct. Rep. 397.

When the question of jurisdiction involves, as this one does, a question of the power of a state court, it may in New York always be examined collaterally, even if it is necessary to prove extrinsic facts in contradiction of the record.

O'Donoghue v. Boies, 159 N. Y. 98, 53 N. E. 537.

To hold that upon such a question, even if expressly decided (instead of, as in *Amherst College v. Ritch*, 151 N. Y. 282, 37 L. R. A. 305, 45 N. E. 876, being assumed *sub silentio*, or involved in the affirmance of the judgment of the general term), the decision of the court of appeals is conclusive upon this court, would be to abrogate the functions of this court upon the Federal question, and require it merely to register the decision of the court of appeals.

Gelpcke v. Dubuque, 1 Wall. 216, 17 L. ed. 529; *Windsor v. McVeigh*, 93 U. S. 274, 278-284, 23 L. ed. 914, 916-918; *Galpin v.*

Page, 18 Wall. 350, 365-368, 373, 21 L. ed. 959, 962, 963, 965.

In *Home L. Ins. Co. v. Fisher*, 188 U. S. 727, 47 L. ed. 668, 23 Sup. Ct. Rep. 380, this court held that, although the question upon which this court acquired jurisdiction had been in the meantime decided adversely to the plaintiff in error by this court, and that question was therefore not even pressed upon the argument, the jurisdiction to decide the whole case was nevertheless retained.

The court of appeals exercised a discretion in denying the motion to amend the remittitur; and the constitutional right to one trial, at least, does not rest in discretion, and cannot be adjudged by a denial of the right.

Simon v. Croft, 182 U. S. 427, 45 L. ed. 1165, 2 Sup. Ct. Rep. 836; *Jacobs v. Marks*, 182 U. S. 591, 45 L. ed. 1246, 21 Sup. Ct. Rep. 865.

It was competent to prove by parol the issues determined. Hence the testimony of the judges was admissible, if they chose to give it.

Miles v. Caldwell, 2 Wall. 43, 17 L. ed. 758; *Campbell v. Rankin*, 99 U. S. 263, 25 L. ed. 436; *Bernards Twp. v. Morrison*, 133 U. S. 523, 33 L. ed. 726, 10 Sup. Ct. Rep. 333.

In New York the common-law presumption of absolute verity in a judgment is only a rebuttable presumption, and the truth is not excluded. Of course a judgment may be impugned in the Federal courts by any means admitted, in the state where it was rendered, for that purpose.

O'Donoghue v. Boies, 159 N. Y. 87, 53 N. E. 537; *Reynolds v. Stockton*, 140 U. S. 254, 35 L. ed. 464, 11 Sup. Ct. Rep. 773.

Mr. **William Blaikie** also argued the cause and filed a brief for appellants:

The essence of estoppel by judgment is that there has been a judicial determination of a fact, and the question always is, Has there been such determination? and not, Upon what evidence or by what means was it reached?

Last Chance Min. Co. v. Tyler Min. Co. 157 U. S. 690, 39 L. ed. 862, 15 Sup. Ct. Rep. 733.

If there be uncertainty as to whether or not the question was passed upon, the judgment is not conclusive as evidence.

Bell v. Merrifield, 109 N. Y. 209, 4 Am. St. Rep. 436, 16 N. E. 55; *Stowell v. Chamberlain*, 60 N. Y. 272; *Russell v. Place*, 94 U. S. 606, 24 L. ed. 214; *Cromwell v. Sac County*, 94 U. S. 351, 24 L. ed. 195.

A judgment is not conclusive in a second action, unless the same question was at issue in the former suit, of which the court had competent jurisdiction.

Ward v. Boyce, 152 N. Y. 203, 36 L. R. A. 549, 46 N. E. 180; *Reynolds v. Aetna L. Ins. Co.* 160 N. Y. 650, 55 N. E. 305.

A former judgment is final only as to the facts which are actually litigated and decided, which relate to the issue therein, and the determination of which was necessary to the determination of that issue.

Bell v. Merrifield, 109 N. Y. 202, 4 Am. St. Rep. 436, 16 N. E. 55; *Rudd v. Cornell*, 171 N. Y. 127, 63 N. E. 823; *Zoeller v. Riley*, 100 N. Y. 102, 53 Am. Rep. 157, 2 N. E. 388; *Palmer v. Hussey*, 87 N. Y. 303; *Reynolds v. Aetna L. Ins. Co.* 160 N. Y. 651, 55 N. E. 305; *Russell v. Place*, 94 U. S. 608, 24 L. ed. 215.

To apply the judgment and give effect to the adjudication actually made, when the record leaves the matter in doubt, extrinsic evidence is admissible.

Washington, A. & G. Steam Packet Co. v. Sickles, 5 Wall. 580, 18 L. ed. 550; *Russell v. Place*, 94 U. S. 608, 24 L. ed. 215.

It is allowable to reason back from a judgment to the basis on which it stands, upon the obvious principle that where a conclusion is indisputable, and could have been drawn only from certain premises, the premises are equally conclusive and indisputable with the conclusion. But such an inference must be inevitable, or it cannot be drawn.

Freeman, Judg. § 257; *Burlen v. Shannon*, 99 Mass. 200, 96 Am. Dec. 733; *Lea v. Lea*, 99 Mass. 493, 96 Am. Dec. 772.

The trial court's decision was upon a ground inconsistent with a decision as to the validity of the releases.

The decision in *Amherst College v. Ritch*, 151 N. Y. 282, 37 L. R. A. 305, 45 N. E. 876, is not *res judicata*.

Jenkins v. Robinson, L. R. 1 H. L. Sc. App. Cas. 117; *Casparsz, Estoppel by Representation & Res Adjudicata*, 342; *Fifield v. Edwards*, 39 Mich. 264; *State ex rel. Brown v. Rusk*, 23 Wis. 643; *Russell v. Place*, 94 U. S. 608, 24 L. ed. 215; *Hooker v. Hubbard*, 102 Mass. 245.

As the state court judgment was not responsive to the issues of the complaint, it is, upon that ground also, no bar.

Arnold v. Angell, 62 N. Y. 511; *Romeyn v. Sickles*, 108 N. Y. 652, 15 N. E. 698; *Neudecker v. Kohlberg*, 81 N. Y. 301; *Stevens v. New York*, 84 N. Y. 305; *Graham v. Read*, 57 N. Y. 683; *Reynolds v. Stockton*, 140 U. S. 254, 35 L. ed. 464, 11 Sup. Ct. Rep. 773; *Crocket v. Lee*, 7 Wheat. 525, 527, 5 L. ed. 514.

The courts will deal with evasions of the law.

Stockton v. Central R. Co. 50 N. J. Eq. 75, 17 L. R. A. 97, 24 Atl. 964.

By departing in this instance from the settled rule of property, and returning to

that rule since the decision herein, the New York court of appeals has deprived the widow and next of kin of the equal protection of the laws.

Security Trust Co. v. Black River Nat. Bank, 187 U. S. 227, 47 L. ed. 154, 23 Sup. Ct. Rep. 52.

Justice Truax was properly called to say if he had considered and decided the issue as to the validity of the releases.

Last Chance Min. Co. v. Tyler Min. Co. 157 U. S. 690, 39 L. ed. 862, 15 Sup. Ct. Rep. 733; *Baker v. Cummings*, 181 U. S. 117, 45 L. ed. 776, 21 Sup. Ct. Rep. 578; *National Foundry & Pipe Works v. Oconto Water Supply Co.* 183 U. S. 234, 46 L. ed. 169, 22 Sup. Ct. Rep. 111.

There is an admitted exception to the rule of *res judicata*, and that is when a judgment has been obtained by fraud in the very fashion described at bar.

United States v. Throckmorton, 98 U. S. 61, 25 L. ed. 93.

There is no distinction in principle between determining a cause upon issues not raised by the pleadings, and rendering a decree by refusing to permit a party to be heard in his defense, or to consider the merits of a sufficient defense.

Hovey v. Elliott, 167 U. S. 446, 42 L. ed. 231, 17 Sup. Ct. Rep. 841.

A question which was entirely overlooked by counsel, and which was not even considered by the court, can hardly be said to have been settled by the decision.

State ex rel. Brown v. Rusk, 23 Wis. 643.

By due process of law is meant one which, following the forms of law, is appropriate to the case and is just to the parties to be affected.

Hagar v. Reclamation Dist. No. 108, 111 U. S. 708, 28 L. ed. 572, 4 Sup. Ct. Rep. 663.

Shall complainant now be cut off from procuring adjudication of his rights because the court erroneously prevented him from having them adjudicated before?

Starr v. Stark, 2 Sawy. 603, Fed. Cas. No. 13,317.

There can be no proceeding against life, liberty, or property, which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights.

Hagar v. Reclamation Dist. No. 108, 111 U. S. 708, 28 L. ed. 572, 4 Sup. Ct. Rep. 663.

When a state by its judicial department takes away property from one private individual and gives it to another, not for an adequate consideration, but without any consideration, such act of a state is not the due process of law guaranteed by the 14th

Amendment of the Constitution of the United States.

Holden v. Hardy, 169 U. S. 389, 42 L. ed. 790, 18 Sup. Ct. Rep. 383; *Logan v. United States*, 144 U. S. 288, 36 L. ed. 437, 12 Sup. Ct. Rep. 617; *Caldwell v. Texas*, 137 U. S. 697, 34 L. ed. 818, 11 Sup. Ct. Rep. 224; *Campbell v. Evans*, 45 N. Y. 358; *People v. O'Brien*, 111 N. Y. 38, 2 L. R. A. 255, 7 Am. St. Rep. 684, 18 N. E. 692; *Monongahela Nav. Co. v. United States*, 148 U. S. 325, 37 L. ed. 467, 13 Sup. Ct. Rep. 622; *Boyd v. United States*, 116 U. S. 635, 29 L. ed. 752, 6 Sup. Ct. Rep. 524; *Hurtado v. California*, 110 U. S. 527, 28 L. ed. 235, 4 Sup. Ct. Rep. 111, 292; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 695, 41 L. ed. 1168, 17 Sup. Ct. Rep. 718; *Walker v. Sauvinet*, 92 U. S. 92, 23 L. ed. 679; *Allen v. Georgia*, 166 U. S. 140, 41 L. ed. 949, 17 Sup. Ct. Rep. 525; *Missouri P. R. Co. v. Nebraska*, 164 U. S. 417, 41 L. ed. 495, 17 Sup. Ct. Rep. 130; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 231, 41 L. ed. 982, 17 Sup. Ct. Rep. 581; *Brown, Const. Law*, 228; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Citizens' Sav. L. Asso. v. Topeka*, 20 Wall. 663, 22 L. ed. 461.

Mr. Charles Andrews filed a brief for the widow and next of kin upon the question of *res judicata*:

The doctrine of *res judicata* rests upon a principle of public policy which requires that, a case having been once decided, there should be an end of strife and litigation.

United States v. Throckmorton, 98 U. S. 65, 25 L. ed. 95.

Constituting a part of the doctrine of *res judicata* are two principal conditions, rooted in the immutable foundation of justice: First; that before a party can be concluded by a former adjudication affecting any property right he must have had a hearing, or an opportunity to be heard, on the point in controversy.

Munday v. Vail, 34 N. J. L. 418; *Reynolds v. Stockton*, 140 U. S. 254, 35 L. ed. 464, 11 Sup. Ct. Rep. 773.

Second; that the adjudication relied upon must have been made by a court or tribunal of competent jurisdiction, authorized to pass upon the question and to render the decree affecting the right embraced in the adjudication.

Herman, Estoppel, § 68.

Jurisdiction may be defined to be the right to adjudicate the subject-matter in a given case.

Reynolds v. Stockton, 140 U. S. 268, 35 L. ed. 468, 11 Sup. Ct. Rep. 773.

Jurisdiction is conferred by the sovereign power and authority which organizes the court, and is to be sought for in the general

nature of its powers, or in authority specially conferred.

17 Am. & Eng. Enc. Law, 2d ed. p. 1060.

Jurisdiction consists not only in the power to hear and determine, but also in the power to render the particular judgment entered in the particular case. There may be the most complete jurisdiction of the person and the general subject-matter, but if the court in rendering the judgment transcends the limitations of its powers as defined by statute, or as regulated by the character of its functions, the judgment is void for want of jurisdiction. This doctrine has been declared in frequent decisions of the United States Supreme Court.

Bigelow v. Forrest, 9 Wall. 339, 19 L. ed. 696; *Ex parte Lange*, 18 Wall. 163, 21 L. ed. 872; *Windsor v. McVeigh*, 93 U. S. 274, 23 L. ed. 914; *Ex parte Yarbrough*, 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. Rep. 152.

A judgment may be impeached collaterally for want of jurisdiction, not only when no jurisdiction was acquired of the person or the subject-matter, but also where the court, although having jurisdiction of the person and the subject-matter, transcended its power in awarding judgment. In other words, the judgment will be void if the court transcends in the relief awarded, although there is no defect of jurisdiction of the person or of the cause.

Windsor v. McVeigh, 93 U. S. 274, 23 L. ed. 914; *Ex parte Lange*, 18 Wall. 163, 21 L. ed. 872; *Bigelow v. Forrest*, 9 Wall. 339, 19 L. ed. 696; *Ex parte Yarbrough*, 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. Rep. 152; *People ex rel. Tweed v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211.

The general term erred in directing final judgment on the question of fraud. It was a jurisdictional error.

Benedict v. Arnoux, 154 N. Y. 726, 49 N. E. 326; *Whitehead v. Kennedy*, 69 N. Y. 462; *Thomas v. New York L. Ins. Co.* 99 N. Y. 250, 1 N. E. 772.

There is a long line of cases supporting the principle that the general term, if it reverses the judgment on the facts, cannot proceed to render a final judgment, but must order a new trial.

New v. New Rochelle, 158 N. Y. 41, 52 N. E. 647; *Van Beuren v. Wotherspoon*, 164 N. Y. 368, 57 N. E. 633.

The only exception is where it appears that in no possible state of proof could the appellant be entitled to judgment.

New v. New Rochelle, 158 N. Y. 41, 52 N. E. 647.

The cases cited in support of the right of the general term to affirm a judgment if, upon an examination of the whole evidence, it is able to find facts to support it, all proceed upon the presumption that the neces-

sary facts were found by the trial court, although not expressed. When this presumption is rebutted, as in this case, as well by the record as by the extrinsic evidence, there is no case which I have been able to find in conflict with the fundamental principle that the general term cannot preclude a party by assuming to decide in the first instance controverted facts not found by the court of original jurisdiction. No good reason can be assigned why the same principle should not be applied, whether the judgment is one of affirmance or reversal.

I assume that it will not be claimed that the judgment of the court of appeals is material on the question of *res judicata*. The jurisdiction of that court excluded it from reviewing the facts. It was bound by a conclusive presumption that the facts supported the judgment, without any inquiry as to the truth.

If any question of fact or liability be conclusively presumed against a party, there is not due process of law.

1 Herman, Estoppel, § 69.

The fact that it was claimed by the counsel for the widow and next of kin before the general term, that the court had jurisdiction to find the facts and render final judgment thereon, creates no estoppel.

Union Bank v. Bush, 36 N. Y. 637.

Where a former judgment is relied upon as *res judicata* of a fact involved in the second action, and the former judgment may have proceeded on a ground not involving a determination of the fact upon which the second action is based, it is always competent—at least when not inconsistent with the record in the former action—to show by parol evidence the grounds of that judgment, so as to exclude any inference that the particular fact was adjudicated thereby.

Washington, A. & G. Steam Packet Co. v. Sickles, 5 Wall. 592, 18 L. ed. 553; *Aurora v. West*, 7 Wall. 106, 19 L. ed. 50; *Russell v. Placc*, 94 U. S. 606, 24 L. ed. 214; *Lewis v. Ocean Nav. & Pier Co.* 125 N. Y. 341, 26 N. E. 301; *Burlen v. Shannon*, 99 Mass. 202, 96 Am. Dec. 733; *Foster v. Busted*, 100 Mass. 409, 1 Am. Rep. 125; 2 Herman, Estoppel, p. 211; 2 Smith, Lead. Cas. 769, 772; 21 Am. & Eng. Enc. Law, title *Res Judicata*, p. 191.

Many of the cases above cited hold that, where the record does not disclose the particular ground of the judgment, and it may have passed on a ground which would involve no estoppel, the burden is upon the party alleging it to show that the controverted question was, in fact, decided in the former action. The opinion of this court in *De Sollar v. Hanscome*, 158 U. S. 221, 39 L. ed. 959, 15 Sup. Ct. Rep. 816, is instruct-

ive on the question of estoppel by judgment.

It is idle to say, in view of the circumscribed powers of the court of appeals, that the plaintiffs had their day in court on the vital question on which their right depends.

People ex rel. Manhattan R. Co. v. Barker, 152 N. Y. 421, 46 N. E. 875.

Mr. **Elihu Root** argued the cause, and, with Messrs. *James L. Bishop*, *William Forse Scott*, *William Ford Upson*, *Thomas H. Hubbard*, *John McL. Nash*, *Stewart L. Woodford*, *Horace Russell*, *Henry L. Stimson*, *C. N. Bovee, Jr.*, *Alfred W. Kiddle*, *Seth Sprague Terry*, *George G. Reynolds*, *Henry B. Twombly*, *Haley Fiske*, and *Henry Stoddard*, filed a brief for appellees:

It is not claimed that the law of the state as construed deprived the appellants of due process, but merely that the law was erroneously construed. It is not claimed that a decision of the question of fact by the general term was not due process, but solely that the general term had no jurisdiction to decide the fact,—which is not a constitutional question. Under such circumstances, the construction and application of the Constitution cannot be said to be involved so as to authorize a direct appeal to this court.

Cosmopolitan Min. Co. v. Walsh, 193 U. S. 460, 48 L. ed. 749, 24 Sup. Ct. Rep. 489; *Carey v. Houston & T. C. R. Co.* 150 U. S. 170, 37 L. ed. 1041, 14 Sup. Ct. Rep. 63; *New Orleans Waterworks Co. v. Louisiana*, 185 U. S. 336, 46 L. ed. 936, 22 Sup. Ct. Rep. 691; *Forsyth v. Vehmeyer*, 177 U. S. 177, 44 L. ed. 723, 20 Sup. Ct. Rep. 623; *Iowa C. R. Co. v. Iowa*, 160 U. S. 389, 40 L. ed. 467, 16 Sup. Ct. Rep. 344.

The court of appeals has never decided that the general term is not authorized to affirm a judgment upon an appeal on a case and exceptions, upon facts not specifically stated in a general concise decision. On the contrary, the power of the general term in this regard has been continuously recognized ever since the adoption of the concise form of decision.

Johnstone v. O'Connor, 21 App. Div. 77, 47 N. Y. Supp. 425, Affirmed in 162 N. Y. 639, 57 N. E. 1123; *Keegan v. Smith*, 60 App. Div. 168, 70 N. Y. Supp. 260; *Gardner v. New York Mut. Sav. & L. Asso.* 67 App. Div. 141, 73 N. Y. Supp. 604; *Multz v. Price*, 91 App. Div. 116, 86 N. Y. Supp. 480.

The concise decision authorized by § 1022 has the effect of a general verdict rendered by a jury, and the same presumptions arise in its support, and the court can look into the evidence only to ascertain whether there were facts proved which would support the decision.

People ex rel. Manhattan R. Co. v.
195 U. S.

Barker, 152 N. Y. 431, 46 N. E. 875; *Bartlett v. Goodrich*, 153 N. Y. 424, 47 N. E. 794; *New York Security & T. Co. v. Lipman*, 157 N. Y. 556, 52 N. E. 595; *Petrie v. Hamilton College*, 158 N. Y. 463, 53 N. E. 216; *Garvey v. Long Island R. Co.* 159 N. Y. 328, 70 Am. St. Rep. 550, 54 N. E. 57; *Solomon v. Continental F. Ins. Co.* 160 N. Y. 598, 46 L. R. A. 682, 73 Am. St. Rep. 707, 55 N. E. 279; *Reed v. McCord*, 160 N. Y. 334, 54 N. E. 737; *Marden v. Dorothy*, 160 N. Y. 46, 46 L. R. A. 694, 54 N. E. 726; *Consolidated Electric Storage Co. v. Atlantic Trust Co.* 161 N. Y. 611, 56 N. E. 145; *Rodgers v. Clement*, 162 N. Y. 427, 76 Am. St. Rep. 342, 56 N. E. 901; *National Harrow Co. v. E. Bement & Sons*, 163 N. Y. 510, 57 N. E. 764; *Lamkin v. Palmer*, 164 N. Y. 204, 58 N. E. 123; *Carpenter v. Taylor*, 164 N. Y. 182, 58 N. E. 53; *Brokaw v. Duffy*, 165 N. Y. 403, 59 N. E. 196; *Woodbridge v. First Nat. Bank*, 166 N. Y. 245, 59 N. E. 836; *Niagara Falls v. New York C. & H. R. Co.* 168 N. Y. 611, 61 N. E. 185; *Genet v. Delaware & H. Canal Co.* 170 N. Y. 289, 63 N. E. 350; *Critten v. Chemical Nat. Bank*, 171 N. Y. 231, 57 L. R. A. 529, 63 N. E. 969; *Hutton v. Smith*, 175 N. Y. 375, 67 N. E. 633; *People ex rel. Sands v. Feitner*, 173 N. Y. 647, 66 N. E. 626.

If the want of jurisdiction of the general term had not before been presented to the court of appeals, it was by the motion to amend the remittitur brought directly to their consideration, and the argument upon both sides, as now presented, was before that court. It denied that motion, all the judges concurring, and it thus declared that the general term had jurisdiction to affirm a judgment upon the facts appearing in the evidence which had not been passed upon by the court at special term. Federal courts are conclusively bound by the law thus settled and announced.

Sioux City Terminal R. & Warehouse Co. v. Trust Co. of N. A. 173 U. S. 99, 43 L. ed. 628, 19 Sup. Ct. Rep. 341; *Missouri, K. & T. R. Co. v. McCann*, 174 U. S. 580, 43 L. ed. 1093, 19 Sup. Ct. Rep. 755; *Morley v. Lake Shore & M. S. R. Co.* 146 U. S. 162, 36 L. ed. 925, 13 Sup. Ct. Rep. 54.

The due process clause of the 14th Amendment does not necessitate that the proceedings in a state court shall be by a particular mode, but only that there shall be a regular course of proceedings in which notice is given of the claim asserted and an opportunity afforded to defend against it.

Simon v. Craft, 182 U. S. 427, 45 L. ed. 1165, 21 Sup. Ct. Rep. 836; *Louisville & N. R. Co. v. Schmidt*, 177 U. S. 230, 44 L. ed. 747, 20 Sup. Ct. Rep. 620; *The Robert W. Parsons (Perry v. Haines)* 191 U. S. 45, 48 L. ed. 85, 24 Sup. Ct. Rep. 8.

There is nothing in the Constitution to prevent any state from adopting any system of laws or adjudication it sees fit, for all or any part of its territory.

Missouri v. Lewis (*Bowman v. Lewis*) 101 U. S. 22, 25 L. ed. 989.

Inasmuch as the judgment of the general term when rendered was in accordance with the law of the state as it then existed and as it was then promulgated, this court will not undertake to say that the judgment so rendered was void for want of due process of law, even though the principle upon which the decision was made was afterwards declared by the court of appeals to be erroneous.

Deposit Bank v. Frankfort, 191 U. S. 499, 48 L. ed. 276, 24 Sup. Ct. Rep. 154; *Loeb v. Columbia Twp.* 179 U. S. 492, 493, 45 L. ed. 290, 291, 21 Sup. Ct. Rep. 174.

Where a trial has once been had which affords a party due process of law, he cannot complain that he has been deprived of due process of law because no right of appeal is given, or because the appeal which he has been permitted to take did not afford him the redress to which he believes himself entitled, where no benefit which he could derive from the judgment has been diminished on appeal.

McKane v. Durston, 153 U. S. 684-687, 38 L. ed. 867, 868, 14 Sup. Ct. Rep. 913; *Andrews v. Swartz*, 156 U. S. 272, 39 L. ed. 422, 15 Sup. Ct. Rep. 389; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383.

Where the parties have been fairly heard in the regular course of judicial proceedings, an erroneous decision by the state court does not deprive the unsuccessful party of his property without due process of law, within the 14th Amendment of the Constitution of the United States.

Central Land Co. v. Laidley, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80; *Walker v. Sauvinet*, 92 U. S. 90, 23 L. ed. 678; *Head v. Amoskeag Mfg. Co.* 113 U. S. 9, 26, 28 L. ed. 889, 895, 5 Sup. Ct. Rep. 441; *Morley v. Lake Shore & M. S. R. Co.* 146 U. S. 162, 171, 36 L. ed. 925, 930, 13 Sup. Ct. Rep. 54; *Bergemann v. Backer*, 157 U. S. 655, 39 L. ed. 845, 15 Sup. Ct. Rep. 727; *Fielden v. Illinois*, 143 U. S. 452, 36 L. ed. 224, 12 Sup. Ct. Rep. 528.

It is not enough that a mere claim in words is made that the appellant has been deprived of due process of law, to justify a direct appeal to this court. It must appear that there is a real, and not merely a feigned or fictitious, question of the invasion of a constitutional right presented, or the appeal will be dismissed.

New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 46 L. ed. 936, 22 Sup. 206

Ct. Rep. 691; *St. Joseph & G. I. R. Co. v. Steele*, 167 U. S. 659, 42 L. ed. 315, 17 Sup. Ct. Rep. 925; *Western U. Teleg. Co. v. Ann Arbor R. Co.* 178 U. S. 239, 44 L. ed. 1052, 20 Sup. Ct. Rep. 867; *Lampasas v. Bell*, 180 U. S. 276, 45 L. ed. 527, 21 Sup. Ct. Rep. 527.

Where a court having jurisdiction of specific property, the subject-matter of an action, awards the property to one of the parties to the action, every other party is conclusively bound by such adjudication, and cannot thereafter assert any right in the property inconsistent with that judgment, until the judgment has been first vacated or set aside.

Cromwell v. Sac County, 94 U. S. 351, 24 L. ed. 195; *Stout v. Lye*, 103 U. S. 66, 26 L. ed. 428; *Dovell v. Applegate*, 152 U. S. 327, 38 L. ed. 463, 14 Sup. Ct. Rep. 611; *United States v. California & O. Land Co.* 192 U. S. 355, 48 L. ed. 476, 24 Sup. Ct. Rep. 266; *Werlein v. New Orleans*, 177 U. S. 390, 44 L. ed. 817, 20 Sup. Ct. Rep. 682; *Nougue v. Clapp*, 101 U. S. 551-555, 25 L. ed. 1026-1028; *Barrow v. Hunton*, 99 U. S. 80, 25 L. ed. 407; *United States v. Throckmorton*, 98 U. S. 61-65, 25 L. ed. 93-95; *Wilson v. Deen* (*Milne v. Deen*) 121 U. S. 525, 30 L. ed. 980, 7 Sup. Ct. Rep. 1004; *Manhattan Trust Co. v. Trust Co. of N. A.* 46 C. C. A. 322, 107 Fed. 328; *Tuska v. O'Brien*, 68 N. Y. 446; *Stilwell v. Carpenter*, 59 N. Y. 414; *Young v. Farwell*, 165 N. Y. 341, 59 N. E. 143; *New York v. Brady*, 115 N. Y. 599, 22 N. E. 237.

This court cannot disregard the conclusive effect of the state court judgment on the ground that it was given on an erroneous view of the law.

Wilson v. Deen (*Milne v. Deen*) 121 U. S. 525, 30 L. ed. 980, 7 Sup. Ct. Rep. 1004.

It cannot be successfully contended that Federal courts of equity have power to disaffirm or disregard judgments of the state courts, by reason of error or irregularity other than want of jurisdiction, or fraud.

Barrow v. Hunton, 99 U. S. 80, 25 L. ed. 407; *Graham v. Boston, H. & E. R. Co.* 118 U. S. 161, 30 L. ed. 196, 6 Sup. Ct. Rep. 1009; *Arrowsmith v. Gleason*, 129 U. S. 99, 100, 32 L. ed. 634, 635, 9 Sup. Ct. Rep. 237; *Marshall v. Holmes*, 141 U. S. 589, 600, 35 L. ed. 870, 874, 12 Sup. Ct. Rep. 62; *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 468, and note, 47 U. S. App. 1, 76 Fed. 429.

The essence of estoppel by judgment is that there has been a judicial determination of a fact, and the question always is, Has there been such determination? and not, Upon what evidence or by what means was it reached?

Last Chance Min. Co. v. Tyler Min. Co. 195 U. S.

157 U. S. 683, 39 L. ed. 859, 15 Sup. Ct. Rep. 733.

The general term might, and the appellate division and the court of appeals may, affirm a judgment when upon the record, including the evidence, it appears that the judgment was right, even though, in order to do so, the appellate court must examine and determine questions of law or fact which were not passed upon by the court below.

Ward v. Hasbrouck, 169 N. Y. 407, 62 N. E. 434; *Keegan v. Smith*, 60 App. Div. 168, 70 N. Y. Supp. 260.

The reason for this distinction between an affirmance and reversal of judgments is found in the nature of the review by an appellate court under the New York practice. When the judgment is reversed, the respondent should ordinarily be granted a new trial, unless the facts are conceded, because upon the record before the appellate court the appellant's exceptions only have been presented and considered, and it may well be that there were, at the trial, erroneous rulings against the respondent which have not been considered, but which might, if presented, materially affect the conclusion.

Thomas v. New York L. Ins. Co. 99 N. Y. 250, 1 N. E. 772.

Where the evidence is before the appellate court, it has always been the rule that the court of appeals might, in support of the judgment, examine the evidence and supply findings needed to support the judgment.

First Nat. Bank v. Chalmers, 144 N. Y. 432, 39 N. E. 331.

The rule is even more emphatic under the practice permitting the short form of decision than it was and is where specific findings of fact and law are made. In the latter case, if an appeal is taken merely from the judgment, without the presentation of "a case" bringing the evidence before the appellate court, the appellate court can only consider whether the legal conclusion is correctly drawn from the facts found.

Rochester Lantern Co. v. Stiles & P. Press Co. 135 N. Y. 209, 31 N. E. 1018.

Where a concise form of decision is made, the general finding is in the nature of a general verdict, and the judgment will be sustained, although the facts stated as the ground of the decision are insufficient to warrant the judgment,—even where the evidence is not before the court.

Health Department v. Weekes, 22 App. Div. 110, 47 N. Y. Supp. 913; *Gardner v. New York Mut. Sav. & L. Assn.* 67 App. Div. 141, 73 N. Y. Supp. 604; *Amherst College v. Ritch*, 151 N. Y. 282, 37 L. R. A. 305, 45 N. E. 876; *Bomeislcr v. Forster*, 154 N. Y. 237, 39 L. R. A. 240, 48 N. E. 534; *People* 195 U. S.

ex rel. Manhattan R. Co. v. Barker, 152 N. Y. 431, 46 N. E. 875.

Cases in which it has been held that, upon reversing a judgment, the general term or appellate division ordinarily may not award ultimate judgment in favor of the appellant, but must send the case back for a new trial, and also those in which it has been held that the appellate division cannot make new findings upon the evidence upon which to base a reversal (*Benedict v. Arnoux*, 154 N. Y. 715, 49 N. E. 326; *New v. New Rochelle*, 158 N. Y. 41, 52 N. E. 647; *Van Beuren v. Wotherspoon*, 164 N. Y. 368, 57 N. E. 633), have no application here.

Any additional fact found by them in the evidence in support of a judgment which they affirm is as conclusively determined by the judgment as though it had been specifically found in the findings of the court below; and since in the *Amherst College Case* the issue as to the validity of the releases was open under the pleadings, the judgment concludes that issue.

New Dunderberg Min. Co. v. Old, 38 C. C. A. 89, 97 Fed. 150; *Werlein v. New Orleans*, 177 U. S. 390, 44 L. ed. 817, 20 Sup. Ct. Rep. 682.

The testimony of jurors will not be received to impeach their verdict.

People ex rel. Hosmer v. Columbia Common Pleas, 1 Wend. 297; *Sargent v. —*, 5 Cow. 106; *Dana v. Tucker*, 4 Johns. 487.

Messrs. John E. Parsons and C. N. Bovee, Jr., filed a brief for appellees Ritch, Bulkley, and Vaughan:

The jurisdiction of the circuit court was not in issue in the court below. The decision of the court did not rest upon the ground that the circuit court, as a Federal court, did not have jurisdiction to hear and determine the cause; on the contrary, the court assumed jurisdiction in giving effect to the judgment of the state court in *Amherst College v. Ritch*, 151 N. Y. 282, 37 L. R. A. 305, 45 N. E. 876.

Bache v. Hunt, 193 U. S. 523, 48 L. ed. 774, 24 Sup. Ct. Rep. 547; *Louisville Trust Co. v. Knott*, 191 U. S. 225, 48 L. ed. 159, 24 Sup. Ct. Rep. 119; *Blythe v. Hinckley*, 173 U. S. 501, 43 L. ed. 783, 19 Sup. Ct. Rep. 497; *United States v. Rider*, 163 U. S. 132, 41 L. ed. 101, 16 Sup. Ct. Rep. 983; *Smith v. McKay*, 161 U. S. 355, 40 L. ed. 731, 16 Sup. Ct. Rep. 490; *Blythe v. Blythe*, 172 U. S. 644, 43 L. ed. 1183, 19 Sup. Ct. Rep. 873; *Arkansas v. Schlierholz*, 179 U. S. 598, 45 L. ed. 335, 21 Sup. Ct. Rep. 229; *Shields v. Coleman*, 157 U. S. 177, 39 L. ed. 663, 15 Sup. Ct. Rep. 570; *Mexican C. R. Co. v. Eckman*, 187 U. S. 429, 47 L. ed. 245, 23 Sup. Ct. Rep. 211; *O'Neal v. United States*, 190 U. S. 36, 47 L. ed. 945, 23 Sup. Ct. Rep. 776; *Barney v. New York*, 193 U. S.

430, 48 L. ed. 737, 24 Sup. Ct. Rep. 502; *West v. Louisiana*, 194 U. S. 258, 48 L. ed. 965, 24 Sup. Ct. Rep. 650.

This suit is not one which involves the construction or application of the Constitution of the United States, within the meaning of the judiciary act of March 3, 1891, authorizing the taking of appeals or writs of error in such cases from district or circuit courts of the United States direct to the Supreme Court.

Cosmopolitan Min. Co. v. Walsh, 193 U. S. 460, 48 L. ed. 749, 24 Sup. Ct. Rep. 489; *C. A. Treat Mfg. Co. v. Standard Steel & I. Co.* 157 U. S. 674, 39 L. ed. 853, 15 Sup. Ct. Rep. 718; *Sloan v. United States*, 193 U. S. 614-620, 48 L. ed. 814-817, 24 Sup. Ct. Rep. 570; *Lambert v. Barrett*, 157 U. S. 697, 39 L. ed. 865, 15 Sup. Ct. Rep. 722; *Central Land Co. v. Laidley*, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80; *Weber v. Rogan*, 188 U. S. 10, 47 L. ed. 363, 23 Sup. Ct. Rep. 263; *Wilson v. North Carolina*, 169 U. S. 586, 42 L. ed. 865, 18 Sup. Ct. Rep. 435.

The mere assertion by the plaintiffs of constitutional questions, or that they have been deprived of their property without due process of law, does not establish jurisdiction. Otherwise, every defeated litigant in a state court action could, in the event of diverse citizenship of the parties, bring an action in the United States circuit court, and, upon his allegation respecting due process of law and the 14th Amendment, secure a review of the whole record upon an appeal directly to this court.

Newburyport Water Co. v. Newburyport, 193 U. S. 561-576, 48 L. ed. 795, 24 Sup. Ct. Rep. 553.

The duties and powers of the appellate court in the state of New York upon appeal have been fully considered and determined in the highest court of that state. The appellate court is required to review all questions of fact and law, and may grant such a judgment to either of the parties as the facts warrant, without ordering a new trial.

Multz v. Price, 91 App. Div. 116, 86 N. Y. Supp. 480; *Johnstone v. O'Connor*, 21 App. Div. 77, 47 N. Y. Supp. 425, Affirmed in 162 N. Y. 639, 57 N. E. 1123; *Harding v. Elliott*, 91 Hun, 502, 36 N. Y. Supp. 648; *Bomeisler v. Forster*, 154 N. Y. 229, 39 L. R. A. 240, 48 N. E. 534.

A decision stating concisely the grounds, without findings, is tantamount, in fact, to the general verdict of a jury.

Health Department v. Weekes, 22 App. Div. 110, 47 N. Y. Supp. 913; *Gardner v. New York Mut. Sav. & L. Asso.* 67 App. Div. 141, 73 N. Y. Supp. 604.

The judgment and record in *Amherst College v. Ritch*, 151 N. Y. 282, 37 L. R. A.

305, 45 N. E. 876, was *res judicata* upon the right, title, or interest of the complainants Fayerweather and Achter in the bill, and Reynolds, as executor, in the cross bill.

Fayerweather v. Ritch, 34 C. C. A. 61, 63 U. S. App. 112, 91 Fed. 721; *Landon v. Bulkley*, 37 C. C. A. 96, 95 Fed. 344; *Manhattan Trust Co. v. Trust Co. of N. A.* 46 C. C. A. 322, 107 Fed. 328; *New Orleans v. Citizens' Bank*, 167 U. S. 371, 42 L. ed. 202, 17 Sup. Ct. Rep. 905; *Cromwell v. Sac County*, 94 U. S. 352, 24 L. ed. 197; *United States v. California & O. Land Co.* 192 U. S. 355, 48 L. ed. 476, 24 Sup. Ct. Rep. 266; *Dowell v. Applegate*, 152 U. S. 327-343, 38 L. ed. 463-469, 14 Sup. Ct. Rep. 611; *Wilson v. Deen (Milne v. Deen)* 121 U. S. 525, 30 L. ed. 980, 7 Sup. Ct. Rep. 1004; *Stout v. Lye*, 103 U. S. 66, 26 L. ed. 428; *Masoh Lumber Co. v. Buchtel*, 101 U. S. 638, 25 L. ed. 1074; *Mitchell v. First Nat. Bank*, 180 U. S. 471, 45 L. ed. 627, 21 Sup. Ct. Rep. 418; *Manson v. Duncanson*, 166 U. S. 533, 41 L. ed. 1105, 17 Sup. Ct. Rep. 647; *United States v. Throckmorton*, 98 U. S. 65, 25 L. ed. 95; *Smith v. Nelson*, 62 N. Y. 288; *Sanders v. Soutter*, 126 N. Y. 199, 27 N. E. 263; *Herring v. New York, L. E. & W. R. Co.* 105 N. Y. 340, 12 N. E. 763; *Pray v. Hegeman*, 98 N. Y. 358; *Thorn v. De Breuille*, 179 N. Y. 64, 71 N. E. 470; *Leavitt v. Wolcott*, 95 N. Y. 212.

Due process of law was not denied to complainants Fayerweather, Achter, and Reynolds in the proceedings in *Amherst College v. Ritch*.

Simon v. Craft, 182 U. S. 427, 436, 45 L. ed. 1165, 1170, 21 Sup. Ct. Rep. 836; *Louisville & N. R. Co. v. Schmidt*, 177 U. S. 230, 44 L. ed. 747, 20 Sup. Ct. Rep. 620; *New Orleans Waterworks Co. v. Louisiana*, 185 U. S. 336, 350, 46 L. ed. 936, 943, 22 Sup. Ct. Rep. 691; *Fayerweather v. Ritch*, 34 C. C. A. 61, 63 U. S. App. 112, 91 Fed. 721; *Kennard v. Louisiana*, 92 U. S. 480, 23 L. ed. 478; *Iowa C. R. Co. v. Iowa*, 160 U. S. 389, 40 L. ed. 467, 16 Sup. Ct. Rep. 344; *Wilson v. North Carolina*, 169 U. S. 586, 42 L. ed. 865, 18 Sup. Ct. Rep. 435; *People ex rel. Witherbec v. Essex County*, 70 N. Y. 228.

The Code of Civil Procedure of the state of New York affords a complete and harmonious system for bringing parties into court, for a full and fair trial of issues, and for subsequent appeals for the correction of errors in the trial of the cause.

Bomeisler v. Forster, 154 N. Y. 237, 39 L. R. A. 240, 48 N. E. 534.

A correct decision will not be reversed on appeal because founded upon a wrong reason.

Ward v. Hasbrouck, 169 N. Y. 407, 62 195 U. S.

N. E. 434; *Marvin v. Universal L. Ins. Co.* 85 N. Y. 278, 39 Am. Rep. 657; *Allard v. Graesert*, 61 N. Y. 1; *Ferguson v. Gill*, 74 Hun, 566, 26 N. Y. Supp. 596.

The 14th Amendment of the Constitution in no way undertakes to control the power of a state to determine by what process legal rights may be ascertained or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice and affords fair opportunity to be heard before the issues are decided.

Iowa C. R. Co. v. Iowa, 160 U. S. 389, 40 L. ed. 467, 16 Sup. Ct. Rep. 344; *Davidson v. New Orleans*, 96 U. S. 97, 104, 24 L. ed. 616, 619; *Gallup v. Schmidt*, 183 U. S. 300, 46 L. ed. 207, 22 Sup. Ct. Rep. 162; *French v. Barber Asphalt Paving Co.* 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625.

Mr. Thomas H. Hubbard filed a brief for the President and Trustees of Bowdoin College:

The appellants had their day in court upon the trial at special term of the New York supreme court, and the judgment rendered by that court is a bar to this action.

Werlein v. New Orleans, 177 U. S. 390, 44 L. ed. 817, 20 Sup. Ct. Rep. 682. See also *Pray v. Hegeman*, 98 N. Y. 351.

The general term may not, as a court of original jurisdiction, make from the record before it on an appeal new findings of fact to support a new judgment contrary to the judgment appealed from, or to modify the judgment appealed from.

Benedict v. Arnoux, 154 N. Y. 715, 49 N. E. 326; *Cutter v. Gudebrod Bros. Co.* 168 N. Y. 512, 61 N. E. 887.

The general term in reality did not make new findings of fact in respect to the releases; on examination of that record it stated and decided, as a proposition of law, that there was not evidence enough to support a verdict or a judgment invalidating the releases.

Whether evidence is sufficient to sustain a verdict is a question of law, not a question of fact. Whether evidence is sufficient to require the reversal of a judgment is also a question of law for the appellate court to pass upon.

Otten v. Manhattan R. Co. 150 N. Y. 395, 44 N. E. 1033.

[297] *Mr Justice **Brewer** delivered the opinion of the court:

Our jurisdiction of this direct appeal from the decision of the circuit court is invoked on the ground that the case involves the application of the Constitution of the United States.

The contention is that, by article 5 of the 195 U. S. U. S., Book 49.

Amendments to the Federal Constitution, no person can "be deprived of life, liberty, or property, without due process of law;" that these plaintiffs were entitled to large shares of the estate of Daniel B. Fayerweather; that they were deprived of this property by the judgment of the circuit court, which gave unwarranted effect to a judgment of the state courts; that this action of the circuit court is not to be considered a mere error in the progress of a trial, but a deprivation of property under the forms of legal procedure. In *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581, we held that a judgment of a state court might be here reviewed if it operated to deprive a party of his property without due process of law, and that the fact that the parties were properly brought into court and admitted to make defense was not absolutely conclusive upon the question of due process. We said (p. 234, L. ed. p. 983, Sup. Ct. Rep. p. 584):

"But a state may not, by any of its agencies, disregard the prohibitions of the 14th Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts, and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law, regard must be had to substance, not to form. This court, referring to the 14th Amendment, has said: 'Can a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation.' *Davidson v. New Orleans*, 96 U. S. 97, 102, 24 L. ed. 616, 618. The *same question could be propounded, [298] and the same answer should be made, in reference to judicial proceedings inconsistent with the requirement of due process of law. If compensation for private property taken for public use is an essential element of due process of law as ordained by the 14th Amendment, then the final judgment of a state court, under the authority of which the property is in fact taken, is to be deemed the act of the state within the meaning of that amendment."

And again (p. 236, 237, L. ed. p. 985, Sup. Ct. Rep. p. 584):

"The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation."

If a judgment of a state court can be re- 14 209

viewed by this court on error upon the ground that, although the forms of law were observed, it necessarily operated to wrongfully deprive a party of his property (as indicated by the decision just referred to), a judgment of the circuit court of the United States, claimed to give such unwarranted effect to a decision of a state court as to accomplish the same result, may also be considered as presenting the question how far it can be sustained in the view of the prohibitory language of the 5th Amendment, and thus involve the application of the Constitution. It is said that the right of these plaintiffs to share in the estate of Daniel B. Fayerweather is undoubted, unless destroyed by the releases they executed; that the fundamental question presented in the trial court of the state was the validity of those releases; that, notwithstanding this, that court came to its conclusion and rendered its judgment without any determination thereof; that the appellate courts wrongfully assumed that the trial court had decided the question, and rendered their judgments on that assumption, so that the necessary result of the proceedings in the state courts was a deprivation of the right of the plaintiffs to a share of the estate, without any finding of the vital fact which [299] alone could destroy their right. The *contention is not that the state courts erred in their finding in respect to this fact, but that there never was any finding. Such decision of the state courts, made without any finding of the fundamental fact, was accepted in the circuit court of the United States as a conclusive determination of the fact. Although these plaintiffs were parties to the proceedings in the state courts, and presented their claim of right, if it be true that the necessary result of the course of procedure in those courts was a denial of their rights,—a taking away and depriving them of their property without any judicial determination of the fact upon which alone such deprivation could be justified,—a case is presented coming directly within the decision in 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581. Giving effect in the circuit court to the state judgment does not change the character of the question. It is simply adding the force of a new determination to one wrongfully obtained, and adding it upon no new facts. Whether the contention of the plaintiffs in respect to the character of the state proceedings can be sustained or not is a question upon the merits, and does not determine the matter of jurisdiction. That depends upon whether there is presented a bona fide and reasonable question of the wrongful character of the proceedings in the state courts.

and the necessary result therefrom. We are of opinion that the jurisdiction of this court must be sustained.

We pass, therefore, to consider the merits of the case. Private right and public welfare unite in demanding that a question once adjudicated by a court of competent jurisdiction shall, except in direct proceedings to review, be considered as finally settled and conclusive upon the parties. *Interest rei publicæ ut sit finis litium*. But in order to make this finality rightful it should appear that the question was distinctly put in issue; that the parties presented their evidence, or at least had an opportunity to present it, and that the question was decided. Cases of an alleged prior adjudication have frequently been presented in this court and the scope of a plea thereof fully determined. In the leading *case of *Cromwell v. Sac* [300] *County*, 94 U. S. 351, 352, 24 L. ed. 195, 197, we said:

"In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be

brought into litigation between the parties in proceedings at law upon any ground whatever."

See also *Wilson v. Deen*, 121 U. S. 525, 30 L. ed. 980, 7 Sup. Ct. Rep. 1004; *Hefner v. Northwestern Mut. L. Ins. Co.* 123 U. S. 747, 31 L. ed. 309, 8 Sup. Ct. Rep. 337; *Wiggins Ferry Co. v. Ohio & M. R. Co.* 142 U. S. 396, 35 L. ed. 1055, 12 Sup. Ct. Rep. [301] 188; *Nesbit v. Independent *District*, 144 U. S. 610, 36 L. ed. 562, 12 Sup. Ct. Rep. 746; *Johnson Steel Street Rail Co. v. Whar-ton*, 152 U. S. 252, 38 L. ed. 429, 14 Sup. Ct. Rep. 608; *Dowell v. Applegate*, 152 U. S. 327, 38 L. ed. 463, 14 Sup. Ct. Rep. 611; *Last Chance Min. Co. v. Tyler Min. Co.* 157 U. S. 683, 39 L. ed. 859, 15 Sup. Ct. Rep. 733; *New Orleans v. Citizens' Bank*, 167 U. S. 371, 42 L. ed. 202, 17 Sup. Ct. Rep. 905; *Southern P. R. Co. v. United States*, 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18; *Bryar v. Campbell*, 177 U. S. 649, 44 L. ed. 926, 20 Sup. Ct. Rep. 794; *United States v. California & O. Land Co.* 192 U. S. 355-358, 48 L. ed. 476-478, 24 Sup. Ct. Rep. 266.

The state court was one of competent jurisdiction, and the present contestants were before that court, taking part in the litigation. The validity of the releases was put in issue by the pleadings, and no judgment could properly have been rendered without a determination of that question. The colleges sought to enforce a secret trust, but the property covered by the trust, together with that passing under the 9th article of the will, was the bulk of the estate,—far more than half. Such a disposition of the testator's property was in contravention of the laws of New York. They who would take the estate in case of intestacy had a right to object to the enforcement of the trust. Only on condition that they waived their objections and released could it be sustained. The judgment enforced it. It therefore practically determined that the releases were valid, and decided against the contention of these plaintiffs, that they were fraudulent and void. All this is evident from a perusal of the pleadings. The appellants concede this and rest their claim in the Federal court partly upon that basis. Thus, in their brief it is said:

"The issues so joined came on to be tried in the state supreme court; these complainants gave evidence tending to prove their allegations, and thereupon it became the duty of the court to adjudge whether the releases which they assailed were invalid, and whether they were entitled to the affirmative relief prayed. The issues so tendered were necessary to be determined before any valid judgment upon those issues could be given pursuant to due process of law, the law of the land and the provisions of the Constitution of the United States." 195 U. S.

The case was tried by the court without a jury. No special *findings of fact were [302] made. According to testimony given on the trial of this case in the circuit court the omission to make special findings was with the acquiescence (if not at the instance) of all the counsel appearing in the state court. The decree adjudged that the residuary estate was held in trust for the colleges named in the 9th article of the will, enjoined the residuary legatees from distributing any portion of that estate under the deed of gift, and directed that it be paid over to the respective colleges. The ordinary rule in respect to a judgment without any special findings is that it, like a general verdict of a jury, is tantamount to a finding in favor of the successful party of all the facts necessary to sustain the judgment. In the general term, on the appeal taken to it, two opinions were filed,—one by Judge Follett, in which Judge Parker concurred, and one by the presiding judge, Van Brunt. Judge Follett, after stating that the executors of the testator's widow and two of his heirs at law and next of kin sought to have the residuary clause declared invalid, under chap. 360 of the Laws of 1860, said:

"The difficulty with their contention is that the widow and heirs released all of their interest in the estate for valuable considerations paid to them. . . . It is urged that these releases were procured by fraud and undue influence. There is no evidence in the record justifying this contention. The terms of settlement were agreed on during the controversy in the surrogate's court over the probate of the will and codicils, and the widow and heirs were represented in that controversy and in the settlement by distinguished counsel, and acted under their advice. . . . If the person entitled to contest a will, or some one or more of its provisions, voluntarily, and for a valuable consideration received after the testator's death, with full knowledge of the invalidity of the will, divests himself of all interest in the property attempted to be disposed of by it, he cannot impeach its validity."

Presiding Judge Van Brunt thus stated his conclusions:

"The testator left him surviving a widow, who was the only *person who could call [303] into operation, for her protection, the statute which we have quoted. The widow, however, has released to the executors all claims to the estate, which release cannot be successfully attacked or set aside. There is consequently no person for whose benefit the statute can operate.

"No rights of heirs and next of kin have been infringed upon, because the trust does not contravene any statute for their benefit,

and is not the subject of attack by them. If it were, they have also executed a release of their interest in the estate in the same manner as the widow.

"We have therefore the case of a trust established, which would be valid as against all the world but for the statute in favor of the widow; and the widow, having released all her rights in the estate, how can her representatives claim the invalidity of a trust as to property in which she had no interest?" [91 Hun, 534, 36 N. Y. Supp. 576.]

The opinion in the court of appeals was delivered by Judge Vann, and concurred in by all the judges except Chief Judge Andrews. In it it is said:

"Although the decision by the special term and the affirmance by the general term were general in form, necessarily some facts were found by those courts, even if they are not specified in the record. Otherwise the burden of deciding questions of fact would be cast upon this court, which has jurisdiction to decide only questions of law. We think that the effect of a decision by the trial court without expressing the facts found is the same as if there had been a general verdict rendered by a jury, and that the same presumptions arise in its support.

"We are of the opinion, therefore, that where the decision of the special term does not state the facts found, and the judgment entered thereon has been affirmed by the general term, upon an appeal to this court all the facts [alleged in the complaint] warranted by the evidence, and necessary to support the judgments below, are presumed to have been found. Hence, upon such an appeal, we have no more control over the facts than

[304] we have *when specific findings are made by the special term and affirmed by the general term. This conclusion takes the question as to the fraud alleged to have been practised by the residuary legatees upon the widow and next of kin in procuring the releases out of the case, for it cannot be said on the record before us that the evidence tending to show fraud is so irresistible as to make the omission to find fraud an error of law. Assuming that there was evidence enough to warrant the inference of fraud, there was also ample evidence to warrant the inference that there was no fraud. A question of fact was thus presented which is beyond our power of review." [151 N. Y. 320, 321, 37 L. R. A. 320, 45 N. E. 886.]

Thus the court of appeals held in accord with the ordinary ruling as to the effect of a judgment without findings. So it has frequently decided. In *Bartlett v. Goodrich*,

153 N. Y. 421, 424, 47 N. E. 794, 795, it said:

"The learned trial judge held that the plaintiff was entitled to recover, and the general term has affirmed the judgment. There were no findings made as the result of the trial, but simply a brief statement of the ground of the decision. In this condition of the record we must presume that all facts warranted by the evidence, and necessary to support the judgment, have been found. *Amherst College v. Ritch*, 151 N. Y. 282, 37 L. R. A. 305, 45 N. E. 876. The appeal, therefore, cannot prevail unless it appears, as matter of law, that the learned trial judge was not warranted, upon any fair view of the evidence, in finding as he did, that the deceased was, at the time of his death, the equitable owner of the policies."

See also *New York Security & T. Co. v. Lipman*, 157 N. Y. 551, 556, 52 N. E. 595; *Garvey v. Long Island R. Co.* 159 N. Y. 323, 328, 70 Am. St. Rep. 550, 54 N. E. 57; *Reed v. McCord*, 160 N. Y. 330, 334, 54 N. E. 737; *Solomon v. Continental F. Ins. Co.* 160 N. Y. 595, 598, 46 L. R. A. 682, 73 Am. St. Rep. 707, 55 N. E. 279; *Rodgers v. Clement*, 162 N. Y. 422, 427, 76 Am. St. Rep. 342, 56 N. E. 901; *National Harrow Co. v. Bement & Sons*, 163 N. Y. 505, 510, 57 N. E. 764; *Niagara Falls v. New York C. & H. R. R. Co.* 168 N. Y. 611, 61 N. E. 185; *Critten v. Chemical Nat. Bank*, 171 N. Y. 219, 231, 57 L. R. A. 529, 63 N. E. 969; *Hutton v. Smith*, 175 N. Y. 375, 378, 67 N. E. 633.

*After the filing of its opinion an application made to the court of appeals, as shown in the statement of facts, to amend the remittitur so as to direct the trial court to find specifically whether the releases were valid or not, was denied. [305]

We have thus the case of a hearing in the trial court upon issues which required a determination of the validity of these releases as a condition of a judgment adverse to these plaintiffs; a judgment against them; an affirmance of the judgment by the general term of the supreme court, with an opinion declaring that there was in the record no evidence justifying the claim that these releases were fraudulently obtained, and void; and a further affirmance by the court of appeals, accompanied by an opinion declaring that, upon the state of the record, it was to be presumed that the validity of the releases had been affirmatively found, and also that there was sufficient evidence to sustain such a finding, followed by a refusal to send the question of the validity of the releases back to the trial court for consideration. Notwithstanding all this, apparent upon the

face of the record, the plaintiffs insist that the validity of the releases was never determined by any of the state courts, and that the final judgment of affirmance by the court of appeals was based upon the presumption of a determination which was never in fact made.

Upon what is this contention based? First, the silence of the judgment, which contains no findings to indicate upon what it is based; second, a memorandum of decision filed by the trial judge, in which he states that "the grounds upon which the issues have been decided are" a promise of the executors that if made residuary legatees they would distribute the residuary estate among the colleges named in the 9th article, and that the testator made them residuary legatees in reliance upon such promise; the opinion of the trial judge, in which he discusses at some length, and with citation of authorities, the validity of the secret trust and the testimony by which it was established, and then, without in terms passing upon the contention respecting the releases, [306] states "the *view that I have taken of the facts and the law of this case renders it unnecessary for me to consider the very interesting questions of law propounded by the learned counsel for the defendants Reynolds, Achter, and Fayerweather;" and, finally, the testimony of the trial judge, given on the hearing in this case some six years after his decision in the state court, to the effect that, in deciding the case he did not consider the question of the validity of the releases.

It is undoubtedly true that, in some cases, evidence may be introduced outside the record to show what particular question was tried and determined in the former suit. *Washington, A. & G. Steam-Packet Co. v. Sickles*, 24 How. 333, 344, 16 L. ed. 650, 654, 5 Wall. 580, 592, 18 L. ed. 550, 553; *Russell v. Place*, 94 U. S. 606, 608, 24 L. ed. 214, 215. But it does not follow that testimony of every kind is admissible for that purpose. In *Washington, A. & G. Steam-Packet Company v. Sickles*, although it was held that "in cases where the record itself does not show that the matter was necessarily and directly found by the jury, evidence *aliunde* consistent with the record may be received to prove the fact," yet, it appearing that some of the jurors on the former trial were permitted to testify as to the particular ground upon which they found their verdict, it was said (p. 593, L. ed. p. 554):

"But it is proper to say that the secret deliberations of the jury or grounds of their proceedings while engaged in making up

their verdict are not competent or admissible evidence of the issues or finding. The jurors oftentimes, though they may concur in the result, differ as to the grounds or reasons upon which they arrive at it.

"The evidence should be confined to the points in controversy on the former trial, to the testimony given by the parties, and to the questions submitted to the jury for their consideration, and then the record furnishes the only proper proof of the verdict."

See also *Wood v. Jackson*, 8 Wend. 9-36, 22 Am. Dec. 603; *Lawrence v. Hunt*, 10 Wend. 80-85, 25 Am. Dec. 539.

Tested by the rule thus laid down the testimony of the trial *judge given six [307] years after the case had been disposed of, in respect to the matters he considered and passed upon, was obviously incompetent. True, the reasoning of the court for the rule is not wholly applicable, for, as the case was tried before a single judge, there were not two or more minds coming by different processes to the same result. Nevertheless, no testimony should be received except of open and tangible facts,—matters which are susceptible of evidence on both sides. A judgment is a solemn record. Parties have a right to rely upon it. It should not lightly be disturbed, and ought never to be overthrown or limited by the oral testimony of a judge or juror of what he had in mind at the time of the decision. Undoubtedly, when the pleadings are general, as in a case of the common counts, evidence may be given of the testimony which was introduced on the trial, for that may disclose what must have been considered and determined. And where the evidence is that testimony was offered at the prior trial upon several distinct issues, the decision of any one of which would justify the verdict or judgment, then the conclusion must be that the prior decision is not an adjudication upon any particular issue or issues, and the plea of *res judicata* must fail.

Putting one side the oral testimony of the trial judge, there is nothing in the other matters specified to disturb the conclusion which follows from an examination of the record, that the validity of the releases was actually determined. Of course, the omission of special findings means nothing, for the judgment implies a finding of all necessary facts. The memorandum of decision naturally states the grounds for arriving at a conclusion concerning the respective claims of the colleges named in the 9th clause and the beneficiaries of the deed of gift, for that was the controversy between those parties, and indeed, the primary controversy presented by the pleadings. The

declaration in the opinion, that the conclusion reached upon the matters discussed rendered it unnecessary to consider the questions of law propounded by the counsel for these plaintiffs, must be read in the light [308] of the *prior statement therein that the widow and next of kin were demanding that the releases executed by them be set aside and they be given the residuary estate, and the further fact that whether the releases were fraudulently obtained and void was a question of fact rather than of law. Evidently the opinion proceeded and the conclusion was reached on the assumption that there was no sufficient testimony to invalidate the releases.

Further, the entire record of the case was taken on appeal to the general term. That court had before it for consideration all the evidence which was presented to the trial court; and, as we have seen, declared in its opinion that there was no evidence justifying the contention that the releases were procured by fraud and undue influence. While this was not stated in the form of a special finding, it discloses the conclusion of the court from the evidence. We cannot hold that it was not authorized to pass upon this question, for its conclusion was sustained by the court of appeals, which, in its opinion, also referred to the question. Finally, by the motion to amend its remittitur, the attention of the court of appeals was specifically called to these very matters which are now urged as showing a failure on the part of the lower courts to determine the question of the validity of the releases, and it refused to make any order which would permit a further consideration. Nothing can be clearer from this record than that the question of the validity of the releases was not only before the state courts, but was considered and determined by them, and the regularity of the procedure was sustained by the highest court of the state. The question was, as affirmed by counsel for these appellants, put in issue by the pleadings, and its determination was a necessary prerequisite to an adverse judgment. It was referred to by all the courts in their opinions, was affirmatively decided by the general term, its decision sustained by the court of appeals, and reaffirmed by that court, by a refusal to amend its remittitur.

Under these circumstances the pleas of [309] *res judicata* were *properly sustained, and the decree of the Circuit Court, dismissing the bill and cross bill, is affirmed.

The CHIEF JUSTICE did not hear the argument, and took no part in the decision of this case.

C. EWING PATTERSON *et al.*, *Appts.*,
v.

JOHN Y. HEWITT *et al.*

(See S. C. Reporter's ed. 309-322.)

Laches in suit to enforce rights to mining location.

1. Laches may defeat a suit in equity to enforce rights in a mining location, although the time fixed in N. M. Comp. Laws, § 2938, for the prosecution of actions or suits "in law or equity" for any lands, tenements, or hereditaments has not expired.
2. A delay of eight years after the right to a deed of an interest in a mining claim has accrued by reason of a proportionate contribution to the work and expense necessary to obtain a patent will defeat a suit to enforce such right, where complainants contributed nothing further to the subsequent development of the mine and the consequent discovery of a rich ore deposit.
3. The refusal of a trustee to execute a deed of an interest in a mining location in compliance with the trust agreement is a repudiation of the trust, which, if known to the complainants, opens the door to the defense of laches to a suit to enforce the trust.

[No. 23.]

Argued October 25, 26, 1904. Decided November 28, 1904.

A PPEAL from the Supreme Court of the Territory of New Mexico to review a decree which affirmed a decree of the District Court for Lincoln County in that Territory, dismissing, on the ground of laches, a bill to enforce a trust in certain mining locations. *Affirmed.*

See same case below (N. M.) 55 L. R. A. 658, 66 Pac. 553.

Statement by Mr. Justice **Brown**:

Appellants C. Ewing Patterson, a resident of New Jersey, and Henry J. Patterson, a resident of New Mexico, on April 29, *1893, filed their bill of complaint in the [310] district court for Lincoln county, territory of New Mexico, against John Y. Hewitt, William Watson, Mathew Hoyle, and Harvey B. Fergusson, residents of New Mexico, and the Old Abe Company, a corporation of the same territory, to enforce a trust which is alleged to have existed between the appellants and the defendant Hewitt, and by

NOTE.—As to laches as a defense—see notes to Hammond v. Hopkins, 36 L. ed. U. S. 135; Felix v. Patrick, 36 L. ed. U. S. 720; Middletown v. Newport Hospital, 1 L. R. A. 191; Calhoun v. Deihl & M. R. Co. 8 L. R. A. 248; Coffey v. Emigh, 10 L. R. A. 125.

On the application of limitations to trusts—see notes to Hughes v. Brown, 8 L. R. A. 480; Cone v. Dunham, 8 L. R. A. 647.

virtue of which they sought to recover a one-fourth interest in two mining locations, made in the name of John Y. Hewitt, on the 2d day of May, 1884. The bill prayed for an accounting of proceeds of ores taken from the mines, and a lien on the property, for an injunction, and the appointment of a receiver.

The facts in the case as found by the district court and adopted by the supreme court are substantially as follows:

In 1881 the property in controversy was claimed by the appellants and by Watson, one of the defendants, under locations previously made by them. Between 1881 and 1883, appellants, in conjunction with the defendant Watson, did a large amount of work upon the claims, and were asserting their rights under the mining laws of the United States. During this time the same ground was also claimed by other parties, among whom was the defendant Hewitt. In August, 1883, a dispute arose in regard to this property between appellants and the defendant Watson on one side and the other parties upon the other side.

The parties interested held a meeting in August or September, 1883, for the purpose of adjusting the differences then existing between them, and to endeavor, if possible, to arrive at an agreement whereby the interests of all would be protected. The two appellants, the defendant Watson and the defendant Hewitt, with several others who were interested, attended this meeting. The result was an agreement between them that all the old locations then existing, whether made by the appellants or any of the defendants, or conflicting claimants, should be from that date abandoned, surrendered, and given up by all of the parties, and that the [311]ground should be *put in possession of Hewitt, as trustee, to hold in his own name for the benefit of all the parties then interested. It was also agreed that Hewitt, as such trustee, should make a deed to such of the said parties holding interests therein as should contribute their part to the work, labor, and expenses necessary to obtain a patent to the land; but there was no agreement as to what should become of the interests of anyone who failed to contribute his share of the expenses. It was also agreed that each of the appellants contributing his share of the expenses should receive a one-eighth interest in the location, and that the said Watson and Hewitt should each receive a one-eighth interest, part on account of their services and part on account of their interests in the ground, and that the remaining shares should go to other parties who were interested therein.

In pursuance of this agreement Hewitt took charge of the property, and, together

with the defendant Watson and one of the appellants Patterson, superintended and directed the work upon said mine during the year 1883 and part of the year 1884. In order to raise money for the working of the mine it was agreed that a one-sixth interest should be sold to H. B. Fergusson for \$500.

During 1884 and 1885 a sufficient amount of work was done upon the property to obtain a patent, and to discover mineral thereon. The appellants contributed their share of the work, which enabled the trustee to obtain a patent, and so far carried out their part of the agreement as to entitle them to a deed from the trustee for their one-eighth interest each, according to said agreement.

In April, 1885, the appellant Henry J. Patterson, in person and by his agent, demanded a deed from Hewitt, trustee, of the one-eighth interest to which he claimed to be entitled; but the defendant Hewitt at that time refused to make the said deed, and has ever since refused to execute the same, and has disputed his right thereto.

No demand for a deed appears to have been made by C. *Ewing Patterson until [312] just before the commencement of this suit, when it was also refused.

In 1883, the complainant C. Ewing Patterson left New Mexico, and, up to the time of the bringing of this suit, had never returned there. The appellant Henry J. Patterson left in 1885, and from that time until the fall of 1892 was a nonresident of New Mexico.

From 1885 to 1890 the defendants performed a large amount of work and expended a good deal of money on the mine in addition to the annual assessment required by the government of the United States thereon; but neither of the appellants ever contributed or offered to contribute any part of the expenses of said work, or perform any labor.

In November, 1890, the defendants discovered a large body of rich ore in the mine, and since that date have taken out therefrom gold amounting to several hundred thousand dollars. In 1892, a corporation known as the Old Abe Mining Company was organized by the defendants Hewitt, Fergusson, Watson, and others, and the ground in controversy, known as the Old Abe ground, including the interests claimed by the appellants, was turned over to the new corporation by the trustee, Hewitt, and this corporation is now holding title thereto.

The appellant Henry J. Patterson, through his agent, Henry Burgess, had knowledge from April, 1885, that Hewitt had refused to carry out said agreement, and execute the deed to him and his co-complainant, and both of the appellants were again informed after April, 1885, that Hewitt had

refused to make the said deeds or to carry out the trust agreement.

Upon this state of facts the district court dismissed the bill upon the ground of laches. The supreme court of the territory affirmed its action (55 L. R. A. 658, 66 Pac. 553), and complainants appealed to this court.

Mr. W. B. Childers argued the cause, and, with **Mr. F. W. Clancy**, filed a brief for appellants:

Where a statute declares that a suit in equity cannot be maintained after the lapse of ten years, nothing less than the lapse of that period can bar the suit. The defense of laches and staleness of claim is no longer available.

Corning v. Stebbins, 1 Barb. Ch. 591; *Varick v. Edwards*, Hoffm. Ch. 417, 11 Paige Ch. 291; *Hill v. Nash*, 73 Miss. 862, 19 So. 710; *Washington v. Soria*, 73 Miss. 665, 55 Am. St. Rep. 555, 19 So. 487; *Cross v. Allen*, 141 U. S. 537, 35 L. ed. 849, 12 Sup. Ct. Rep. 67.

Our statute expressly provides in effect that no suit shall be barred within ten years.

Every statute must be construed from the words in it, and that construction is to be preferred which gives to all of them an operative meaning.

Potter's Dwarrr. Stat. 144, 145; *Early v. Doe*, 16 How. 617, 14 L. ed. 1082; *Post Master General v. Early*, 12 Wheat. 152, 6 L. ed. 583; *United States v. Gooding*, 12 Wheat. 477, 6 L. ed. 699; *Washington Market Co. v. Hoffman*, 101 U. S. 115, 116, 25 L. ed. 783, 784; *Allen v. Louisiana*, 103 U. S. 84, 85, 26 L. ed. 319, 320; *Montclair Twp. v. Ramsdell*, 107 U. S. 152, 27 L. ed. 432, 2 Sup. Ct. Rep. 391; *United States v. Fisher*, 109 U. S. 145, 27 L. ed. 886, 3 Sup. Ct. Rep. 154.

No general rule as to laches can be laid down which controls in all cases, but each case must be decided upon its own peculiar circumstances: and in withholding or granting relief where the defense of laches has been interposed, the court lays great stress upon the presence or absence of special circumstances which make it inequitable or otherwise to grant what complainants ask.

Hammond v. Hopkins, 143 U. S. 250, 36 L. ed. 145, 12 Sup. Ct. Rep. 418; *Gallier v. Cadwell*, 145 U. S. 368, 36 L. ed. 738, 12 Sup. Ct. Rep. 873; *Halstead v. Grinnan*, 152 U. S. 416, 417, 38 L. ed. 496, 497, 14 Sup. Ct. Rep. 641; *Penn. Mut. L. Ins. Co. v. Austin*, 168 U. S. 698, 42 L. ed. 631, 18 Sup. Ct. Rep. 223; *Abraham v. Ordway*, 158 U. S. 420, 39 L. ed. 1039, 15 Sup. Ct. Rep. 894.

Mere delay or silence on the part of complainants is not enough to bar them, no

matter how long continued, if it does not extend beyond the statutory period of limitation.

New York Rubber Co. v. Rothery, 107 N. Y. 315, 1 Am. St. Rep. 822, 14 N. E. 269; *Philadelphia, W. & B. R. Co. v. Dubois*, 12 Wall. 64, 20 L. ed. 269; *American Co. v. Bradford*, 27 Cal. 360; *Lux v. Haggin*, 69 Cal. 267, 10 Pac. 674; *Wood, Limitation of Actions*, §§ 61-63; *Kline v. Vogel*, 90 Mo. 250, 1 S. W. 733, 2 S. W. 408; *Perry, Tr.* § 850; *First Nat. Bank v. Nelson*, 106 Ala. 535, 18 So. 155; *Hill v. Epley*, 31 Pa. 333; *Brant v. Virginia Coal & I. Co.* 93 U. S. 336, 23 L. ed. 929; *Ross v. Payson*, 160 Ill. 349, 43 N. E. 402.

In cases where a trust is clearly established by the testimony, or where fraud is clearly proved, or where the property has not passed into the hands of persons innocent of the fraud and without notice thereof, and lapse of time has not obscured the facts or caused the loss of testimony, relief will be granted, notwithstanding great delay on the part of a complainant.

McIntyre v. Pryor, 173 U. S. 53, 43 L. ed. 611, 19 Sup. Ct. Rep. 352.

Mr. H. B. Fergusson argued the cause and filed a brief for appellees:

Appellants delayed the institution of their suit in this case for at least eight years. This, under the facts before this court, is laches.

Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. ed. 329; *Great West Min. Co. v. Woodmas of Alston Min. Co.* 14 Colo. 90, 23 Pac. 908; *Kinne v. Webb*, 49 Fed. 512; *Harwood v. Cincinnati & C. Air-Line R. Co.* 17 Wall. 78, 21 L. ed. 558; *Brown v. Buena Vista County*, 95 U. S. 157, 24 L. ed. 422; *Hayward v. Eliot Nat. Bank*, 96 U. S. 611, 24 L. ed. 855; *Holgate v. Eaton*, 116 U. S. 33, 29 L. ed. 538, 6 Sup. Ct. Rep. 224; *Société Foncière v. Milliken*, 135 U. S. 304, 34 L. ed. 208, 10 Sup. Ct. Rep. 823; *Hammond v. Hopkins*, 143 U. S. 224, 36 L. ed. 134, 12 Sup. Ct. Rep. 418; *Hoyt v. Latham*, 143 U. S. 567, 36 L. ed. 264, 12 Sup. Ct. Rep. 568; *Pratt v. California Min. Co.* 9 Sawy. 354, 24 Fed. 869; *Manning v. San Jacinto Tin Co.* 7 Sawy. 418, 9 Fed. 726; *Kline v. Vogel*, 90 Mo. 239, 1 S. W. 733, 2 S. W. 408; *Halsted v. Grinnan*, 152 U. S. 412, 38 L. ed. 495, 14 Sup. Ct. Rep. 641; *Richards v. Mackall*, 124 U. S. 183, 31 L. ed. 396, 8 Sup. Ct. Rep. 437; *McCabe v. Matthews*, 155 U. S. 550, 39 L. ed. 256, 15 Sup. Ct. Rep. 190; *Evers v. Watson*, 156 U. S. 527, 39 L. ed. 520, 15 Sup. Ct. Rep. 430; *Johnson v. Atlantic, G. & W. I. Transit Co.* 156 U. S. 618, 39 L. ed. 556, 15 Sup. Ct. Rep. 520; *Johnston v. Standard Min. Co.* 148 U. S. 360, 37 L. ed. 480, 13 Sup. Ct. Rep. 585; *Foster v. Mansfield, C. & L. M. R. Co.*

146 U. S. 88, 36 L. ed. 899, 13 Sup. Ct. Rep. 28.

Complainants are required to allege and prove satisfactory reasons or excuses for long delay.

Badger v. Badger, 2 Wall. 87, 17 L. ed. 836; *Gooden v. Kimmell*, 99 U. S. 201, 25 L. ed. 431.

Complainants are held to diligence in efforts to ascertain; and means of knowledge are held to be the same as knowledge.

Norris v. Haggin, 28 Fed. 275; *Grymes v. Sanders*, 93 U. S. 55, 23 L. ed. 798; *Mudsill Min. Co. v. Watrous*, 9 C. C. A. 415, 22 U. S. App. 12, 61 Fed. 163.

Delay cannot be excused except by some actual hindrance or impediment caused by the fraud or concealment of the party in possession.

Wagner v. Baird, 7 How. 234, 12 L. ed. 681; *Landsdale v. Smith*, 106 U. S. 391, 27 L. ed. 219, 1 Sup. Ct. Rep. 350.

The excuse of absence, ignorance, and poverty is held not sufficient.

Naddo v. Bardon, 2 C. C. A. 335, 4 U. S. App. 642, 51 Fed. 493; *Galliher v. Cadwell*, 145 U. S. 371, 36 L. ed. 739, 12 Sup. Ct. Rep. 873.

In express continuing trusts the question of repudiation by the trustee is important. But even in express continuing trusts, after such notice of repudiation, the statute of limitations and the doctrine of laches both apply in all their vigor.

Naddo v. Bardon, 2 C. C. A. 335, 4 U. S. App. 642, 51 Fed. 493; *Speidel v. Henrichi*, 120 U. S. 377, 30 L. ed. 718, 7 Sup. Ct. Rep. 610; *Philippi v. Philippe*, 115 U. S. 151, 29 L. ed. 336, 5 Sup. Ct. Rep. 1181; *Felix v. Patrick*, 145 U. S. 317, 36 L. ed. 719, 12 Sup. Ct. Rep. 862; *Wood v. Carpenter*, 101 U. S. 140, 25 L. ed. 808; *Godden v. Kimmell*, 99 U. S. 201, 25 L. ed. 431; *Wollensak v. Reiher*, 115 U. S. 96, 29 L. ed. 350, 5 Sup. Ct. Rep. 1137.

Laches is not, like limitation, a mere matter of time, but principally a question of the inequity of permitting the claims to be enforced; an inequity founded upon some change in the condition or relations of the property or parties.

Galliher v. Cadwell, 145 U. S. 368, 36 L. ed. 738, 13 Sup. Ct. Rep. 874; *Badger v. Badger*, 2 Wall. 94, 17 L. ed. 838; *Harwood v. Cincinnati & C. Air-Line R. Co.* 17 Wall. 78, 21 L. ed. 558; *McQuiddy v. Ware*, 20 Wall. 19, 22 L. ed. 312; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. ed. 329; *Sullivan v. Portland & K. R. Co.* 94 U. S. 807, 24 L. ed. 324; *Brown v. Buena Vista County*, 95 U. S. 157, 24 L. ed. 422; *Hayward v. Eliot Nat. Bank*, 96 U. S. 611, 24 L. ed. 855; *Holgate v. Eaton*, 116 U. S. 33, 29 L. ed. 538, 6 Sup. Ct. Rep. 224; *Davison v.*
195 U. S.

Davis, 125 U. S. 90, 31 L. ed. 635, 8 Sup. Ct. Rep. 825; *Société Foncière v. Milliken*, 135 U. S. 304, 34 L. ed. 208, 10 Sup. Ct. Rep. 823; *Hall v. Russell*, 3 Sawy. 506, Fed. Cas. No. 5,943, Affirmed in 101 U. S. 503, 25 L. ed. 829; *Hayden v. Manning*, 106 U. S. 586, 27 L. ed. 306, 1 Sup. Ct. Rep. 617; *Lakin v. Sierra Buttes Gold Min. Co.* 25 Fed. 337.

Inexcusable delay for a period short of the time prescribed by the statute constitutes laches, and is an equitable defense wholly independent and outside of the statute; wherever the relief sought is wholly equitable, as in this case.

Bliss v. Prichard, 67 Mo. 181; *Kline v. Vogel*, 90 Mo. 239, 1 S. W. 733, 2 S. W. 408; *Tatum v. Holliday*, 59 Mo. 426; *Landrum v. Union Bank*, 63 Mo. 56; *Moreman v. Talbott*, 55 Mo. 397; *Davis v. Fox*, 59 Mo. 127; *Scruggs v. Decatur Mineral & Land Co.* 86 Ala. 173, 5 So. 441; *Calhoun v. Millard (Calhoun v. Delhi & M. R. Co.)* 121 N. Y. 69, 8 L. R. A. 248, 24 N. E. 27; *Heywood v. Buffalo*, 14 N. Y. 540; *Venice v. Woodruff*, 62 N. Y. 462, 20 Am. Rep. 495; *Springport v. Teutonia Sav. Bank*, 75 N. Y. 397; *First Nat. Bank v. Nelson*, 106 Ala. 535, 18 So. 154; *Frame v. Kenny*, 2 A. K. Marsh. 145, 12 Am. Dec. 367; *Nettles v. Nettles*, 67 Ala. 599; *James v. James*, 55 Ala. 525; *Bergen v. Bennett*, Cai. Cas. 19, 2 Am. Dec. 281; *Sheldon v. Rockwell*, 9 Wis. 166, 76 Am. Dec. 265; *Mooers v. White*, 6 Johns. Ch. 360; *Kerr, Fraud & Mistake*, pp. 303 *et seq.*; *Story, Eq. Jur.* § 1520; *Pon. Eq. Jur.* §§ 817, 917, and note.

Mr. Justice **Brown** delivered the opinion of the court:

The defense of laches, which prompted the dismissal of the bill in this case, has so often been made the subject of discussion in this court that a citation of cases is quite unnecessary. Some degree of diligence in bringing suit is required under all systems of jurisprudence. In actions at law, the question of diligence is determined by the words of the statute. If an action be brought the day before the statutory time expires, it will be sustained; if the day after, it will be defeated. In suits in equity the question is determined by the circumstances of each particular case. The statute of limitations consorts with the rigid principles of the common law, but is ill adapted to the flexible remedies of a court of equity. The statute frequently works great practical injustice,—the doctrine of laches, never. True, lapse of time is one of the chief ingredients, but there are others of almost equal importance. Change in the value of the property between the time the cause of action arose and the time the bill was filed,

complainant's knowledge or ignorance of the facts constituting the cause of action, as well as his diligence in availing himself [318] of the means *of knowledge within his control,—are all material to be considered upon the question whether the suit was brought without unreasonable delay.

1. In the case under consideration the appellants claim the benefit of § 2938 of the Compiled Laws of New Mexico, to the following effect:

"No person or persons, nor their children or heirs, shall have, sue, or maintain any action or suit, either in law or equity, for any lands, tenements, or hereditaments, but within ten years next after his, her, or their right to commence, have, or maintain such suit shall have come, fallen, or accrued," etc.

If this were an action of ejectment at law, there seems to be no question but what it could be maintained, since it was brought within ten years from the time the cause of action accrued; but where the statute is in terms applicable to suits in equity, as well as at law, it is ordinarily construed, in cases demanding equitable relief, as fixing a time beyond which the suit will not, under any circumstances, lie; but not as precluding the defense of laches, provided there has been unreasonable delay within the time limited by the statute. In an action at law, courts are bound by the literalism of the statute; but in equity the question of unreasonable delay within the statutory limitation is still open. *Alsop v. Riker*, 155 U. S. 448-460, 39 L. ed. 218-222, 15 Sup. Ct. Rep. 162.

If this were not so, it would seem to follow that in the code states, where there is but one form of action applicable both to proceedings of a legal and equitable nature, a statute of limitations, general in its terms, would apply to suits of both descriptions, and the doctrine of laches become practically obsolete. This, however, is far from being the case, as questions of laches are as often arising and being discussed in the code states as in the others. In a few cases where the statute of limitations is made applicable in terms to suits in equity, it has been construed as allowing a suit to be begun at any time within the period limited by the statute, notwithstanding the intermediate laches of the complainant, although in those [319] *cases it will usually be found that the language of the statute is explicit and imperative. *Hill v. Nash*, 73 Miss. 849, 19 So. 709; *Washington v. Soria*, 73 Miss. 665, 55 Am. St. Rep. 555, 19 So. 485.

But the weight of authority is the other way, and we consider the better rule to be that, even if the statute of limitations be made applicable in general terms to suits in equity, and not to any particular defense,

the defendant may avail himself of the laches of the complainant, notwithstanding the time fixed by the statute has not expired. This has been expressly held in Alabama (*Scruggs v. Decatur Mineral & Land Co.* 86 Ala. 173, 5 So. 440), in Missouri (*Bliss v. Prichard*, 67 Mo. 181; *Kline v. Vogel*, 90 Mo. 239, 2 S. W. 408), and in New York (*Calhoun v. Millard*, 121 N. Y. 69, 8 L. R. A. 248, 24 N. E. 27). In the last case the question is discussed at considerable length by Chief Judge Andrews, and the conclusion reached that "the period of limitation of equitable actions fixed by the statute is not, where a purely equitable remedy is invoked, equivalent to a legislative direction that no period short of that time shall be a bar to relief in any case, or precludes the court from denying relief in accordance with equitable principles for unreasonable delay, although the full period of ten years has not elapsed since the cause of action accrued."

Indeed, in some cases the diligence required is measured by months rather than by years. *Pollard v. Clayton*, 1 Kay & J. 462; *Attwood v. Small*, 6 Clark & F. 356.

And in others a delay of two, three, or four years has been held fatal. *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. ed. 329; *Hayward v. Eliot Nat. Bank*, 96 U. S. 611, 24 L. ed. 855; *Holgate v. Eaton*, 116 U. S. 33, 29 L. ed. 538, 6 Sup. Ct. Rep. 224; *Hagerman v. Bates*, 5 Colo. App. 391, 38 Pac. 1100; *Graff v. Portland Town & Mineral Co.* 12 Colo. App. 106, 54 Pac. 854.

2. The facts in this case, so far as they concern the applicability of the defense of laches, are that all prior locations made by the claimants to this land were abandoned in August, 1883, when an oral agreement was entered into that Hewitt should be appointed trustee for all concerned; that upon the performance of certain conditions by the parties interested he *should make [320] a deed to each of such parties as should contribute his part to the work and expense necessary to obtain a patent; that each of the appellants contributed his share of the work in the years 1883 and 1884,—enough to entitle each of them to a deed of his interest under the agreement; that in April, 1885, Henry J. Patterson demanded a deed of Hewitt, which was refused, but that C. Ewing Patterson did not demand his deed until just before the institution of this suit; that the defendants and their associates, from the year 1885 to 1890, performed a large amount of work in developing the mine, to which neither of the appellants contributed any part; that in November, 1890, a large body of rich ore was discovered, and since that time gold to the amount of several hundred thousand dollars has been

taken out. Both of the appellants left the territory of New Mexico during the year 1885, and resided abroad up to the time of the beginning of this suit. Both were aware that Hewitt had refused to deed them their interest in the mine and in the patent which he, in the meantime, had obtained to the property.

It thus appears that the right of action accrued to the appellants in April, 1885, and that this suit was not begun until eight years thereafter,—in 1893. Whether the refusal of Hewitt to make the deeds was right or wrong is not material here. There is no doubt from the findings that appellants had no share in the subsequent development of the mine or the discovery of ore in 1890, and that it was through the efforts and perseverance of the defendants, and the aid they received from Ferguson, that they were put in possession of this valuable property. If appellants had expected a share in this property they should either have brought a bill promptly to enforce their rights, or at least contributed their proportionate share to the subsequent work and labor, and the expenses then incurred. To award them now a deed to their original interest in the property would be grossly unjust to the defendants, through whose exertions the value of the property was discovered and the mine put upon a paying basis.

[321] While *it is true the court might impose upon the appellants the payment of their proportionate share of labor and expenses as a condition of relief, it could not compensate the defendants for the risk assumed by them that their exertions would come to nought. There is no class of property more subject to sudden and violent fluctuations of value than mining lands. A location which to-day may have no salable value may in a month become worth its millions. Years may be spent in working such property, apparently to no purpose, when suddenly a mass of rich ore may be discovered, from which an immense fortune is realized. Under such circumstances, persons having claims to such property are bound to the utmost diligence in enforcing them, and there is no class of cases in which the doctrine of laches has been more relentlessly enforced.

3. But little need be said in reply to appellants' argument that a trust relation was established between these parties by the oral agreement of 1883, under which Hewitt was to take possession, hold the property for the benefit of all concerned, and ultimately to convey to each his proportionate share. In this connection it is sought to apply the familiar rule that neither laches nor the statute of limitations is applicable against an express trust, so long as that

trust continues. Conceding all that can be claimed as to the existence of an express parol trust in this case, the refusal of Hewitt to execute the deed to H. J. Patterson of his interest in the property, of which both appellants had notice, was a distinct repudiation of such trust, which entitled the complainants to immediate relief, and opened the door to the defense of laches. *Speidel v. Henrici*, 120 U. S. 377-386, 30 L. ed. 718, 719, 7 Sup. Ct. Rep. 610; *Riddle v. Whitehill*, 135 U. S. 621-634, 34 L. ed. 283-287, 10 Sup. Ct. Rep. 924.

The supreme court of the territory also found that the case was within § 2916 of the Compiled Laws of the territory, requiring that all actions founded upon "unwritten contracts . . . or for relief upon the ground of fraud, and all other actions not herein otherwise provided for and specified," shall be brought within four years; and that this defense was not *answered by [322] § 2930, declaring that "none of the provisions of this act shall run against causes of action originating in or arising out of trusts, when the defendant has fraudulently concealed the cause of action, or the existence thereof, from the party entitled or having the right thereto." As there was no evidence that the defendants had fraudulently concealed the facts from the appellants, and abundant proof that the facts were known to them, the latter section was held not to apply. While the case does not necessarily involve it, we see no reason to question the correctness of the court's conclusion on this point.

We are clearly of the opinion that the delay of eight years in this case was inexcusable, and the decree of the court below must, therefore, be affirmed.

METROPOLITAN RAILROAD COMPANY,
Appt. and Plff. in Err.,
v.

HENRY B. F. MACFARLAND, Henry L. West, and John Biddle, Commissioners of the District of Columbia.

(See S. C. Reporter's ed. 322-332.)

Review in condemnation proceedings—error, not appeal, the proper remedy—necessity of bill of exceptions.

1. Writ of error, and not appeal, is the only mode of reviewing a judgment of the court of appeals of the District of Columbia, sustaining an assessment and award in condemnation proceedings instituted under the act of Congress of June 6, 1900 (31 Stat. at L. 668, chap. 810), in view of the provision of D. C. Code, § 233 (31 Stat. at L. 1227, chap. 854),

NOTE.—On distinction between appeal and writ of error—see note to *Miners' Bank v. Iowa*, 13 L. ed. U. S. 867.

that the power to review judgments or decrees of that court is to be exerted only in the same manner, and under the same regulations, as prevailed before its organization in cases of writs of error to, or appeals from, the supreme court of that District.

2. Errors of the court below, committed in sustaining the refusal of the trial court to give certain requested instructions or to set aside an assessment in condemnation proceedings, cannot be considered on writ of error, in the absence of any bill of exceptions, allowed and authenticated by the trial judge, although the transcript contains what purport to be certain instructions asked and refused, marked filed by the clerk, and a petition to make certain testimony of record, and other papers concerning the evidence given before the jury, and an agreement between counsel, reciting that the court allowed the prayer of such petition.

[No. 16.]

Argued October 24, 1904. Decided November 28, 1904.

A PPEAL from, and IN ERROR to, the Court of Appeals of the District of Columbia, to review an affirmance of an order of the Supreme Court of that District, which sustained an assessment and award in condemnation proceedings. Appeal *dismissed* and judgment *affirmed* on writ of error.

See same case below, 20 App. D. C. 421.

Statement by Mr. Justice **White**:

Upon this record the Metropolitan Railroad Company seeks, both by appeal and writ of error, to obtain a review of the action of the court of appeals of the District of Columbia, affirming an order of the su-
[323]preme court of the District, which *order sustained an award against the company, contained in the verdict of a jury, rendered in condemnation proceedings, under an act of Congress. 31 Stat. at L. 668, chap. 810. The statute referred to is entitled, "An Act Authorizing and Requiring the Metropolitan Railroad Company to Extend Its Lines on Old Sixteenth Street." Briefly, the act authorized and required the company to extend its lines over the streets to which the act referred, and, for the purpose of enabling this to be done, directed the commissioners of the District to commence the necessary proceedings to acquire the land needed for the widening of the streets. It was directed that the condemnation proceedings should be commenced in the supreme court of the District, upon notice, under the supervision of the court, to all interested parties. A jury of seven was directed to be empaneled by the court, and this jury, after organizing and viewing the premises, were to "proceed, in the presence of the court, if the court shall so direct, or otherwise, as the

court may direct, to hear and receive such evidence as may be offered or submitted on behalf of the District of Columbia, and by any person or persons having any interest in the proceedings for the extension of said street." The act required the jury to return a written verdict fixing the amount of damages sustained by the lot owners by reason of the taking of their property for the widening of the streets, and also to ascertain and fix the benefits which would result from the work, not only to the lot owners, but to the Metropolitan Railroad Company, and the sum of the benefits was directed to be assessed against the railroad company and the lot owners. Power was conferred upon the court to hear any objections which might be made to the verdict, and to set it aside in whole or in part if the court were satisfied that it was unjust or unreasonable.

Section 13 of the act is as follows:

"Sec. 13. That no appeal by any interested party from the decision of the supreme court of the District of Columbia confirming the assessment or assessments for benefits or damages herein provided for, nor any other proceedings at law or *in equity by [324] such party against the confirmation of such assessment or assessments, shall delay or prevent the payment of the award to others in respect to the property condemned nor the widening of such streets: *Provided, however*, That upon the final determination of said appeal or other proceeding at law or in equity, the amount found to be due and payable as damages sustained by reason of the widening of the streets under the provisions hereof shall be paid as hereinbefore provided."

The transcript before us shows that in July, 1900, the commissioners of the District instituted the proceedings in condemnation required by the act, and that, among others, the Metropolitan Railroad Company was made a party. A jury having been empaneled, they were directed by the court to view the premises, and, outside of the presence of the court, to hear such evidence as might be produced by the interested parties, and to return their verdict to the court. Soon afterwards the railroad company filed an answer praying that it might be dismissed from the proceedings, because the act of Congress requiring the company to extend its lines was unconstitutional, and because the company could not be made liable for any assessment for benefits conferred upon it by the proposed work, as it owned no property in the District embraced by the improvement. Immediately following the answer of the railroad company is set out what purports to be instructions asked by the railroad company to be given by the court to the jury. Each of these instruc-

tions is marked by the clerk as filed on a named date, and below each instruction, unaccompanied by any certificate from a judge, is the statement, "Rejected, with permission to present later." Following these papers is what purports to be a notice on behalf of the railroad company that, on a given day, it would present a request to the court for the giving of the refused instructions as well as of others; and the paper in question, as also the instructions referred to in it, are marked filed by the clerk on a date named, and below some of the instructions, [325] without any *certificate whatever by the judge, is a recital, "Rejected, and exception by the Railroad Company," or "Granted, and exception by D. C. and also by G. F. Williams, on behalf of certain property owners."

The transcript shows that the jury returned a verdict to the court, fixing the damages and benefits, and that there was assessed against the railroad company, for benefits, the sum of \$25,000. A rule nisi was entered to confirm the verdict, and the railroad company filed the following exceptions:

"The Metropolitan Railroad Company excepts to the finding, assessment, and award against it for alleged benefits to it from the proposed widening and extension of the said Columbia road and Sixteenth street, and for cause or ground of exception shows:

"1. That the said finding, assessment, and award are without evidence to support the same.

"2. That the said finding, assessment, and award are contrary to the evidence.

"3. That the said finding, assessment, and award are contrary to the weight of the evidence.

"4. For errors of law in the instructions given and refused by the court to the jury, over the objection and exception of the Metropolitan Railroad Company, before the said finding, assessment, and award were made, as shown by the record of the said cause."

After the filing of these exceptions the transcript shows that a paper was filed by the clerk, which is styled "Petition of Metropolitan R. R. Co., to make of record testimony as to the benefits to Metropolitan Railroad Company." In this petition it is recited that the evidence before the jury was taken outside of the presence of the court, and that the only testimony before the jury on the subject of the benefits to the railroad company, as shown by affidavits annexed to the petition, was that of James B. Lackey, which was reduced to writing by a stenographer. The court was asked to allow the affidavits and deposition to be

[326] filed as part of the record, "the *same being essential to the hearing and determination
195 U. S.

of this respondent's exceptions to said award, filed in this cause, and it being impossible for this respondent properly to defend its rights in the premises without, in some way, causing the said evidence, and the fact that it was the only evidence in the case upon the question of said benefits to this respondent, to appear of record." Upon this petition the following indorsement is shown: "Let the within petition be filed. A. B. Hagner, Justice." The transcript then sets out what purports to be the affidavits and testimony of Lackey, referred to in the petition.

It is also shown that, upon a subsequent date, the supreme court of the District, after due notice to all interested parties, and after hearing arguments of counsel upon the exceptions to the verdict, overruled the exceptions, and entered a final decree confirming the award and assessment as found by the jury, except in a minor particular, which need not be noticed. There is nothing in the transcript showing that any exception was reserved to the overruling of the objections to the award interposed by the company, and no bill of exceptions is shown to have been allowed by the judge. Immediately at the foot of the final decree appears the following:

"And from so much of the above decree as overrules its exceptions and confirms the verdict, award, and assessment against it, the Metropolitan Railroad Company appeals in open court, and the penalty of the appeal bond is fixed by the court at \$100.

"A. B. Hagner, Asso. Justice."

Next follows a stipulation signed by the attorneys for the District and for the railroad company as to what should constitute the transcript of record for the purposes of the appeal of the Metropolitan Railroad Company. Item 11 reads as follows:

"Petition of Metropolitan Railroad Co. to make of record certain testimony, and allowance of same, filed November 24, 1900.

***"Motion to vacate order on said petition." [327]

The motion last referred to, however, does not appear in the transcript.

On the appeal of the railroad company the court of appeals affirmed the order appealed from (20 App. D. C. 421), and from its action in so doing the railroad company prayed, and was allowed, an appeal to this court. About a month afterwards the attorney for the railroad company filed in said court of appeals a motion in the cause, reading as follows:

"And now comes the appellant, by its counsel, and shows to the court that because of the fact that the record in this cause contains what may possibly be considered a bill of exceptions, it may be that the prop-

er remedy would be held to be a writ of error instead of an appeal to the Supreme Court of the United States. It therefore prays that this honorable court, in addition to the appeal which was granted to it to the Supreme Court of the United States in this cause on the 24th day of October, 1902, it may also be allowed a writ of error to said court, and that the supersedeas bond required upon said appeal may also be taken and accepted as a supersedeas bond upon said writ of error."

An entry appears in the transcript of the allowance of a writ of error, the filing of a bond conditioned for the prosecution both of the appeal and writ of error, and the transcript contains citations, as well on the writ of error as on the appeal, signed by the chief justice of the court of appeals. The consolidated proceeding, by appeal and writ of error, is the one which is now here for review.

Messrs. J. J. Darlington and C. C. Cole argued the cause and filed a brief for appellant and plaintiff in error.

Mr. Edward H. Thomas argued the cause, and, with *Mr. Andrew B. Duvall*, filed a brief for appellees and defendants in error.

[328] **Mr. Justice White*, after making the foregoing statement, delivered the opinion of the court:

Assuming that the matters complained of are susceptible of review by this court, the first question is whether our jurisdiction is dependent upon the appeal or the writ of error.

That a proceeding involving the exercise of the power of eminent domain is essentially but the assertion of a right legal in its nature has been determined. So, also, the decisions of this court have settled that a condemnation proceeding initiated before a court, conducted under its supervision, with power to review and set aside the verdict of the jury, and with the right of review vested in an appellate tribunal, is, in its nature, an action at law. *Kohl v. United States*, 91 U. S. 367, 376, 23 L. ed. 449, 452; *Searl v. School Dist. No. 2*, 124 U. S. 197, 31 L. ed. 415, 8 Sup. Ct. Rep. 460; *Chappell v. United States*, 160 U. S. 499, 513, 40 L. ed. 510, 515, 16 Sup. Ct. Rep. 397.

The proceedings provided for in the act of June 6, 1900, being of this character, it is, we think, manifest that the jurisdiction of this court can be exercised only by writ of error.

When both the proceeding by appeal and that by writ of error were allowed, the jurisdiction of this court to review the judg-

ments and decrees of the court of appeals of the District of Columbia was regulated by § 233 of the Code of the District of Columbia. 31 Stat. at L. 1227, chap. 854. In effect that section was but a re-enactment of the then existing provisions of the 8th section of the act of February 9, 1893 [27 Stat. at L. 436, chap. 74, U. S. Comp. Stat. 1901, p. 573], which act established the court of appeals of the District of Columbia. By said section of the Code the power of this court to review by writ of error or appeal the judgments or decrees of said court of appeals, excluding certain exceptional and enumerated cases, is limited to cases where the matter in dispute, exclusive of costs, exceeds the sum of \$5,000; and such power to review is to be exerted only in the same manner and under the same regulations as theretofore prevailed before the organization of the court of appeals in cases *of writs of error on judgments or appeals [329] from decrees rendered in the supreme court of the District of Columbia.

Now, as it is settled by the authorities previously referred to that the proceeding in question was legal in its nature, and not one of equitable cognizance, and as it has also been settled that the jurisdiction of this court prior to the act of 1893, to review the final judgments or decrees of the supreme court of the District of Columbia, did not give power to review by appeal a matter not of equitable cognizance (*Ormsby v. Webb*, 134 U. S. 47, 64, 33 L. ed. 805, 812, 10 Sup. Ct. Rep. 478), it necessarily follows that we are without jurisdiction to review the action of the court of appeals of the District of Columbia on the appeal here taken, and that appeal must, therefore, be dismissed.

Thus disposing of the appeal, we come to consider the case on the writ of error. The errors assigned in the brief of counsel are as follows:

"The court below erred in sustaining the trial court:

"1st. *In refusing to set aside the assessment because not supported by the evidence, and because contrary to the same and the weight thereof.*

"2d. *In refusing to instruct the jury that no assessment could be made against it as a corporation, but only against such of its property, if any, as might be benefited.*

"3d. *In refusing to instruct the jury that no assessment of benefits could be made against appellant.*"

In view of the condition of the record as disclosed by the statement of the case which we have made, we are of opinion that we cannot pass upon the errors embraced by these assignments.

The inability so to do results from the

fact that there is no bill of exceptions in the record showing that the supreme court of the District of Columbia was asked to and refused to give the alleged instructions upon which the second and third assignments of error depend, nor does it appear, from a bill of exceptions or in any other appropriate mode, upon what the supreme court [330] of the District of Columbia acted *in considering the exception expressly stated to be based upon the evidence. Not only this, but there is nothing of record exhibiting the fact that any exception was duly taken to the action of the court in overruling the objections urged by the railroad company to the confirmation of the verdict of the jury.

True it is that the transcript contains what purport to be certain instructions asked and refused, marked filed by the clerk. True also is it that there is in the printed transcript a petition and other papers concerning the evidence given before the jury, to which we have referred in the statement of the case. And it is also true that there is in the printed transcript an agreement between counsel, reciting that the court allowed the prayer of the petition. But, in the absence of a bill of exceptions, allowed and authenticated by the judge, these documents form no part of the record in this court, which we have alone the right to consider in determining the merits of the errors assigned. *Young v. Martin*, 8 Wall. 357, 19 L. ed. 419; *Baltimore & P. R. Co. v. Sixth Presby. Church*, 91 U. S. 127, 23 L. ed. 260; *Clune v. United States*, 159 U. S. 593, 40 L. ed. 270, 16 Sup. Ct. Rep. 125; *Nelson v. Flint*, 166 U. S. 276, 279, 41 L. ed. 1002, 1003, 17 Sup. Ct. Rep. 576.

In *Young v. Martin*, where entries had been made by the clerk in his minutes, stating the filing of a demurrer, argument thereon, and overruling of the demurrer, and that exception had been taken by plaintiff, it was held that the exception was not available. The court said (p. 356, L. ed. p. 419):

"These entries do not present the action of the court and the exceptions in such form that we can take any notice of them. It is no part of the duty of the clerk to note in his entries the exceptions taken, or to note any other proceedings of counsel, except as they are preliminary to, or the basis of, the orders or judgment of the court."

It may be observed in passing that whilst it is not now necessary to seal a bill of exceptions (Rev. Stat. § 953, U. S. Comp. Stat. 1901, p. 696), the other requisites referred to are essential.

In *Baltimore & P. R. Co. v. Sixth Presby. Church*,—a case similar in character to that under review,—the court said (pp. 130, 131, L. ed. p. 261):
[331] 195 U. S.

"Neither depositions nor affidavits, though appearing in the transcript of a common-law court of errors, can ever be regarded as a part of the record unless the same are embodied in an agreed statement of facts, or are made so by a demurrer to the evidence, or are exhibited in a bill of exceptions.

"Exceptions may be taken by the opposite party to the introduction of depositions or affidavits; and the party introducing such evidence in a subordinate court may insist that the court shall give due effect to the evidence, and, in case of refusal to comply with such a request, may except to the ruling of the court, if it be one prejudicial to his rights. Where neither party excepts to the ruling of the court, either in respect to its admissibility or legal effect, the fact that such a deposition or affidavit is exhibited in the transcript is not of the slightest importance in the appellate court, as nothing of the kind can ever constitute the proper foundation for an assignment of error. *Suydam v. Williamson*, 20 How. 433, 15 L. ed. 980.

"Inquisitions like the present one bear a strong analogy in many respects to the report or award of referees appointed under a rule of court, to whom is referred a pending action. Referees in such cases make their report to the court; and in such a case the report, unlike an award at common law, must be confirmed before the prevailing party is entitled to the benefit of the finding of the referees. When the report is filed in court the losing party may file objections in writing to the confirmation of the report, and may introduce evidence in support of the objections; and it is well-settled law that the ruling of the court in overruling such objections is the proper subject of a bill of exceptions. *York & C. R. Co. v. Myers*, 18 How. 250, 15 L. ed. 382."

In *Clune v. United States*, in the course of the opinion the court said (159 U. S. 593, 40 L. ed. 270, 16 Sup. Ct. Rep. 126):

"Finally, there is a claim of error in the [332] instructions, but the difficulty with this is that they are not legally before us. True, there appears in the transcript that which purports to be a copy of the charge, marked by the clerk as filed in his office among the papers in the case; but it is well settled that instructions do not in this way become part of the record. They must be incorporated in a bill of exceptions, and thus authenticated by the signature of the judge. This objection is essentially different from that of the lack or the sufficiency of exceptions. An appellate court considers only such matters as appear in the record. From

time immemorial that has been held to include the pleadings, the process, the verdict, and the judgment, and such other matters as, by some statutory or recognized method, have been made a part of it."

That parties, by their affidavits or agreements, cannot cause that to become a bill of exceptions which is not such in a legal sense, is settled. *Nelson v. Flint*, 166 U. S. 276, 279, 41 L. ed. 1002, 1003, 17 Sup. Ct. Rep. 576; *Malony v. Adsit*, 175 U. S. 281, 285, 44 L. ed. 163, 165, 20 Sup. Ct. Rep. 115, and cases cited.

As it results that the record before us does not exhibit error, *the judgment of the Court of Appeals of the District of Columbia must be, and it is, affirmed.*

OTTO OLSEN, *Plff. in Err.*,
v.

A. D. SMITH, L. Huth, L. Best, *et al.*

(See S. C. Reporter's ed. 332-345.)

Commerce—validity of state pilotage laws—error to state court—Federal question.

1. State legislation concerning pilotage is not necessarily repugnant to the commerce clause of the Federal Constitution.
2. Whether clauses of a state pilotage law granting discriminatory exemptions, in violation of U. S. Rev. Stat. § 4237, U. S. Comp. Stat. 1901, p. 2903, can be eliminated without destroying the remaining provisions, is a question for the state court to decide, and cannot be reviewed by the Federal Supreme Court, on writ of error to the state court.
3. Only the discriminatory features of state pilotage laws are abrogated by the provision of U. S. Rev. Stat. § 4237, U. S. Comp. Stat. 1901, p. 2903, forbidding such discrimination.

NOTE.—Effect on state pilotage laws of congressional prohibition against discrimination.

The effect of the provision of U. S. Rev. Stat. § 4237, U. S. Comp. Stat. 1901, p. 2903, prohibiting discrimination in state pilotage laws, in the rates of pilotage or half pilotage, between vessels sailing between the ports of one state and vessels sailing between ports of different states, or any discrimination against vessels propelled in whole or in part by steam, or against national vessels of the United States, has received consideration in several cases.

This statute is constitutional and valid under the clause of the Federal Constitution authorizing Congress to regulate commerce between the states. *Freeman v. The Undaunted*, 37 Fed. 662.

The exemption from all pilotage charges unless a pilot be actually employed, which Cal. Pol. Code, § 2468, makes in favor of all vessels coasting between ports in the state, and between San Francisco and any port in Oregon, Washington, or Alaska, renders this section repugnant to the congressional prohibition. *Ibid.*

So, the exemption in favor of Texas ports

and annulling and abrogating "all existing regulations or provisions making any such discrimination."

4. The exemption of coastwise steam vessels of the United States, from the operation of state pilotage laws, created by U. S. Rev. Stat. § 4444, U. S. Comp. Stat. 1901, p. 3037, interferes with such laws only so far as they relate to these vessels, as the section expressly declares that "nothing in this title shall be considered to annul or affect any regulation established by the laws of any state, requiring vessels entering or leaving a port in any such state, other than coastwise steam vessels, to take a pilot duly licensed or authorized by the laws of such state."
5. State pilotage laws, as applied to a British vessel coming from a foreign port, do not conflict with a treaty provision that "no higher or other duties or charges shall be imposed in any ports of the United States on British vessels than those payable in the same ports by vessels of the United States," because of the exemption of coastwise steam vessels of the United States from pilotage, resulting from U. S. Rev. Stat. § 4444, U. S. Comp. Stat. 1901, p. 3037, or of any lawful exemption of coastwise vessels, created by the state laws.
6. No inherent rights guaranteed by the Federal Constitution are infringed by state regulations providing for the appointment of pilots, and restricting the right to pilot to those duly appointed.
7. No monopoly or combination forbidden by the Federal anti-trust laws is created by state regulations providing for the appointment of pilots, and restricting the right to pilot to those duly appointed.

[No. 42.]

Argued November 3, 1904. Decided November 28, 1904.

IN ERROR to the Court of Civil Appeals for the Fourth Supreme Judicial District of the State of Texas to review a judg-

and ships from any charge for pilotage except for actual services, which is made by Tex. Rev. Stat. 1895, art. 3801, is an invalid discrimination. *Olsen v. Smith* (Tex. Civ. App.) 68 S. W. 320.

So, the exception which Ga. Code, § 1512, makes in favor of coasters in that state, and between the ports of that state and other designated states, renders invalid the provision of that section that any person, master, or commander of a ship or vessel bearing toward any of the harbors of that state, who refuses to receive a pilot on board, shall be liable to the first pilot offering his services outside the bar for the full pilotage rate. *Sprague v. Thompson*, 118 U. S. 90, 30 L. ed. 115, 6 Sup. Ct. Rep. 988.

But the South Carolina legislation of 1878 prescribing a system of pilotage for the ports of that state, requiring the employment of licensed pilots, and establishing the fees to be paid by incoming and outgoing vessels, contains no invalid discrimination. *State v. Penny*, 19 S. C. 218.

The failure of the Virginia pilotage laws to impose pilotage fees between her inland ports,

ment which affirmed in part a judgment of the District Court of Galveston County, in that State, in favor of plaintiffs in an action in which the alleged repugnancy of the pilotage laws of that state to the Federal Constitution and laws was set up as a defense. *Affirmed.*

See same case below (Tex. Civ. App.) 68 S. W. 320.

The facts are stated in the opinion.

Mr. Walter Gresham argued the cause and filed a brief for plaintiff in error:

The articles under discussion clearly constitute one entire scheme, and the illegal provisions of the statute are so interwoven and connected that it seems impossible to separate them without substituting the opinion of the judge for the expressed will of the legislature.

Sprague v. Thompson, 118 U. S. 94, 95, 30 L. ed. 115, 117, 6 Sup. Ct. Rep. 988; *Freeman v. The Undaunted*, 37 Fed. 662.

The anti-trust law of Congress is very broad and comprehensive in its terms. It prohibits all contracts or combinations that are or may be in restraint of trade or commerce, whether they were unlawful at common law or not, and whether they are unreasonably in restraint of commerce or not.

United States v. Trans-Missouri Freight Assn. 166 U. S. 327, 41 L. ed. 1023, 17 Sup. Ct. Rep. 540.

Every contract, combination, or conspiracy, such as is shown in this case, is included within the language of this statute, and, to use the words of the Supreme Court, "no exception or limitation can be added, without placing in the act that which has been omitted by Congress."

Ibid.

As the business or official duties of defendants in error are inseparably connected with interstate and foreign commerce and

the instrumentalities thereof, Congress has the power to say, and has said, that all such agreements, combinations, and conspiracies as shall restrain trade or commerce by shutting out the operation of the general law of competition, are illegal.

United States v. Joint Traffic Assn. 171 U. S. 569, 43 L. ed. 287, 19 Sup. Ct. Rep. 25.

An agreement of the nature of this one, which directly and effectually stifles competition, must be regarded under the statute as one in restraint of trade.

United States v. Joint Traffic Assn. 171 U. S. 577, 43 L. ed. 290, 19 Sup. Ct. Rep. 25.

All the authorities agree that, in order to vitiate a contract or combination, it is not essential that its result shall be a complete monopoly; it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition.

Addyston Pipe & Steel Co. v. United States, 175 U. S. 237, 44 L. ed. 146, 20 Sup. Ct. Rep. 96; *Northern Securities Co. v. United States*, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; *Montague & Co. v. Lowry*, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307.

The legislature has limited the number of deputies, and has undertaken to delegate to defendants in error the power to select and limit the number of men who can become qualified to serve as branch pilots.

Petterson v. Pilot Comrs. 24 Tex. Civ. App. 33, 57 S. W. 1002.

Such a limitation and delegation of authority by the legislature is illegal, whether a branch pilot be an officer of the state or not.

Willis v. Owen, 43 Tex. 41; *People's Pass. R. Co. v. Memphis City R. Co.* 10 Wall. 50, 19 L. ed. 848; *Cooley*, Const. Lim. 6th ed. 137, and note 1.

or between Virginia and Maryland ports which can be reached without going to sea, or upon vessels bound to or from any point on the Potomac river, does not render this legislation repugnant to the congressional prohibition. *Darden v. Thompson*, 101 Va. 635, 44 S. E. 755.

Nor is this prohibition violated by the exemption of vessels owned wholly within the state from the payment of any pilotage dues, unless a pilot is actually employed, which is made by Fla. act of March 7, 1879. *Williams v. The Lizzie Henderson*, Fed. Cas. No. 17,726a.

As in *OLSEN v. SMITH*, the other provisions of the state laws have sometimes been sustained after eliminating the discriminatory features.

Thus, while the exemption from pilotage and half pilotage charges, established by Cal. Pol. Code §§ 2466, 2468, in favor of vessels coasting between California ports, or between San Francisco and any port in Oregon, Washington, or Alaska, renders this legislation invalid so far as it relates to coasting vessels, it may be enforced as to vessels engaged in foreign trade. *The Alameda*, 31 Fed. 366.

195 U. S. U. S., Book 49.

And the exemption under Cal. Pol. Code, § 2468, of certain coasting vessels from the charge of half pilotage, does not have the effect of bringing the whole system of regulations for half pilotage, prescribed by § 2466, providing for a system of pilotage and half pilotage, and exempting vessels engaged in the whaling or fishing trade, within the inhibition of that statute; § 2466 being left intact, while § 2468 is invalid so far as it conflicts with the Federal prohibition. *The Alameda v. Neal*, 32 Fed. 331. The court distinguished *Sprague v. Thompson*, 118 U. S. 90, 30 L. ed. 115, 6 Sup. Ct. Rep. 988, on the ground that in that case it was sought to charge a coasting vessel which was excepted from pilotage charges by the Georgia Code, while here it was sought to except from such charges a vessel engaged in foreign commerce, because of an exemption in favor of certain coasting vessels, contained in an independent section.

On the general subject of the liability of vessel or owner for compulsory pilotage fees, see note to *Clayton v. Hebb*, 39 L. R. A. 177.

This statute is also unconstitutional because it deprives all citizens of the state of the liberty of pursuing one of the industrial avocations of life, takes from him the "property" which every man has or should have in his labor, and (if a pilot is an officer) disfranchises him from holding an office, without the due course of the law of the land.

Brenham v. Brenham Water Co. 67 Tex. 560, 4 S. W. 143.

A pilot is a seaman authorized by law to act as an officer of a ship in conducting her into and out of a port. His duties require that he should be able to navigate and manage a ship, and have a knowledge of the harbor for which he has been licensed.

Hobart v. Drogan, 10 Pet. 123, 9 L. ed. 368.

A branch pilot is not an officer of this state.

Dean v. Healy, 66 Ga. 503; Navigation Laws of the U. S. 1899, p. 53; 18 Am. & Eng. Enc. Law, p. 444; *United States v. Forbes*, 1 Crabbe, 558, Fed. Cas. No. 15,129.

But if it be conceded that a branch pilot is some sort of an officer of this state, and not a mere licensed employee, such as a physician or lawyer, then it by no means follows that he is an executive officer of the state. An "executive officer" is defined to be one whose duties are mainly to cause the laws to be executed and obeyed.

Bouvier, Law Dict.

An executive officer of the state is one whose duty it is to execute the laws of the state.

19 Am. & Eng. Enc. Law, p. 391.

The right of the defendants in error to maintain this suit is based upon the hypothesis that a pilot is a state officer.

United States v. Hartwell, 6 Wall. 385, 18 L. ed. 830; *Atty. Gen. v. Drohan*, 169 Mass. 534, 61 Am. St. Rep. 301, 48 N. E. 279; *Shelby v. Alcorn*, 36 Miss. 273, 72 Am. Dec. 169; *Vance v. W. A. Vandercook Co.* 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674.

This statute is in effect a regulation of interstate and foreign commerce and the instrumentalities thereof. Its restrictions and limitations upon the liberty of plaintiff in error to act as a pilot are not only an abridgement, but a deprivation, of the privileges and immunities guaranteed him as a citizen of the United States.

Slaughter-House Cases (Butchers' Benev. Asso. v. Crescent City L. S. L. & S. H. Co.) 16 Wall. 79, 21 L. ed. 409; Brannon, 14th Amend. 83; *Smith v. Alabama*, 124 U. S. 480, 31 L. ed. 513, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064, 82 Fed. 533; *Powell v. Penn-*

sylvania, 127 U. S. 684, 32 L. ed. 256, 8 Sup. Ct. Rep. 992, 1257; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 757, 758, 28 L. ed. 591, 4 Sup. Ct. Rep. 652; *Allgeyer v. Louisiana*, 165 U. S. 589-591, 41 L. ed. 835, 836, 17 Sup. Ct. Rep. 427.

In the statute under discussion, neither the public health nor the morals of the people are involved, but merely the right to follow an ordinary industrial occupation, the liberty to pursue which the state cannot deprive plaintiff in error of.

Cooley, Const. Lim. 6th ed. 744, 745; *People v. Marx*, 99 N. Y. 386, 52 Am. Rep. 34, 2 N. E. 29; *Bertholf v. O'Reilly*, 74 N. Y. 515, 30 Am. Rep. 323; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; Brannon, 14th Amend. 109-115; *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 25 Am. St. Rep. 863, 10 S. E. 285; *State v. Julow*, 129 Mo. 172, 29 L. R. A. 257, 50 Am. St. Rep. 443, 31 S. W. 781; *Ex parte Kuback*, 85 Cal. 274, 9 L. R. A. 482, 20 Am. St. Rep. 226, 24 Pac. 737; *Leep v. St. Louis, I. M. & S. R. Co.* 58 Ark. 407, 23 L. R. A. 264, 41 Am. St. Rep. 109, 25 S. W. 75; *Wally v. Kennedy*, 2 Yerg. 554, 24 Am. Dec. 511; *Com. v. Perry*, 155 Mass. 117, 14 L. R. A. 325, 31 Am. St. Rep. 533, 28 N. E. 1126; *Frorer v. People*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395.

The grant of the privilege of piloting at the port of Galveston to twelve men, and then conferring upon them the authority to determine who, if any, shall possess the qualifications required by the statute, before he can be appointed a pilot, is a denial of the equal protection of the laws.

Connolly v. Union Sewer Pipe Co. 184 U. S. 558-567, 46 L. ed. 689-692, 22 Sup. Ct. Rep. 431.

Mr. James B. Stubbs argued the cause, and, with Mr. Charles J. Stubbs, filed a brief for defendants in error:

The objectionable provisions of the statute are separable from the rest of the provisions.

The Alameda v. Neal, 32 Fed. 333; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 398, 38 L. ed. 1014, 1023, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Western U. Teleg. Co. v. State*, 62 Tex. 630.

The allowed and the prohibited paragraphs of the state law are plainly separable and distinct, and it is only when all the provisions are so connected in meaning and interdependent that it cannot be presumed that the legislature would have passed one without the other, that the entire statute will be disregarded.

Keokuk Northern Line Packet Co. v. Keokuk, 95 U. S. 89, 24 L. ed. 381.

The point is not whether the parts are

contained in the same section, for the distribution into sections is purely artificial. but whether they are essentially and inseparably connected in substance,—whether the provisions are so interdependent that one cannot operate without the other.

Loeb v. Columbia Turp. 179 U. S. 490, 45 L. ed. 290, 21 Sup. Ct. Rep. 174.

It is apparent that the legislature would not have hesitated, if the matter had been called to its attention, to make the state exemptions or options conform to the national.

Tiernan v. Rinker, 102 U. S. 123, 26 L. ed. 103, 47 Tex. 393; *Texas & P. R. Co. v. Mahaffey*, 10 Tex. Ct. Rep. 779, 81 S. W. 1047.

All depends upon the intention of the legislature, as shown by the general scope of the law.

Florida C. R. Co. v. Schutte, 103 U. S. 118, 142, 26 L. ed. 327, 335.

It is only when different clauses of an act are so dependent upon each other that it is evident that the legislature would not have enacted one of them without the other—as, when the two things provided are necessary parts of one system—that the whole act will fall with the invalidity of one clause. When there is no such connection and dependency, the act will stand though different parts of it are rejected.

Little Rock & Ft. S. R. Co. v. Worthen, 120 U. S. 102, 30 L. ed. 590, 7 Sup. Ct. Rep. 469.

This court will accept the construction of the Texas courts in such cases as this.

W. W. Cargill Co. v. Minnesota, 180 U. S. 466, 45 L. ed. 626, 21 Sup. Ct. Rep. 423; *Tullis v. Lake Erie & W. R. Co.* 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; *Missouri P. R. Co. v. Nebraska*, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *St. Louis, I. M. & S. R. Co. v. Paul*, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419; *Missouri, K. & T. R. Co. v. McCann*, 174 U. S. 586, 43 L. ed. 1097, 19 Sup. Ct. Rep. 755.

The contention that in all cases where American vessels are relieved from any duty or charge in a port of the United States, the same exemptions should extend to British vessels at that port, is true, but defendant does not and cannot show that American vessels employed in commerce with foreign countries are exempt from such charges in Texas ports. The vessels of the two countries are upon a parity, as the treaties and laws have been understood and applied for many years; and this construction is the only reasonable and just one.

Hunt v. Card, 14 Pick. 135.

195 U. S.

It has been held that the formation of a partnership among all the pilots of the port is not unlawful, but commendable, for the reason that by so combining they could relieve each other at stated hours, purchase better boats with their joint funds, and otherwise conduce to better service.

Petterson v. Pilot Comrs. 24 Tex. Civ. App. 33, 57 S. W. 1002; *Jones v. Fell*, 5 Fla. 510; *Levine v. Michel*, 35 La. Ann. 1121; *The Pirate*, 32 Fed. 490; *The City of Dundee*, 103 Fed. 698, Affirmed in 47 C. C. A. 581, 108 Fed. 679; *Mason v. Irvine*, 27 Fed. 459.

An agreement, to be in conflict with the anti-trust act, must directly and substantially, and not merely indirectly and incidentally, regulate interstate or foreign commerce.

Anderson v. United States, 171 U. S. 615, 43 L. ed. 306, 19 Sup. Ct. Rep. 50; *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; *Hopkins v. United States*, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 231, 44 L. ed. 136, 143, 20 Sup. Ct. Rep. 96.

The state has the right to limit the number of port pilots, and require service as a deputy pilot as a condition precedent to appointment as pilot.

Pacific Mail S. S. Co. v. Joliffe, 2 Wall. 450, 17 L. ed. 805; *Petterson v. Pilot Comrs.* 24 Tex. Civ. App. 33, 57 S. W. 1007; *Davidson v. Sadler*, 23 Tex. Civ. App. 600, 57 S. W. 54.

Licensed state pilots are public officers.

People ex rel. Palmer v. Woodbury, 14 Cal. 43; *People ex rel. Flynn v. Abbott*, 16 Cal. 359; 23 Am. & Eng. Enc. Law, 2d ed. p. 324.

They seem to be treated as such in Massachusetts.

Dolliver v. Parks, 136 Mass. 499.

The Oregon law seems to authorize limitation as to number.

The California, 1 Sawy. 596, Fed. Cas. No. 2,313.

The Indiana law seems to require bond and oath after appointment by the governor.

Barnaby v. State, 21 Ind. 450.

Will it be questioned that, if Congress had taken charge of the entire subject, its right to prescribe an apprenticeship or a deputyship could be successfully challenged?

Gibbons v. Ogden, 9 Wheat. 207, 6 L. ed. 72; *Tiedeman*, Pol. Power, 626; *Hughes*, Adm. 28-38; *The China (The China v. Walsh)* 7 Wall. 53, 19 L. ed. 67; *Wilson v. McNamee*, 102 U. S. 572, 26 L. ed. 234; *Cooley v. Port Wardens*, 12 How. 300, 13 L. ed. 996.

Legislation limited in its application, but

operating alike on all persons similarly situated, is not within the 14th Amendment.

Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357.

The right to designate the class from which certain officers shall be selected carries with it the idea of inequality; but this fact alone does not determine the matter of constitutionality.

Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 106, 43 L. ed. 913, 19 Sup. Ct. Rep. 609.

The following cases are instances in which the state delegated to others the authority to recommend in one case, and to appoint in the other, the pilot commissioners of the ports of Boston and New York respectively:

Opinion of the Justices, 154 Mass. 603, 31 N. E. 634; *Sturgis v. Spofford*, 45 N. Y. 446.

While it is conceded that Congress can, if it deems best, assume control of pilotage in every state, yet it is equally well settled that the mere grant to Congress of the power to regulate commerce did not deprive the states of the power to regulate pilots, unless and until Congress should determine otherwise.

Ex parte McNiel, 13 Wall. 236, 20 L. ed. 624; *The Carrie L. Tyler*, 45 C. C. A. 405, 106 Fed. 426; *Smith v. The Creole*, 2 Wall. Jr. 485, Fed. Cas. No. 13,033; *Darden v. Thompson*, 101 Va. 635, 44 S. E. 755.

As in the case of the locomotive engineer, *Smith v. Alabama*, 124 U. S. 465, 32 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564, where a license was required, there is no doubt that the state could have prescribed further conditions than those which it did; such, for instance, as service as an apprentice.

Mr. Justice **White** delivered the opinion of the court:

The defendants in error, who were plaintiffs in the court of original jurisdiction, as the duly licensed state pilots of the port of Galveston, Texas, sued in a Texas district court to recover the damages averred to have been caused them by the alleged illegal action of the defendant in offering, when he was not authorized by law to do so, his services "to pilot sail vessels or registered steamers, bound to or from foreign ports, in or out of the port of Galveston." An injunction was prayed restraining the defendant from acting "in any manner as branch or deputy pilot, or pilot under the [339] laws of the state *of Texas, and of said port, or under the laws of the United States, with respect to the kind of vessels specified." The defendant filed a general demurrer, and, reserving the demurrer, answered, raising

special defenses based on averments that the pilotage laws of Texas were in conflict with the Constitution and laws of the United States. The court overruled the demurrer of the defendant, and, on the ground that no defense was stated, sustained a demurrer to the answer. A judgment was entered in favor of the plaintiffs, awarding an injunction as prayed. (Tex. Civ. App.) 68 S. W. 320. The case was taken to the court of civil appeals for the first supreme judicial district, was thence transferred to the court of civil appeals for the fourth supreme judicial district, where the decree below was affirmed, with a slight modification not necessary to be stated. The supreme court of the state having declined to review the action of the court of civil appeals, this writ of error was prosecuted to the latter court.

The defenses raised by the answer, which the court below held to be no defense to the action, and which are in effect reiterated in the assignments of error, require us to determine, first, whether the state of Texas had power to enact laws regulating pilotage in the ports of that state; and, second, if such power existed, whether the provisions of the state statutes on that subject are void because they conflict with acts of Congress on the subject of pilotage, and because the statutes of Texas as to pilotage contain provisions of such a character as to cause them to be repugnant to the 14th Amendment or to the laws of Congress forbidding combinations in restraint of trade or commerce. Briefly, the pilotage laws of the state of Texas provide as follows: The governor is authorized to appoint for each port whose population and circumstances shall warrant it, "a board of five persons of respectable standing, to be known as commissioners of pilotage." Upon this board power is conferred to fix, within the maximum limits provided by law, the charges to be made by branch and deputy pilots for their services, to regulate the manner *in which such pilots shall perform [340] their duty, to examine them as to their qualifications, to hear complaints made against them, and, if occasion requires, to suspend them until the governor shall act in the matter. Upon the governor is conferred the authority to appoint such number of branch pilots as may from time to time be necessary, each of whom shall hold office for two years, subject to removal by the governor at pleasure, and any one who is not a duly commissioned branch pilot or deputy thereof is prohibited from engaging in the business of pilotage so far as the statutes provide for pilotage services by the duly appointed pilots. Revised Statutes of the state of Texas for 1895, articles 3790,

3791, 3792, 3793, 3794, 3796, and 3803. The maximum rates of pilotage are provided for as follows:

"The rate of pilotage on any class of vessels shall not, in any port of this state, exceed \$4 for each foot of water which the vessel, at the time of piloting, draws, and whenever a vessel, except of the classes below excepted, shall decline the services of a pilot, offered outside the bar, and shall enter the port without the aid of one, she shall be liable to the first pilot whose services she so declined, for the payment of half pilotage; and any vessel which, after being brought in by a pilot, shall go out without employing one, shall be liable to the payment of half pilotage to the pilot who brought her in, or, if she has come in without the aid of a pilot, though offered outside, she shall, on so going out, be liable for the payment of half pilotage to the pilot who had first offered his services before, she came in; but if she has come in without the aid of a pilot, or the offer of one outside, she shall not, in case of going out without a pilot, be liable to half pilotage. . . ." Article 3800.

The vessels excepted from the operation of the foregoing provisions are thus stated in article 3801:

"The following classes of vessels shall be free from any charge for pilotage, unless for actual service, to wit: All vessels of twenty tons and under, all vessels of what-
[341]soever burthen *owned in the state of Texas, and registered and licensed in the district of Texas, when arriving from or departing to any port of the state of Texas; all vessels of seventy-five tons and under, owned and licensed for the coasting trade in any part of the United States, when arriving from or departing to any port in the state of Texas; all vessels of seventy-five tons or under owned in the state of Texas and licensed for the coasting trade in the district of Texas, when arriving from or departing to any port in the United States."

The first contention in effect is that the state was without power to legislate concerning pilotage, because any enactment on that subject is necessarily a regulation of commerce within the provision of the Constitution of the United States. The unsoundness of this contention is demonstrated by the previous decisions of this court, since it has long since been settled that even although state laws concerning pilotage are regulations of commerce, "they fall within that class of powers which may be exercised by the states until Congress has seen fit to act upon the subject." *Cooley v. Port Wardens*, 12 How. 299, 13 L. ed. 996; *Ex parte McNiel*, 13 Wall. 237, 20 L. ed. 624; 195 U. S.

Wilson v. McNamee, 102 U. S. 572, 26 L. ed. 234.

The second proposition relied on is that, albeit the state had power to legislate concerning pilotage until Congress acted, the state laws are void because in conflict with the laws enacted by Congress. This is based upon two provisions of the Revised Statutes of the United States, the one providing that "no regulations or provisions shall be adopted by any state which shall make any discrimination in the rate of pilotage or half pilotage between vessels sailing between the ports of one state and vessels sailing between the ports of different states, or any discrimination against vessels propelled in whole or in part by steam, or against national vessels of the United States, and all existing regulations or provisions making any such discrimination are annulled and abrogated" (Rev. Stat. 4237, U. S. Comp. Stat. 1901, p. 2903); the other being the provision of the statutes (Rev. Stat. 4444, U. S. Comp. Stat. 1901, p. 3037) exempting coastwise steam vessels from the operation *of state pilotage laws. Undoubt-[342] edly the exempting clause of the Texas statute is discriminatory, and is therefore void, because in conflict with the law of the United States. The court below so decided. It held, however, that the provisions discriminating in favor of Texas ships and ports were separable from the remainder of the statutes, and therefore the general regulations concerning pilotage were valid, although the discriminating provisions were eliminated. . Whether the illegal clauses granting discriminatory exemptions could be eliminated without destroying the other provisions of the state laws regulating pilotage is a state, and not a Federal, question. For the purpose of determining the validity of the statutes in their Federal aspect this court accepts the interpretation given to the statutes by the state court, and tests their validity accordingly. *W. W. Cargill Co. v. Minnesota*, 180 U. S. 452, 466, 45 L. ed. 619, 625, 21 Sup. Ct. Rep. 423, and authorities there cited. True it is in *Sprague v. Thompson*, 118 U. S. 90, 30 L. ed. 115, 6 Sup. Ct. Rep. 988, a case involving the pilotage laws of Georgia, in the course of the opinion it was remarked (p. 94, L. ed. p. 116, Sup. Ct. Rep. p. 989) that the ruling of the supreme court of the state of Georgia, that the illegal provision of the statute in question was separable, caused the statute "to enact what confessedly the legislature never meant." But this remark was not made the basis of the conclusion, since it was decided in that case that the pilotage charge in question was invalid, even under the construction given by the supreme court of the state of Georgia to

the state statute, because the exaction which was in controversy was in conflict with the provisions of the Revised Statutes of the United States, exempting coastwise steam vessels from pilotage charges. In any event, it is apparent that the observation referred to, made in the case of *Sprague v. Thompson*, has been qualified by the later decisions of this court to which we have previously referred.

Of course, whilst accepting the construction of the state court as to the divisibility of the statute, the duty yet remains, for the purpose of the Federal question, to determine whether the statute as construed is [343] valid. As the effect of *the construction below was to eliminate the discrimination from the statute, it is clear, in view of the power of the state to legislate concerning pilotage until Congress acts upon the subject, that the statutes, as interpreted below, were within the power of the state, and not in conflict with any act of Congress. Indeed, it is obvious from the provisions of the Revised Statutes (§ 4237, U. S. Comp. Stat. 1901. p. 2903) forbidding discrimination in state legislation concerning pilotage, that Congress did not intend by that section to revoke the power of the states on the subject, or to abrogate existing pilotage laws of the several states, containing discriminatory provisions, but only to abrogate the provisions making the discrimination. This results since the statute, after first generally prohibiting regulations by any state discriminating "in the rate of pilotage or half pilotage between vessels sailing between the ports of one state and vessels sailing between the ports of different states, or any discrimination against vessels propelled in whole or in part by steam, or against national vessels of the United States," in careful language annuls and abrogates only "all existing regulations or provisions making any such discrimination." And this construction of the section in question disposes also of the argument that, if the statute be accepted as interpreted by the state court, it is nevertheless repugnant to the law of the United States, since, if the exceptions found in the state statute are eliminated, then those statutes impose pilotage charges upon all vessels, and hence subject coastwise steam vessels of the United States to such charges, although they are expressly exempted therefrom. Rev. Stat. § 4444, U. S. Comp. Stat. 1901, p. 3037. But the provisions of that section clearly contemplated that, by the existing state laws, coastwise steam vessels of the United States were subject to pilotage charges, and proposed, whilst withdrawing such vessels from pilotage charges, not in other respects to interfere with the state

laws on the subject of pilotage. This is plainly the result of the following provision contained in the section in question:

"Nothing in this title shall be construed to annul or affect *any regulation estab-[344]lished by the laws of any state, requiring vessels entering or leaving a port in any such state, other than coastwise steam vessels, to take a pilot duly licensed or authorized by the laws of such state."

Nor is there merit in the contention that, as the vessel in question was a British vessel, coming from a foreign port, the state laws concerning pilotage are in conflict with a treaty between Great Britain and the United States, providing that "no higher or other duties or charges shall be imposed in any of the ports of the United States on British vessels than those payable in the same ports by vessels of the United States." [8 Stat. at L. 229, art. 2.] Neither the exemption of coastwise steam vessels from pilotage, resulting from the law of the United States, nor any lawful exemption of coastwise vessels, created by the state law, concerns vessels in the foreign trade, and, therefore, any such exemptions do not operate to produce a discrimination against British vessels engaged in foreign trade, and in favor of vessels of the United States in such trade. In substance the proposition but asserts that, because, by the law of the United States, steam vessels in the coastwise trade have been exempt from pilotage regulations, therefore there is no power to subject vessels in foreign trade to pilotage regulations, even although such regulations apply, without discrimination, to all vessels engaged in such foreign trade, whether domestic or foreign.

It remains only to consider the contentions based upon the 14th Amendment and the anti-trust laws of Congress. The argument is, that the right of a person who is competent to perform pilotage services to render them is an inherent right, guaranteed by the 14th Amendment, and that therefore all state regulations providing for the appointment of pilots, and restricting the right to pilot to those duly appointed, are repugnant to the 14th Amendment. But this proposition in its essence simply denies that pilotage is subject to governmental control, and therefore is foreclosed by the adjudications to which we have previously referred. The contention that (because) the commissioned pilots have a *monopoly of the business, and by combina-[345]tion among themselves exclude all others from rendering pilotage services, is also but a denial of the authority of the state to regulate, since, if the state has the power to regulate, and in so doing to appoint and commission those who are to perform pilot-

age services, it must follow that no monopoly or combination in a legal sense can arise from the fact that the duly authorized agents of the state are alone allowed to perform the duties devolving upon them by law. When the propositions just referred to are considered in their ultimate aspect they amount simply to the contention, not that the Texas laws are void for want of power, but that they are unwise. If an analysis of those laws justified such conclusion,—which we do not at all imply is the case,—the remedy is in Congress, in whom the ultimate authority on the subject is vested, and cannot be judicially afforded by denying the power of the state to exercise its authority over a subject concerning which it has plenary power until Congress has seen fit to act in the premises.

Affirmed.

CLARENCE T. BIRKETT, *Plff. in Err.*,
v.
COLUMBIA BANK.

(See S. C. Reporter's ed. 345-351.)

Bankruptcy—discharge—effect of debts not scheduled—knowledge of creditor.

Knowledge of bankruptcy proceedings on the part of a creditor of the bankrupt, which is not acquired until after discharge, though in time to prove his claim under the bankruptcy act of July 1, 1898 (30 Stat. at L. 563, chap. 541, U. S. Comp. Stat. 1901, p. 3448), § 65, and to move, under § 15 (U. S. Comp. Stat. 1901, p. 3428), to revoke the discharge, is not the "actual knowledge of the proceedings in bankruptcy" which, under § 17, is essential to the release, by the discharge, of provable debts which have not been duly scheduled in time for proof and allowance.

[No. 26.]

Argued October 28, 1904. Decided November 28, 1904.

IN ERROR to the Supreme Court of the State of New York to review a judgment entered in that court in accordance with the direction of the Court of Appeals of that State, which affirmed a judgment of the Appellate Division of the Supreme Court, First Department, which had, in turn, affirmed a judgment of the Supreme Court at a term held in and for the county of New York, in favor of plaintiff in an action on a promissory note, in which defendants set up a discharge in bankruptcy as a bar. *Affirmed.*

See same case below, 174 N. Y. 112, 66 N. E. 652.

The facts are stated in the opinion.

195 U. S.

Mr. John Murray Downs argued the cause, and Messrs. Robert G. Scherer and Thomas Carmody filed a brief for plaintiff in error.

Mr. Julius J. Frank argued the cause and filed a brief for defendant in error.

Mr. Justice McKenna delivered the opinion of the court:

This is an action on a promissory note for \$750. The defense is discharge in bankruptcy. The making of the note *was admitted, and the only question presented is the effect of the discharge. (346)

The facts as found by the court are: Plaintiff in error and one Calvin Russell, who died before the commencement of this action, were partners, doing business under the name of Russell & Birkett, and in that name made and delivered to the Manhattan Railway Advertising Company a promissory note for \$750. The latter company indorsed the note to defendant in error, of which Russell & Birkett had knowledge before its maturity. On the 13th of April, 1899, the firm of Russell & Birkett and plaintiff in error, upon their own petition, were adjudicated bankrupts in the United States district court for the northern district of New York, and were discharged September 12, 1899. The claim of defendant in error was not scheduled, either as a debt of the firm or of plaintiff in error, in time for proof and allowance with the name of the defendant in error, though defendant in error was known, at the time of filing the schedules, to be the owner and holder thereof by plaintiff in error, and that defendant in error had no notice or actual knowledge or other knowledge of the proceedings in bankruptcy prior to the discharge of the bankrupts. No notice of the proceedings in bankruptcy was at any time given to defendant in error by, or by the direction of, the bankrupts or either of them. It was decided that the claim of defendant in error was not barred by the discharge in bankruptcy, and judgment was directed for defendant in error.

The judgment was successively confirmed by the appellate division of the supreme court and the court of appeals. 174 N. Y. 112, 66 N. E. 652. Thereupon judgment was entered in the supreme court, in accordance with the direction of the court of appeals. This writ of error was then sued out.

Section 7 of the bankrupt law of 1898 devolves a number of duties upon the bankrupt, all directed to the purpose of a full and unreserved exposition of his affairs, property, and creditors. Among his duties he is required to "prepare, make oath to, and file in court, within ten days . . . a schedule of his property showing the amount and kind of property, the location

thereof, its money value in detail, and a list of his creditors, showing their residences, if known; if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to, all in triplicate, one copy of each for the clerk, one for the referee, and one for the trustee. . . ." To the neglect of this duty the law attaches a punitive consequence. Section 17 provides: "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such . . . have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy . . ." [30 Stat. at L. 548, 550, chap. 541, U. S. Comp. Stat. 1901, pp. 3424, 3428.]

But plaintiff in error urges that defendant in error did have actual knowledge of the proceedings in bankruptcy, and that Congress contemplated that there might be an intentional or inadvertent omission of the names of creditors from the schedule of debts, and provided against it by other provisions of the law; especially by that which makes it the duty of the referee to give notice to creditors (§ 38), and by that which imposes the duty on the bankrupt to appear at the meeting of creditors, for examination. [350]

The finding of the trial court is that defendant in error "had no notice or actual knowledge, or other knowledge, of said proceedings in bankruptcy prior to the discharge of the bankrupt therein." This is made more definite as to time by the court of appeals. Defendant in error, upon making an inquiry by letter November 6, 1899, about Russell & Birkett, was informed that they had gone through bankruptcy; and subsequently (November 17) the northern district was given as the district of the proceedings. The discharge was September 12, 1899. Knowledge, therefore, it is contended, came to defendant in error in time to prove its claim (§ 65), and to move to revoke the discharge of the bankrupt (§ 15). It is hence argued that defendant in error must be held to have had "actual knowledge of the proceedings in bankruptcy," as those words of § 17 must be construed. We do not think so, nor is that construction supported by the other provisions of the law urged by plaintiff in error. Actual knowledge of the proceedings, contemplated by the section, is a knowledge in time to avail a creditor of the benefits of the law,—in time to give him an equal opportunity with other creditors,—not a knowledge that may come so late as to deprive him of participation in the administration of the affairs of the estate, or to de-

prive him of dividends (§ 65). The provisions of the law relied upon by plaintiff in error are for the benefit of creditors, not of the debtor. That the law should give a creditor remedies against the estate of a bankrupt, notwithstanding the neglect or default of the bankrupt, is natural. The law would be, indeed, defective without them. It would also be defective if it permitted the bankrupt to experiment with it,—to so manage and use its provisions as to conceal his estate, deceive or keep his creditors in ignorance of his proceeding, without penalty to him. It is easy to see what results such looseness would permit,—what preference could be accomplished and covered by it.

Judgment affirmed.

CITY OF SEATTLE, *Appt.*,

v.

DANIEL KELLEHER, Administrator of
John W. Thompson, Deceased.

(See S. C. Reporter's ed. 351-360.)

Constitutional law—due process of law in assessments for public improvements—re-assessments—bona fide purchaser.

1. Assessing by the frontage rule the entire cost of a street extension, including a charge for planking, is not manifestly unfair to an abutting owner whose property lies some distance beyond the point where the planking stopped as to render the assessment void as a denial of due process of law.
2. Including in a reassessment for the cost of a street extension a charge for certain work which was not authorized by the ordinance ordering the improvement is not a denial of due process of law to a property owner affected thereby, where the municipality has done or adopted the work, and presumably has paid for it.
3. Due process of law is not denied by a reassessment for the cost of a street extension because it includes a charge or work which, when done, could not be included in a local assessment.
4. A charter provision that the cost of planking is to be paid out of the general taxes does not prevent a later special assessment therefor upon the owners of property abutting on a local improvement, in the carrying out of which such planking was done.
5. The doctrine respecting bona fide purchasers for value cannot be invoked to prevent the enforcement of the lien of a reassessment for

* NOTE.—On constitutionality of frontage rule of assessment—see *Raleigh v. Peace*, 17 L. R. A. 330, and note.

As to what constitutes due process of law—see *Kuntz v. Sumption*, 2 L. R. A. 655, and note; *Re Gannon*, 5 L. R. A. 359, and note; *Ulman v. Baltimore*, 11 L. R. A. 224, and note; *Gilman v. Tucker*, 13 L. R. A. 304, and note. And see notes to *People v. O'Brien*, 2 L. R. A. 255; *Pearson v. Yewdall*, 24 L. ed. U. S. 436; *Wilson v. North Carolina*, 42 L. ed. U. S. 865.

a local improvement by one who purchased the property affected after the original attempt to assess had been declared void, and before the new assessment was authorized.

[No. 29.]

Argued October 28, 1904. Decided November 28, 1904.

APPEAL from the Circuit Court of the United States for the District of Washington to review a decree enjoining the enforcement of an assessment for a local improvement. *Reversed and remanded for further proceedings.*

The facts are stated in the opinion.

Mr. Mitchell Gilliam argued the cause, and, with **Mr. Walter S. Fulton**, filed a brief for appellant:

The right exists to make a reassessment by a different method than that in force at the time the original assessment was made.

Norwood v. Baker, 172 U. S. 293, 43 L. ed. 452, 19 Sup. Ct. Rep. 187; *Wilson v. Seattle*, 2 Wash. 543, 27 Pac. 474.

The question of adopting a method of levying assessments for local improvements lies purely in legislative discretion, and so long as that discretion is exercised in a reasonable manner, and gives parties interested an opportunity to be heard, with the right to appeal to the courts from the determination of the city council, it cannot be said that there is a violation of the 14th Amendment of the Constitution of the United States.

Tonawanda v. Lyon, 181 U. S. 389, 45 L. ed. 908, 21 Sup. Ct. Rep. 609; *Wight v. Davidson*, 181 U. S. 371, 45 L. ed. 900, 21 Sup. Ct. Rep. 616; *French v. Barber Asphalt Paving Co.* 181 U. S. 325, 45 L. ed. 879, 21 Sup. Ct. Rep. 625; *Walston v. Nevin*, 128 U. S. 580, 32 L. ed. 545, 9 Sup. Ct. Rep. 192; *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; *Stanley v. Albany County*, 121 U. S. 535, 550, 30 L. ed. 1000, 1003, 7 Sup. Ct. Rep. 1234; *Mobile v. Kimball*, 102 U. S. 691, 26 L. ed. 238; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *United States v. Memphis*, 97 U. S. 284, 24 L. ed. 937; *Laramie County v. Albany County*, 92 U. S. 307, 23 L. ed. 552; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 176, 41 L. ed. 394, 17 Sup. Ct. Rep. 56; *Parsons v. District of Columbia*, 170 U. S. 51, 42 L. ed. 946, 18 Sup. Ct. Rep. 521; *Mattingly v. District of Columbia*, 97 U. S. 687, 24 L. ed. 1098; *Walston v. Nevin*, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192; *Shoemaker v. United States*, 147 U. S. 282, 37 L. ed. 170, 13 Sup. Ct. Rep. 361; *Paulsen v. Portland*, 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750; *Fallbrook Irrig.* 195 U. S.

Dist. v. Bradley, 164 U. S. 176, 41 L. ed. 394, 17 Sup. Ct. Rep. 56; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Kidd v. Parsons*, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; *People ex rel. Griffin v. Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266; 24 Am. & Eng. Enc. Law, p. 71; *Lexington v. McQuillan*, 9 Dana, 513, 35 Am. Dec. 161; *Dorgan v. Boston*, 94 Mass. 238; *Cooley, Const. Lim.* 6th ed. p. 623; *Baltimore v. Johns Hopkins Hospital*, 56 Md. 1; *Northern Indiana R. Co. v. Connelly*, 10 Ohio St. 159; 2 Dill. Mun. Corp. 2d ed. § 761; *Elliott, Roads and Streets*, pp. 391, 392; *Cooley, Taxn.* 2d ed. p. 644; *Whiting v. Townsend*, 57 Cal. 515; *Hayden v. Atlanta*, 70 Ga. 817; *Emery v. San Francisco Gas Co.* 28 Cal. 345; *Bacon v. Savannah*, 86 Ga. 301, 12 S. E. 580; *Springfield v. Green*, 120 Ill. 269, 11 N. E. 261; *Palmer v. Stumph*, 29 Ind. 337; *Amery v. Keokuk*, 72 Iowa, 701, 30 N. W. 780; *Shcley v. Detroit*, 45 Mich. 431, 8 N. W. 52; *Farrar v. St. Louis*, 80 Mo. 379; *State, Sigler, Prosecutor, v. Fuller*, 34 N. J. L. 232; *O'Reilley v. Kingston*, 114 N. Y. 439, 21 N. E. 1004; *Roberts v. First Nat. Bank*, 8 N. D. 504, 79 N. W. 1049; *Upington v. Oviatt*, 24 Ohio St. 232; *King v. Portland*, 2 Or. 147; *Magee v. Com.* 46 Pa. 358; *Harrell v. Storrie* (Tex. Civ. App.) 47 S. W. 838; *Davis v. Lynehburg*, 84 Va. 861, 6 S. E. 230; *Austin v. Seattle*, 2 Wash. 669, 27 Pac. 557; *Weeks v. Milwaukee*, 10 Wis. 243.

Mr. Frederick Bausman argued the cause, and, with **Messrs. Daniel Kelleher** and **G. Meade Emory**, filed a brief for appellee:

When a tax reaches a point where it violates the principles of taxation itself, it ceases to be a tax, and is mere confiscation.

Norwood v. Baker, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187; *Sears v. Boston*, 173 Mass. 71, 43 L. R. A. 834, 53 N. E. 138; 2 *Cooley, Taxn.* 1209.

No secret lien should be sustained.

Richards v. Lewis L. Arms Shingle & Lumber Co. 74 Mich. 57, 41 N. W. 860; *Smith v. Allen*, 18 Wash. 1, 39 L. R. A. 82, 63 Am. St. Rep. 864, 50 Pac. 783.

Curative statutes should not be permitted to interfere with the rights of third persons whose investment has meantime been made in good faith.

Cooley, Const. Lim. 3d ed. 539, 540; *Williams v. Albany*, 122 U. S. 154, 30 L. ed. 1088, 7 Sup. Ct. Rep. 1244.

The state should be estopped, as it was in a case where its officers had erroneously discharged a tax of record, on the faith of which a transfer was made.

Curnen v. New York, 79 N. Y. 511.

District assessments are a tax, but, while

they are a tax, it is perfectly clear that they are not a tax in the sense in which the tax is generally understood.

Cooley, Taxn. 3d ed. chap. 20, p. 1153; *Scott v. Toledo*, 1 L. R. A. 688, 36 Fed. 385; *Paulsen v. Portland*, 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an appeal from a decree of the circuit court, declaring an assessment upon the plaintiff's land void under the 14th Amendment, and enjoining the city against enforcing the same. The facts are these: Weller street, in Seattle, runs east from Elliott bay, and formerly stopped at the east line of Maynard's donation claim. The land now belonging to the appellee, the plaintiff below, is 100 acres to the east of that line, extending to the line of the Jackson street addition. Weller street, if extended eastward, would run through the middle of this land for 2,500 feet. While this land belonged to one Hill, in 1889, he petitioned that Weller street be extended and graded to the Jackson street addition line, and he submitted to the city council, and circulated, although he did not record, [356] plans *showing the extension, with his land on the two sides of it divided into lots and blocks. The plan was approved, and in 1890 the city passed an ordinance that Weller street be graded from the beginning to Jackson street addition, and that sidewalks be constructed on both sides of it, coextensive with the grade. Ordinance No. 1285. The street was graded, and, according to the testimony, had to be cut and filled almost continuously. It also was planked for some distance, but the planking stopped about 1,000 feet before reaching Hill's tract. Then an assessment was levied, but this was held void. The next things that happened were a sale of Hill's land and a mortgage of it in January, 1892, to the appellee, which later was foreclosed. The appellee, who lived out of the state, alleges that he was ignorant of the submission of the plan by Hill.

On March 9, 1893, an act was approved authorizing a new assessment, when the old one had been declared void, upon the lands benefited, to the extent of their proportionate part of the expense of the improvement, based upon its actual value at the time of its completion, and having reference to the benefits received. Notice by publication of a time for hearing objections was provided for, with an appeal to the courts. Laws of 1893, chap. 95. When the improvement in question was ordered, by the charter of Seattle the planking was to be paid for out of the general taxes. Laws of 1885-

1886, pp. 238, 241, § 7. The special assessment for the other elements, according to the assessed value of the land, could be imposed upon the abutting property to 128 feet back from the street. This was modified by a new charter, adopted later in 1890, and still in force. Under the latter the assessment was to be by the front foot, with different percentages for four parallel subdivisions at successive distances from the street up to 120 feet. It was to be for the costs of the improvement. To carry out the plan, local improvement districts were to be established, including all the property within the termini of the improvement, and *not more [357] than 120 feet on each side of the margin. Reassessments were authorized. In pursuance of the charter an ordinance was adopted by the city, providing the manner in which the local assessment should be made. Ordinance No. 2085.

In this state of the ordinances and laws a reassessment of the whole cost of the improvement was ordered in January, 1894, in conformity with the act of 1893, the new charter, and the ordinance No. 2085. Ordinance No. 3199. The proper steps were taken and the assessment was confirmed on March 5, 1894. Ordinance No. 3267. By this assessment the whole cost of the improvement, \$35,620.60, was levied on the abutting land, and \$14,262.68 was fixed as the plaintiff's share. It is alleged that he thus is charged 44 per cent under the present plan, whereas under the one in force when the improvement was made he would have been charged only 32 per cent. It also is alleged that, being absent from the state, he did not know of the reassessment proceedings until they were concluded.

The bill disputed, among other things, that the prolongation of Weller street through the plaintiff's land ever had been dedicated as a street. But, in view of the assumption by the circuit court that the dedication was made out, and the statement by it that the point had been decided by the supreme court of the state, this objection, if open, very properly was not pressed before us. See *Seattle v. Hill*, 23 Wash. 92, 62 Pac. 446. Therefore we have not gone into details upon that part of the case. We see no cause to doubt that the circuit court was right. The main ground of argument is that the planking could not be included in the assessment. The reasons, as summed up by the circuit court, are that the law in force at the time of doing the work did not authorize a charge for planking upon the abutting property, that the ordinance No. 1285, ordering the improvement, did not authorize any planking, that the city could assess only the land abutting on the improvement, and the plaintiff's land was far

[358] away from *the planking, and that such an assessment of the whole cost, including the planking, on the property on Weller street, is absolutely unfair as to the plaintiff's land.

A general attack upon the statute of 1893 is not attempted. It was within the power of the legislature to create, or to authorize the creation of, special taxing districts, and to charge the cost of a local improvement upon the property in such a district by frontage. *Webster v. Fargo*, 181 U. S. 394, 45 L. ed. 912, 21 Sup. Ct. Rep. 623; *French v. Barber Asphalt Paving Co.* 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625; *McNamee v. Tacoma*, 24 Wash. 591, 595, 64 Pac. 791; *Cooley*, Const. Lim. 7th ed. 729. The only question of principle, therefore, raised by the inclusion of the planking in the sum of which the plaintiff was to pay his share, is whether it was manifestly unfair in this particular case. Taken by itself it looks like an unwarrantable attempt to make one man pay for another man's convenience.

On the other hand, so far as the work was similar in character throughout the street, we are of opinion that the improvement might be regarded as one. *Webster v. Fargo*, 181 U. S. 394, 45 L. ed. 912, 21 Sup. Ct. Rep. 623. See *Lincoln v. Street Comrs.* 176 Mass. 210, 212, 57 N. E. 356. And if this be admitted we cannot say that the assessing board might not have been warranted in thinking that substantial justice was done. There were many cuts and fills made in grading the road. So far as appears, the heaviest work may have been done on the plaintiff's land, which seems to have been the summit of an ascent. Improvement of one sort may have been the greatest there, while that of a different kind, needed where the travel was, was at the other end of the street. It is true that the circuit judge considered that there was manifest injustice in assessing the plaintiff's land, which was empty and unimproved, by the front foot at the same rate as the improved land lower down and nearer to the bay, and that his opinion naturally carries weight, from his probable acquaintance with the condition of the place. But we do not find a sufficient warrant for it on the record. We must consider how things looked at the time. The owner of the land desired the improvements,

[359] if carried out *as he wished. The extension of the street helped to bring his land into the market. It was more likely to benefit him than those who were lower down. We cannot invalidate the assessment because the speculation has failed. Assuming, without deciding, that the question is open to the plaintiff in this proceeding, we are of opinion that the record does not justify interfer-

195 U. S.

ence by injunction on the ground that the assessment was manifestly unfair.

The answer to the other objections may be made in few words. If, as is said, planking was not authorized under the word "sidewalks" in ordinance No. 1285, the city has done or adopted the work, and presumably has paid for it. At the end the benefit was there, on the ground, at the city's expense. The principles of taxation are not those of contract. A special assessment may be levied upon an executed consideration, that is to say, for a public work already done. *Bellows v. Weeks*, 41 Vt. 590, 599, 600; *Mills v. Charleton*, 29 Wis. 400, 413, 9 Am. Rep. 578; *Hall v. Street Comrs.* 177 Mass. 434, 439, 59 N. E. 68. If this were not so it might be hard to justify reassessments. See *Norwood v. Baker*, 172 U. S. 269, 293, 43 L. ed. 443, 452, 19 Sup. Ct. Rep. 187; *Williams v. Albany*, 122 U. S. 154, 30 L. ed. 1088, 7 Sup. Ct. Rep. 1244; *Frederick v. Seattle*, 13 Wash. 428, 43 Pac. 364; *Cline v. Seattle*, 13 Wash. 444, 43 Pac. 367; *Bacon v. Seattle*, 15 Wash. 701, 47 Pac. 1102; *Cooley*, Taxn. 3d ed. 1280. The same answer is sufficient if it be true that when the work was done the cost of planking could not be included in the special assessment, which again depends on the meaning of the words "sidewalk" and "pave" in the old charter, § 8, taken with the special provision for planking in § 7. Laws of 1885-1886, pp. 238, 241. The charge of planking on the general taxes was not a contract with the landowners, and no more prevented a special assessment being authorized for it later than silence of the laws at the same time as to how it should be paid for would have. In either case the legislature could do as it thought best. Of course, it does not matter that this is called a reassessment. A reassessment may be a new assessment. Whatever the legislature *could authorize if it were ordering an as-[360] sessment for the first time it equally could authorize, notwithstanding a previous invalid attempt to assess. The previous attempt left the city free "to take such steps as were within its power to take, either under existing statutes, or under any authority that might thereafter be conferred upon it, to make a new assessment upon the plaintiff's abutting property" in any constitutional way. *Norwood v. Baker*, 172 U. S. 269, 293, 43 L. ed. 443, 452, 19 Sup. Ct. Rep. 187, 196; *McNamee v. Tacoma*, 24 Wash. 591, 64 Pac. 791; *Annie Wright Seminary v. Tacoma*, 23 Wash. 109, 62 Pac. 444.

We think it unnecessary to consider other questions on the part of the case that we have dealt with. We have said enough in our opinion to show that the enforcement of the assessment lien could not be prevented by the original owner. It is urged, how-

ever, that a different rule could be applied in favor of one who purchased the land under the circumstances stated above. But the attempt to liken taxation, whether general or special, to the enforcement of a vendor's lien, and thus to introduce the doctrine concerning bona fide purchasers for value, rests on a fallacy similar to that which we have mentioned above, which would deny the right to tax upon an executed consideration. A man cannot get rid of his liability to a tax by buying without notice. See *Tallman v. Janesville*, 17 Wis. 71, 76; *Cooley, Taxn.* 3d ed. 527, 528. Indeed, he cannot buy without notice, since the liability is one of the notorious incidents of social life. In this case the road was cut through the plaintiff's land, and, if he had looked, was visible upon the ground. Whether it had been paid for was for him to inquire. The history of what had happened would have suggested that it was not improbable that sooner or later a payment must be made.

Decree reversed.

Mr. Justice **Harlan** and Mr. Justice **Brown** dissent.

On January 3, 1905, Mr. Justice **Holmes** announced that the decree of November 28, 1904, was modified by striking out the order to dismiss the bill and by remanding the cause for further proceedings in accordance with the opinion.

[361] *UNITED STATES, *Appt.*,
v.

F. G. EVANS, Claimant of the British
Steamship "Blackheath."†

(See S. C. Reporter's ed. 361-369.)

Admiralty jurisdiction — collision with beacon.

The admiralty jurisdiction of the Federal courts extends to a libel *in rem* against a vessel for negligently colliding with and destroying a beacon standing some 15 or 20 feet from the channel, in water 12 or 15 feet deep, though it is built upon piles driven firmly into the bottom.

[No. 34.]

†This case is reported by the Official Reporter under the title of "The Blackheath."

NOTE.—On the question of admiralty jurisdiction—see notes to *The Curtis*, 3 L. R. A. 711; *Case v. Loftus*, 5 L. R. A. 684.

As to admiralty jurisdiction of torts—see note to *Campbell v. H. Hackfeld & Co.* 62 C. A. 279.

236

Argued October 31 and November 1, 1904.
Decided November 28, 1904.

A PPEAL from the District Court of the United States for the Southern District of Alabama to review a decree dismissing, for want of jurisdiction, a libel *in rem* against a vessel for negligently running into and destroying a beacon. *Reversed.*

See same case below, 122 Fed. 112.

The facts are stated in the opinion.

Assistant Attorney General McReynolds argued the cause and filed a brief for appellant.

Mr. Benjamin Carter argued the cause, and, with *Mr. R. H. Clarke*, filed a brief for appellee.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an appeal from the district court on the question of jurisdiction, which is certified. The case is a libel *in rem* against a British vessel for the destruction of a beacon,—Number 7, Mobile ship-channel lights,—caused by the alleged negligent running into the beacon by the vessel. The beacon stood 15 or 20 feet from the channel of Mobile river or bay, in water 12 or 15 feet deep, and was built on piles driven firmly into the bottom. There is no question that it was attached to the realty, and that it was a part of it by the ordinary criteria of the common law. On this ground the district court declined jurisdiction, and dismissed the libel. *The Blackheath*, 122 Fed. 112.

In *The Plymouth*, 3 Wall. 20, *sub nom. Hough v. Western Transp. Co.* 18 L. ed. 125, where a libel was brought by the owners of a wharf burned by a fire negligently started on a vessel, the jurisdiction was denied by this court. See also *Ex parte Phenix Ins. Co.* 118 U. S. 610, 30 L. ed. 274, 7 Sup. Ct. Rep. 25. In two later cases there are *dicta* denying the jurisdiction equally when a building on shore is damaged by a vessel running into it. *Johnson v. Chicago & P. Elevator Co.* 119 U. S. 388, 30 L. ed. 447, 7 Sup. Ct. Rep. 254; *Homer Ramsdell Transp. Co. v. La Compagnie Générale Transatlantique*, 182 U. S. 406, 411, 45 L. ed. 1155, 1159, 21 Sup. Ct. Rep. 831. And there are a number of decisions of district and other courts since *The Plymouth*, which more or less accord with the conclusion of the court below. See note to *Campbell v. H. Hackfeld & Co.* 62 C. A. 287-290. It would be simple, if simplicity were the only thing to be considered, to confine the admiralty jurisdiction, in respect of damage to property, to damage done to property afloat. That distinction sounds like a logical consequence of the rule determining the admiralty cognizance of torts by place.

195 U. S.

On the other hand, it would be a strong thing to say that Congress has no constitutional power to give the admiralty *here as broad a jurisdiction as it has in England or France. Or, if that is in some degree precluded, it ought at least to be possible for Congress to authorize the admiralty to give redress for damage by a ship, in a case like this, to instruments and aids of navigation prepared and owned by the government. But Congress cannot enlarge the constitutional grant of power, and therefore if it could permit a libel to be maintained, one can be maintained now. We are called on by the appellee to say that the remedy for any case of damage to a fixture is outside the constitutional grant.

The precise scope of admiralty jurisdiction is not a matter of obvious principle or of very accurate history. As to principle, it is clear that if the beacon had been in fault, and had hurt the ship, a libel could have been maintained against a private owner, although not *in rem*. *Philadelphia, W. & B. R. Co. v. Philadelphia & H. de G. Steam Towboat Co.* 23 How. 209, 16 L. ed. 433; *Atlee v. Northwestern Union Packet Co.* 21 Wall. 389, 22 L. ed. 619; *Panama R. Co. v. Napier Shipping Co.* 166 U. S. 280, 41 L. ed. 1004, 17 Sup. Ct. Rep. 572. Compare *The Rock Island Bridge*, 6 Wall. 213, 18 L. ed. 753. But, as has been suggested, there seems to be no reason why the fact that the injured property was afloat should have more weight in determining the jurisdiction than the fact that the cause of the injury was. *The Arkansas*, 5 McCrary, 364, 17 Fed. 383, 387; *The F. & P. M. No. 2*, 33 Fed. 511, 515; *Hughes, Admiralty*, 183. And again, it seems more arbitrary than rational to treat attachment to the soil as a peremptory bar, outweighing the considerations that the injured thing was an instrument of navigation, and no part of the shore, but surrounded on every side by water, a mere point projecting from the sea.

As to history, while, as it is well known, the admiralty jurisdiction of this country has not been limited by the local traditions of England (*The Lottawanna*, 21 Wall. 558, 574, 22 L. ed. 654, 661), the traditions of England favor it in a case like this. The admiral's authority was not excluded by attachment even to the main shore. From before the time of Rowghton's Articles he could hold inquest over nuisances there to

[366] navigation, *and order their abatement. 1 Black Book (Twiss) 224, art. 7; *Clerke, Praxis*; 1 Select Pleas in Adm., 6 Seld. Soc. Publ., xlv., lxxx.; Articles of Feb. 18, 1633, *Exton, Maritime Dicæology*, pp. 262, 263; 2 *Hale, De Port.*, chap. 7, p. 88, in *Hargrave, Law Tracts*; *Zouch, in Malynes, Lex Merc.*, 3d ed. 122; 1 *Comyns's Digest, Admiralty*, 195 U. S.

E. 13. See *Benedict, Admiralty*, 3d ed. § 151; *De Lovio v. Boit*, 2 Gall. 398, 470, 471, note, Fed. Cas. No. 3,776. Coke mentions that "of latter times by the letters patents granted to the lord admirall he hath power to erect beacons, seamarks and signs for the sea, etc." 4 Co. Inst. 148, 149. To the French admiral, it is expressly stated, belonged "contraincte et pugnicion, tant en criminel que en civil," in this matter. 1 Black Book, 445, 446. See *Crosse v. Diggs*, 1 Sid. 158. *Spelman* says: "The place absolutely subject to the jurisdiction of the admiraltie, is the sea, which seemeth to comprehend publick rivers, fresh waters, creekes, and surrounded places whatsoever within the ebbing and flowing of the sea at the highest water." Eng. Works, 2d ed. 226. Finally, by the articles of February 18, 1633, all the judges of England agreed that the admiralty jurisdiction extended to "injuries there which concern navigation upon the sea." *Exton, Maritime Dicæology, ad fin.*, pp. 262, 263. And "if the libel be founded upon one single continued act, which was principally upon the sea, though part was upon land, a prohibition will not go." *Comyns's Digest, Admiralty*, F. 5; 1 Rolle, Abr. 533, pl. 18.

What the early law seems most to have looked to as fixing the liability of the ship was the motion of the vessel, which was treated as giving it the character of a responsible cause. *Braeton* recognizes this as an extravagance, but admits the fact, for the common law. 122a, 136b. 1 Select Pleas of the Crown, 1 Seld. Soc. Pub. 84. The same was true in admiralty. *Rowghton, ubi sup.* art. 50; 2 *Rotulæ Parliamentariæ*, 345, 346, 372a, b; 3 *Rotulæ Parliamentariæ* 94a, 120b, 121a; 4 *Rotulæ Parliamentariæ* 12a, b, 492b, 493. The responsibility of the moving cause took the form of deodand when it occasioned death, like the steam engine in *Queen v. Eastern Counties R. Co.* 10 Mees. & W. 59, and innumerable *early instances. [367] but it was not confined to such cases. 2 Black Book (Twiss) 379. But compare 1 Select Pleas in Adm., 6 Seld. Soc. Publ. lxxi., lxxii. The principle has remained until the present day. *United States v. The Malek Adhel*, 2 How. 210, 234, 11 L. ed. 239, 249; *The China*, 7 Wall. 53, 19 L. ed. 67.

The foregoing references seem to us enough to show that to maintain jurisdiction in this case is no innovation even upon the old English law. But a very little history is sufficient to justify the conclusion that the Constitution does not prohibit what convenience and reason demand.

In the case of *The Plymouth* there was nothing maritime in the nature of the tort

for which the vessel was attached. The fact that the fire originated on a vessel gave no character to the result, and that circumstance is mentioned in the judgment of the court, and is contrasted with collision, although the consideration is not adhered to as the sole ground for the decree. It has been given weight in other cases. *Campbell v. H. Hackfeld & Co.* 62 C. C. A. 274, 125 Fed. 696; *Queen v. London Court Judge* [1892] 1 Q. B. 273, 294; *Benedict, Admiralty*, 3d ed. § 308. Moreover, the damage was done wholly upon the mainland. It never has been decided that every fixture in the midst of the sea was governed by the same rule. The contrary has been supposed in some American cases (*The Arkansas*, 5 McCrary, 364, 17 Fed. 383, 387; *The F. & P. M. No. 2*, 33 Fed. 511, 515), and is indicated by the English books cited above. It is unnecessary to determine the relative weight of the different elements of distinction between *The Plymouth* and the case at bar. It is enough to say that we now are dealing with an injury to a government aid to navigation from ancient times subject to the admiralty,—a beacon emerging from the water,—injured by the motion of the vessel, by a continuous act, beginning and consummated upon navigable water, and giving character to the effects upon a point which is only technically land, through a connection at the bottom of the sea. In such a case jurisdiction may be taken without transcending the limits of the Constitution or encountering

[368] **The Plymouth* or any other authority binding on this court. As to the present English law, see *The Uhla*, L. R. 2 Adm. & Eccl. 29, note; *The Swift* [1901] P. 168.

Decree reversed.

Mr. Justice **Brown**, concurring:

I do not dissent from the conclusion of the court, although for forty years the broad language of Mr. Justice Nelson in the case of *The Plymouth*, 3 Wall. 20, *sub nom. Hough v. Western Transp. Co.* 18 L. ed. 125, has been accepted by the profession and the admiralty courts as establishing the principle that the jurisdiction of the admiralty does not extend to injuries received by any structure affixed to the land, though such injuries were caused by a ship or other floating body. It received the approval of this court in the case of *Ex parte Phoenix Ins. Co.* 118 U. S. 610, 30 L. ed. 274, 7 Sup. Ct. Rep. 25, and in that of *Johnson v. Chicago & P. Elevator Co.* 119 U. S. 388, 30 L. ed. 447, 7 Sup. Ct. Rep. 254, and has been followed by the courts of at least a dozen different districts, and applied to bridges, piers, derricks, and every other class of structure permanently affixed to the soil.

I do not think this case can be distinguished from the prior ones, as, in my opinion, it makes no difference in principle whether a beacon be affixed to piles driven into the bottom of the river or to a stone projecting from the bottom, or whether it be surrounded by 12 feet or 1 foot of water, or whether the injury be done to a wharf projecting into a navigable water, or to a beacon standing there, or whether the damage be caused by a negligent fire or by bad steering.

I accept this case as practically overruling the former ones, and as recognizing the principle adopted by the English admiralty court jurisdiction act of 1861 (§ 7), extending the jurisdiction of the admiralty court to "any claim for damages by any ship." This has been held in many cases to include damage done to a structure affixed to the land. The distinction between damage done to fixed and to floating structures is a somewhat artificial one, and, in my view, founded upon no sound principle; and the fact that [369] Congress, under the Constitution, cannot extend our admiralty jurisdiction, affords an argument for a broad interpretation commensurate with the needs of modern commerce. To attempt to draw the line of jurisdiction between different kinds of fixed structures, as, for instance, between beacons and wharves, would lead to great confusion and much further litigation.

CITIZENS' NATIONAL BANK OF KANSAS CITY, MISSOURI, *Plff. in Err.*,

v.

M. S. C. DONNELL.

(See S. C. Reporter's ed. 369-374.)

Usury by national banks.

1. By compounding interest oftener than is permitted by Mo. Rev. Stat. § 3711, a national bank charges interest at a higher rate than that allowed by the laws of the state within the meaning of U. S. Rev. Stat. § 5197, U. S. Comp. Stat. 1901, p. 3493, fixing the rate which national banks may charge, although the compounded interest is less than the state laws permit to be charged directly, without compounding.
2. A national bank which has made a 12 per cent charge on overdrafts, where 8 per cent is the highest rate of interest permitted by the

NOTE.—On forfeiture or other effect of taking or receiving illegal interest by national bank—see note to *Citizens' Nat. Bank v. Gentry*, 56 L. R. A. 673.

On usury by national banks generally—see note to *Farmers' & M. Nat. Bank v. Dearing*, 23 L. ed. U. S. 196.

As to usury in agreement for interest after maturity—see note to *Ward v. Cornett*, 49 L. R. A. 550.

state laws, cannot escape the forfeiture prescribed by U. S. Rev. Stat. § 5198, U. S. Comp. Stat. 1901, p. 3493, where a greater rate of interest is charged than the state laws allow, because of the trifling amount, or on the theory that the charge is a penalty because of the failure to pay a debt when due.

3. A national bank whose action on a promissory note is met by the plea of usury may not avoid the forfeiture of the entire interest, imposed by U. S. Rev. Stat. § 5198, U. S. Comp. Stat. 1901, p. 3493, in absolute terms, by then declaring an election to remit the excessive interest.

[No. 36.]

Argued November 1, 1904. Decided November 28, 1904.

IN ERROR to the Supreme Court of the State of Missouri to review a judgment reversing the judgment of the Circuit Court of Jackson County, in that State, in favor of plaintiff in a suit on a promissory note for the full amount claimed, and directing the trial court to enter up judgment for plaintiff without interest, which it decided was forfeited under the national banking act because usurious. *Affirmed.*

See same case below, 172 Mo. 384, 72 S. W. 925.

The facts are stated in the opinion.

Mr. Oliver H. Dean argued the cause, and, with *Messrs. William D. McLeod and Hale Holden*, filed a brief for plaintiff in error:

The penalties prescribed by § 5198 of the national banking act are exclusive, and the usury laws of the state have no application to national banks in so far as such penalties are concerned.

Farmers' & M. Nat. Bank v. Dearing, 91 U. S. 29, 23 L. ed. 96.

To subject a bank to the penalty for taking usurious interest, there must have been not only a larger rate of interest than allowed by the state law, but the larger rate must have been knowingly received.

National banking act (U. S. Rev. Stat. § 5198, U. S. Comp. Stat. 1901, p. 3493).

And this must not only be alleged, but proved.

Henderson Nat. Bank v. Alves, 91 Ky. 142, 15 S. W. 132.

The question of what is compound interest, and what is not, is necessarily to be determined by this court.

Haseltine v. Central Nat. Bank, 183 U. S. 132, 46 L. ed. 118, 22 Sup. Ct. Rep. 50.

The methods of business to be pursued by a national bank cannot be prescribed by a state statute; they rest upon higher authority.

Tyler, Usury, p. 244.

Promises to pay the highest legal rate

of interest semi-annually or quarterly are not usurious.

Hawley v. Howell, 60 Iowa, 79, 14 N. W. 199; *Goodrich v. Reynolds*, 31 Ill. 490, 83 Am. Dec. 240; *Tallman v. Truesdell*, 3 Wis. 443; *Mowry v. Shumway*, 44 Conn. 493; *Brown v. Vandyke*, 8 N. J. Eq. 795, 55 Am. Dec. 250; *Ragan v. Day*, 46 Iowa, 240; *Mann v. Cross*, 9 Iowa, 327.

Usury is not committed by payment of a premium less in amount than the legal interest.

Oyster v. Longnecker, 16 Pa. 269; *Upton v. O'Donahue*, 32 Neb. 565, 49 N. W. 267; *Mills v. Johnston*, 23 Tex. 309; *Brestle v. Mehaffie*, 19 Pa. 117; *Dcy v. Dunham*, 2 Johns. Ch. 182; *Tepoel v. Saunders County Nat. Bank*, 24 Neb. 815, 40 N. W. 415; *Smith v. Parsons*, 55 Minn. 520, 57 N. W. 311; *Webb, Usury*, § 115; *Brown v. Scottish-American Mortg. Co.* 110 Ill. 235; *Miner v. Paris Exch. Bank*, 53 Tex. 561; *Camp v. Bates*, 11 Conn. 495; *Wilcox v. Howland*, 23 Pick. 169.

The mere compounding of interest is not of itself usurious.

Mills v. Johnston, 23 Tex. 330; *Andrews v. Hoxie*, 5 Tex. 194; *Miner v. Paris Exch. Bank*, 53 Tex. 561; *Martin v. Land Mortg. Bank*, 5 Tex. Civ. App. 171, 23 S. W. 1032; *Brown v. Crow* (Tex. Civ. App.) 29 S. W. 653.

Compound interest at the highest rate allowed by law is not unlawful.

Wilcox v. Howland, 23 Pick. 167; *Mosher v. Chapin*, 12 Wis. 453; *Webb, Usury*, §§ 123, 125; *Stansbury v. Stansbury*, 24 W. Va. 634; *Camp v. Bates*, 11 Conn. 495; *Stewart v. Petree*, 55 N. Y. 621, 14 Am. Rep. 352; *Kellogg v. Hickok*, 1 Wend. 521; *Fobes v. Cantfield*, 3 Ohio, 18; *Hale v. Hale*, 1 Coldw. 233.

Penalties on overdrafts are not unlawful.

Hatch v. Douglas, 48 Conn. 116, 40 Am. Rep. 154; 27 Am. & Eng. Enc. Law, p. 994; *Upton v. O'Donahue*, 32 Neb. 565, 49 N. W. 267; *Burke v. Raab*, 4 Ill. App. 338; *Lawrence v. Cowles*, 13 Ill. 577; *Downey v. Beach*, 78 Ill. 53; *Fisher v. Otis*, 3 Chand. 83, 3 Pinney, 78; *Chaffe v. Landers*, 46 Ark. 364; *Jones v. Hubbard*, 6 Call. (Va.) 211; *Call v. Scott*, 4 Call. (Va.) 402; *Pollard v. Baylor*, 6 Munf. 433; *Wadsworth v. Champion*, 1 Root, 393; *Tuttle v. Clark*, 4 Conn. 153; *Cole v. Lockhart*, 2 Ind. 631; *Gambrell v. Doe*, 8 Blackf. 140, 44 Am. Dec. 760; *Billingsley v. Dean*, 11 Ind. 331; *Sumner v. People*, 29 N. Y. 337; *Bank of Chenango v. Curtiss*, 19 Johns. 326; *Jordan v. Lewis*, 2 Stew. 426; *Rogers v. Sample*, 33 Miss. 310, 69 Am. Dec. 349; *Moore v. Hytton*, 16 N. C. (1 Dev. Eq.) 429; *Fisher v. Anderson*, 25 Iowa, 28, 95 Am. Dec. 761; *Watson v. McClanahan*, 13 Ala. 57.

The test of usury in such cases is, Has the debtor the absolute and unconditional right to discharge his obligations at maturity by paying the amount of the prescribed and lawful interest?

Gaar v. Louisville Bkg. Co. 11 Bush, 189, 21 Am. Rep. 209.

Where a promissory note provides that, if the principal is not paid when due, a greater rate of interest shall be paid than is allowed by law, and it is made payable on so long a time as not to induce the belief that the interest clause was intended as an evasion of the statute, it will not be held to be usurious from such fact alone.

Wilday v. Morrison, 66 Ill. 532.

In *Gould v. Bishop Hill Colony*, 35 Ill. 324, it is held that an agreement in a promissory note payable in six months after its date, to pay 25 per cent interest after maturity and until the note is paid, is not usurious.

So, agreements to pay 24 per cent, 50 per cent, and 20 per cent after maturity, have been sustained.

Weyrich v. Hobelman, 14 Neb. 432, 16 N. W. 436; *Wight v. Shuck*, 1 Morris (Iowa) 425; *Conrad v. Gibbon*, 29 Iowa, 120.

In *Gower v. Carter*, 3 Iowa, 244, 66 Am. Dec. 71, it is held that an agreement to pay 2 per cent per month as a penalty in default of payment of a promissory note at maturity is not essentially different from an agreement to pay a gross sum as such a penalty; and it is a settled rule that no other sum can now be recovered, under a penalty, than that which shall compensate the plaintiff for his actual loss.

It is lawful to provide that, if the debt be not paid at maturity, the debtor may pay the creditor's attorneys' fees for the collection of the debt.

Fowler v. Equitable Trust Co. 141 U. S. 384, 35 L. ed. 786, 12 Sup. Ct. Rep. 1; *Smith v. Silvers*, 32 Ind. 321; *Daniels v. Silvers*, 32 Ind. 322; *Nelson v. Everett*, 29 Iowa, 184; *Dunn v. Rogers*, 43 Ill. 260.

A parol agreement to pay interest upon interest is valid.

Thayer v. Wilmington Star Min. Co. 105 Ill. 541; *Fessenden v. Taft*, 65 N. H. 39, 17 Atl. 713; *Cameron v. Merchants' & M. Bank*, 37 Mich. 242; *Brown v. Cass County Bank*, 86 Iowa, 527, 53 N. W. 410; *Guild v. First Nat. Bank*, 4 S. D. 566, 57 N. W. 503; *First Nat. Bank v. Fenn*, 75 Iowa, 221, 39 N. W. 279.

Where one debt is tainted with usury, and the others are not, and all the debts are incorporated into one obligation, the tainted debt does not poison the whole.

Porter v. Jefferies, 40 S. C. 92, 18 S. E. 229; *Smith v. Heath*, 4 Daly, 123; *Farmers'* 240

& *M. Bank v. Hoagland*, 7 Fed. 159; *Burnhisel v. Firman*, 22 Wall. 170, 22 L. ed. 766; *Farmers' & M. Bank v. Joslyn*, 37 N. Y. 353.

By the law of Missouri, if usury is once paid it cannot be collected back.

Ferguson v. Soden, 111 Mo. 208, 33 Am. St. Rep. 512, 19 S. W. 727; *Ransom v. Hays*, 39 Mo. 445.

Charging interest on overdue interest is not compounding the interest.

16 Am. & Eng. Enc. Law, 2d ed. p. 1074.

When an action is brought by a national bank on a note executed in its favor, and usury is pleaded, the court will permit such bank to remit the excessive interest stipulated for, and recover the debt, with legal interest. This is especially true when a transaction is in good faith and there was no intention to violate the law.

Brown v. Marion Nat. Bank, 169 U. S. 416, 419, 42 L. ed. 801, 802, 18 Sup. Ct. Rep. 390; *McBroom v. Scottish Mortg. & Land Invest. Co.* 153 U. S. 318-328, 38 L. ed. 729-733, 14 Sup. Ct. Rep. 852.

Mr. **Edward P. Garnett** argued the cause and filed a brief for defendant in error:

The supreme court of Missouri found as a matter of fact that, upon each and every item which entered into and formed a part of the note in question, the plaintiff charged interest at a greater rate than was allowed by the laws of the state of Missouri; and it is well settled that the findings of facts in the state courts are, on a writ of error, conclusive in this court.

Jenkins v. Neff, 186 U. S. 230, 46 L. ed. 1140, 22 Sup. Ct. Rep. 905; *E. Bement & Sons v. National Harrow Co.* 186 U. S. 83, 46 L. ed. 1064, 22 Sup. Ct. Rep. 747; *Gardner v. Boncstell*, 180 U. S. 362, 45 L. ed. 574, 21 Sup. Ct. Rep. 399; *Thayer v. Spratt*, 189 U. S. 353, 47 L. ed. 849, 23 Sup. Ct. Rep. 576; *Egan v. Hart*, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; *Western U. Teleg. Co. v. Call Pub. Co.* 181 U. S. 103, 45 L. ed. 771, 21 Sup. Ct. Rep. 561.

The following well-reasoned cases show how completely foreclosed is all controversy as to the construction of §§ 5197 and 5198 of the national banking act:

Brown v. Marion Nat. Bank, 169 U. S. 416, 42 L. ed. 801, 18 Sup. Ct. Rep. 390; *Danforth v. National State Bank*, 17 L. R. A. 622, 1 C. C. A. 62, 3 U. S. App. 7, 48 Fed. 271; *Farmers' & M. Bank v. Hoagland*, 7 Fed. 159; *Daingerfield Nat. Bank v. Ragland*, 181 U. S. 45, 45 L. ed. 738, 21 Sup. Ct. Rep. 536; *Barnet v. Muncie Nat. Bank*, 98 U. S. 555, 25 L. ed. 212; *Farmers' & M. Nat. Bank v. Dearing*, 91 U. S. 29, 23 L. ed. 196; *First Nat. Bank v. Will*, 184 U. S. 155, 46 L. ed. 478, 22 Sup. Ct. Rep. 457;

Haseltine v. Central Nat. Bank, 183 U. S. 132, 46 L. ed. 118, 22 Sup. Ct. Rep. 50.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a writ of error to the supreme court of Missouri on the ground that the plaintiff in error is denied the rights with regard to charging interest conferred upon it by the national banking act. Rev. Stat. §§ 5197, 5198, U. S. Comp. Stat. 1901, p. 3493. The suit was brought by the plaintiff in error upon a promissory note for \$20,000, with interest at 8 per cent. made on April 29, 1892. The facts, shortly stated, are as follows: On October 29, 1892, the plaintiff bought the defendant's note for \$15,000, with interest at 7 per cent. On July 12, 1895, the defendant being behindhand with his payments of interest and also having overdrawn a bank account which he kept in the plaintiff's bank, he gave the plaintiff a new note for \$17,500, and interest at 7 per cent, in satisfaction of both liabilities. The amount of this note included three semiannual interest charges of \$525 each, with a few days' further interest, on the former note, with interest on this interest from the time it was due, and charges of 1 per cent or more a month on the amount overdrawn each month. It left the defendant with a credit on his bank account of \$230.50. On April 29, 1896, the note in suit and another note for \$2,000 were given in satisfaction of the last note for \$17,500, and of another note for \$2,500, of October 1, 1895, with interest accrued on both, and of an overdraft of \$919.90, and a balance of \$2.42. The overdraft item included, as before, charges of about 1 per cent a month on the amounts actually overdrawn.

The supreme court of Missouri held that the plaintiff must forfeit all interest from the beginning of the above transactions, and [373] could recover only the original \$15,000, *the actual overdraft on July 12, 1895, \$474.24, the bank credit of \$230, given the same day, the note of October 1, 1895, for \$2,500, the overdraft on April 29, 1896, of \$878.81, and the bank credit of \$2.42—in all, \$19,081.97, less \$5,500 collected on account since the action was begun. 172 Mo. 384, 72 S. W. 925.

By the U. S. Rev. Stat. § 5197, U. S. Comp. Stat. 1901, p. 3493, a bank may charge "interest at the rate allowed by the laws of the state, . . . where the bank is located, and no more." By § 5198 (U. S. Comp. Stat. 1901, p. 3493), taking, receiving, or charging "a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid

thereon." The Revised Statutes of Missouri fix 6 per cent as the rate of interest in the absence of agreement (§ 3705), but allow parties to agree in writing for not over 8 per cent (§ 3706). They also allow parties to contract in writing for the payment of interest upon interest, "but the interest shall not be compounded oftener than once in a year" (§ 3711). It will be seen that the charge on the overdrafts went beyond § 3706, and the compounding of the semiannual interest on the notes encountered § 3711.

The plaintiff in error denies that the prohibition of compounding oftener than once a year affects the "rate of interest" within the meaning of those words in U. S. Rev. Stat. § 5198, U. S. Comp. Stat. 1901, p. 3493, and contends that so long as the total sums received would not amount to more than 8 per cent on the debt, it has a right to charge them under U. S. Rev. Stat. § 5197, U. S. Comp. Stat. 1901, p. 3493, coupled with Mo. Rev. Stat. § 3706. It disposes of the 12 per cent charge on overdrafts by the suggestion that the amount is trifling, and *de minimis non curat lex*, and that this charge was a penalty because of a failure to pay a debt *when due, and there- [374] fore not usurious. We are of a different opinion. The rate of interest which a man receives is greater when he is allowed to compound than when he is not, the other elements in the case being the same. Even if the compounded interest is less than might be charged directly without compounding, a statute may forbid enlarging the rate in that way, whatever may be the rules of the common law. The supreme court of Missouri holds that that is what the Missouri statute has done. On that point, and on the question whether what was done amounted to compounding within the meaning of the Missouri statute, we follow the state court. *Union Nat. Bank v. Louisville, N. A. & C. R. Co.* 163 U. S. 325, 331, 41 L. ed. 177, 179, 16 Sup. Ct. Rep. 1039. Therefore, since the interest charged and received by the plaintiff was compounded more than once a year, it was at a rate greater than was allowed by U. S. Rev. Stat. § 5197, U. S. Comp. Stat. 1901, p. 3493, and it was forfeited. The suggestions as to the 12 per cent charge on overdrafts do not seem to us to need answer.

There is no doubt, of course, that the court could go behind the face of the present note, and analyze the sum which it represents into its original elements. *Brown v. Marion Nat. Bank*, 169 U. S. 416, 42 L. ed. 801, 18 Sup. Ct. Rep. 390; *Haseltine v. Central Nat. Bank*, 183 U. S. 132, 135, 136, 46 L. ed. 118-120, 22 Sup. Ct. Rep. 50. These cases sufficiently show, also, if more is wanted than the words of Rev. Stat. § 5198, U. S. Comp.

Stat. 1901, p. 3493, that the court below did not err in forfeiting all the interest from the beginning.

We perceive no warrant in the statute or the cases for the contention that the bank, when it brings the action and is met by the plea of usury, may avoid the forfeiture imposed by Rev. Stat. § 5198, U. S. Comp. Stat. 1901, p. 3493, in absolute terms, by then declaring an election to remit the excessive interest.

Judgment affirmed.

[375]*BALTIMORE SHIPBUILDING & DRY DOCK COMPANY OF BALTIMORE CITY, *Plff. in Err.*,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE *et al.*

(See S. C. Reporter's ed. 375-382.)

Taxes—state taxation as prohibited by Federal interest—taxation of Federal agency.

1. A state tax, though in form levied upon land conveyed by the United States to a corporation for dry-dock purposes, with a reserved right in the grantor to the free use of the dry dock, and a provision for forfeiture in case of the continued unfitness of the dry dock for use, or the use of the land for other purposes, will be held to create a lien upon the company's interest alone, where the highest state court so regards the effect of the tax, although it neglects to modify its judgment sustaining the tax to conform to its views.
2. The United States has no such interest in land conveyed by it to a corporation for dry-dock purposes, with a reserved right to the free use of the dry dock, and a provision for forfeiture in case of the continued unfitness of the dry dock for use, or the use of the land for other purposes, as will prevent the state from taxing the corporation's interest in such land.
3. Land conveyed by the United States to a corporation for dry-dock purposes is not entirely exempted from state taxation, as an agency of the United States, because of a reservation in the conveyance of the right to the free use of the dry dock, and a provision therein for forfeiture in case of the continued unfitness of the dry dock for use, or the use of the land for other purposes.

[No. 39.]

Argued November 2, 3, 1904. Decided November 28, 1904.

NOTE.—On the limitations of the taxing power arising out of the mutual independence of Federal and state governments—see note to Grether v. Wright, 23 C. C. A. 515.

On the power of the states to tax—see note to Dobbins v. Erie County, 10 L. ed. U. S. 1022.

IN ERROR to the Court of Appeals of the State of Maryland to review a judgment which affirmed an order of the Baltimore City Court, confirming the action of the Appeal Tax Court of Baltimore City in assessing for taxation certain property held under a conveyance from the United States for dry-dock purposes, with a reserved right in the grantor to the free use of the dry dock, and a provision for forfeiture in case of the continued unfitness of the dry dock for use, or the use of the land for other purposes. *Affirmed.*

See same case below, 97 Md. 97, 54 Atl. 623.

The facts are stated in the opinion.

Messrs. E. P. Keech, Jr., and Leon E. Greenbaum argued the cause, and, with Mr. Archibald H. Taylor, filed a brief for plaintiff in error:

The estate of the United States in this land may be said to be a right of reverter absolute, subject to the performance of certain continuing conditions for the sole benefit of the reversioner, and conferring upon the reversioner certain valuable present rights of user in the land itself.

Northern P. R. Co. v. Townsend, 190 U. S. 267, 47 L. ed. 1044, 23 Sup. Ct. Rep. 671.

"Property" may be the land or thing itself, or it may be a right, absolute or qualified, in the land or thing.

2 Austin, Jur. (Campbell's Notes), § 1051; 2 Bouvier, Law Dict. (1897) *Property*, p. 780; Anderson, Law Dict. (1889) *Property*, p. 835.

All "property" is not of necessity taxed by the state of Maryland.

Buchanan v. Talbot County, 47 Md. 286; *Baltimore v. Johnson*, 96 Md. 737, 61 L. R. A. 568, 54 Atl. 646; *Baltimore & F. Turnpk. Co. v. Appeal Tax Court*, Baltimore Daily Record, May 7, 1903.

The state of Maryland has no power to tax the property of the United States, including land in which the United States has an interest or estate.

Black, Tax Titles (1893) § 35; Cooley, Taxn. 3d ed. 135-139; *Howell v. State*, 3 Gill, 14; *M'Culloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579; *Van Brocklin v. Tennessee* (*Van Brocklin v. Anderson*) 117 U. S. 151, 29 L. ed. 845, 6 Sup. Ct. Rep. 670, *Wisconsin C. R. Co. v. Price County*, 133 U. S. 496, 504, 33 L. ed. 687, 690, 10 Sup. Ct. Rep. 341.

This doctrine is applicable not only in cases where the United States is vested with full legal and equitable title to the property sought to be taxed, but to all cases of lands in which the United States has any real interest; and it fails to apply only in cases when the United States may be vested with

the mere dry legal title, full beneficial or equitable ownership and title being vested in others.

Carroll v. Safford, 3 How. 441, 11 L. ed. 671; *Witherspoon v. Duncan*, 4 Wall. 210, 18 L. ed. 339.

Land of the United States lying within a state is not taxable by the state. If such land has been bought or taken up by an individual, it is not subject to state taxation so long as something remains to be done by the individual to perfect his right to a patent from the United States.

Cooley, Const. L. p. 60; *Kansas P. R. Co. v. Prescott*, 16 Wall. 603, 21 L. ed. 373; *Union P. R. Co. v. McShane*, 22 Wall. 444, 22 L. ed. 747; *Tucker v. Ferguson*, 22 Wall. 527, 22 L. ed. 805; *Forbes v. Gracely*, 94 U. S. 762, 24 L. ed. 313; *Central Colorado Improv. Co. v. Pueblo County*, 95 U. S. 259, 24 L. ed. 495; *Northern P. R. Co. v. Traill County* (*Northern P. R. Co. v. Rockne*) 115 U. S. 600, 29 L. ed. 477, 6 Sup. Ct. Rep. 201; *Van Brocklin v. Tennessee* (*Van Brocklin v. Anderson*) 117 U. S. 151, 29 L. ed. 845, 6 Sup. Ct. Rep. 670; *Wisconsin C. R. Co. v. Price County*, 133 U. S. 496, 33 L. ed. 687, 10 Sup. Ct. Rep. 341; *Hussman v. Durham*, 165 U. S. 147, 41 L. ed. 665, 17 Sup. Ct. Rep. 253.

The assessment in the case is laid upon the land as such, and not upon the interest of the plaintiff in error therein.

Cooley, Taxn. 3d ed. pp. 721 *et seq.*; *Baltimore v. Canton Co.* 63 Md. 218; *Baltimore v. Boyd*, 64 Md. 10, 20 Atl. 1028; *Cooper v. Holmes*, 71 Md. 20, 17 Atl. 711. See also Cooley, Taxn. 3d ed. pp. 960 *et seq.*; Black, Tax Titles (1893) §§ 419-422; Burroughs, Taxn. (1877), p. 346; *Textor v. Shipley*, 86 Md. 424, 38 Atl. 932; *Northern P. R. Co. v. Traill County* (*Northern P. R. Co. v. Rockne*) 115 U. S. 600, 29 L. ed. 477, 6 Sup. Ct. Rep. 201; *Hefner v. Northwestern Mut. L. Ins. Co.* 123 U. S. 747, 31 L. ed. 309, 8 Sup. Ct. Rep. 337; *Emery v. Boston Terminal Co.* 178 Mass. 172, 86 Am. St. Rep. 473, 59 N. E. 763.

Even if the statutes of Maryland do permit assessments upon partial interests or estates in land, and the court has such an assessment before it in this case, it is none the less void, and the provisions of the statutes in this respect must of necessity be inoperative here from the peculiar conditions of this case, growing out of the interest of the United States in this land.

Moriarty v. Boone County, 39 Iowa, 634.

The state of Maryland may not tax the interest of a private party in lands in which the United States also has an interest, without the consent of the United States.

Kansas P. R. Co. v. Prescott, 16 Wall. 603, 21 L. ed. 373; *Northern P. R. Co. v.*
195 U. S.

Traill County (*Northern P. R. Co. v. Rockne*) 115 U. S. 600, 610, 611, 29 L. ed. 477, 480, 6 Sup. Ct. Rep. 201; *Wisconsin C. R. Co. v. Price County*, 133 U. S. 505, 33 L. ed. 692, 10 Sup. Ct. Rep. 341; *Central P. R. Co. v. Nevada*, 162 U. S. 512, 40 L. ed. 1057, 16 Sup. Ct. Rep. 885; *Northern P. R. Co. v. Myers*, 172 U. S. 589, 43 L. ed. 564, 19 Sup. Ct. Rep. 276; Cooley, Taxn. 3d ed. pp. 137-139.

The land in question, with the dry dock constructed on it, is a Federal agency actually used by the United States in the exercise of its constitutional powers, and hence is not subject to state taxation.

M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579. See also *Van Brocklin v. Tennessee* (*Van Brocklin v. Anderson*) 117 U. S. 151, 29 L. ed. 845, 6 Sup. Ct. Rep. 670; Cooley, Const. Lim. 7th ed. pp. 45, 612, *et seq.*

Mr. Edgar Allan Poe argued the cause, and, with Mr. W. Cabell Bruce, filed a brief for defendants in error:

It is the settled law of the state of Maryland that taxes are not levied on things, but on the owner of things; the value of the things owned merely fixing the measure of the owner's liability to contribute in taxes towards the support of the government.

Monticello Distilling Co. v. Baltimore, 90 Md. 425, 45 Atl. 210; *Carstairs v. Cochran*, 95 Md. 500, 52 Atl. 601.

A state has the undoubted power to tax private property having a situs within its territorial limits, and may require the party in possession of the property to pay the taxes thereon. Unless restrained by provisions of the Federal Constitution, the power of the state as to the mode, form, and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction.

Carstairs v. Cochran, 193 U. S. 10, 48 L. ed. 596, 24 Sup. Ct. Rep. 318.

The courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the states for their grants; but whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the states, subject to the condition that their rules do not impair the efficacy of the grants or the use and enjoyment of the property by the grantees.

Northern P. R. Co. v. Townsend, 190 U. S. 270, 47 L. ed. 1046, 23 Sup. Ct. Rep. 671.

By the imposition of the tax there manifestly has been no impairment of the efficiency of the grant, or the use and enjoyment of the property by the grantee.

Union P. R. Co. v. Peniston, 18 Wall. 5, 21 L. ed. 787.

In *Central P. R. Co. v. Nevada*, 162 U. S. 512, 40 L. ed. 1057, 16 Sup. Ct. Rep. 885, and in *Northern P. R. Co. v. Myers*, 172 U. S. 589, 43 L. ed. 564, 19 Sup. Ct. Rep. 276, it was held that the possessory claim of the railroad company to government lands lying within a state was subject to taxation by the state, notwithstanding the fact that the lands might thereafter be determined to be mineral lands, and for that reason excluded from the operation of the grant from the United States to the railroad company.

He who has the right to property, and is not excluded from its enjoyment, shall not be permitted to use the legal title of the government to avoid his just share of state taxation.

Wisconsin C. R. Co. v. Price County, 133 U. S. 496, 33 L. ed. 687, 10 Sup. Ct. Rep. 341.

The principle of exemption from taxation of governmental agencies does not apply to the property of individuals or corporations which is not in the exclusive use, or under the exclusive control, of the government, although the latter may have a fixed right to a preference in the use of such property when occasion may require.

Thomson v. Union P. R. Co. 9 Wall. 579, 19 L. ed. 792; *Union P. R. Co. v. Peniston*, 18 Wall. 5, 21 L. ed. 787.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a writ of error to the court of appeals of the state of Maryland, brought to reverse a judgment sustaining a tax upon certain land. The plaintiff in error filed a petition and appeal from an assessment by the appeal tax court of Baltimore in the Baltimore city court, alleging that its land was not subject to taxation, and, if subject, was taxed too high. The city court reduced the tax, but held the land liable, and its judgment was affirmed by the court of appeals. 97 Md. 97, 54 Atl. 623. The land in question formerly belonged to the United States, being part of the property known as Fort McHenry, and is admitted not to have been taxable at that time. Under an act of Congress of June 19, 1878 (20 Stat. at L. 167, chap. 310), it was conveyed to the plaintiff in error on March 26, 1879. By the terms of the deed, following the requirements of the act, the consideration of the conveyance and the condition upon which it was made was that the dock company should construct a dry dock upon the land as specified, which it did, and that it should "accord to the United States the right to the use forever of the said dry dock at any time for the prompt examination and repair of

vessels belonging to the United States, free from charge for docking, and if at any time said property hereby conveyed shall be diverted to any other use *than that herein[381] named, or if the said dry dock shall be at any time unfit for use for a period of six months or more, the property hereby conveyed, with all its privileges and appurtenances, shall revert to, and become the absolute property of, the United States." This condition is relied upon as still keeping the land outside the taxing power of the state.

It is argued that the United States has such an interest in the land as to prevent the tax, and also that the land is an agency of the government by the terms of the grant. It is noted that this tax originally was levied upon the land, not upon the dock company's interest, and although the language of the final judgment was "the property concerned in the appeal in this case," that is supposed to mean the same thing.

We will deal with the argument drawn from the last consideration first. It is true that commonly taxes on land create a lien paramount to all interest, and that a tax sale often has been said to extinguish all titles, and to start a new one. *Hefner v. Northwestern Mut. L. Ins. Co.* 123 U. S. 747, 751, 31 L. ed. 309, 311, 8 Sup. Ct. Rep. 337; *Textor v. Shipley*, 86 Md. 424, 438, 38 Atl. 932; *Emery v. Boston Terminal Co.* 178 Mass. 172, 184, 86 Am. St. Rep. 473, 59 N. E. 763. Perhaps it was assumed that this always was the effect of tax sales, in *Northern P. R. Co. v. Traill County*, 115 U. S. 600, 29 L. ed. 477, 6 Sup. Ct. Rep. 201. But it needs no argument to show that a state may do less. It may tax a life estate to one and a remainder to another, and sell only the interest of the party making default. With regard to what the state of Maryland has done and what are the purport and attempted effect of the tax in this case, we follow the court of appeals. That court treated the tax and the lien as going only to the dock company's interest in the land, although, probably by an oversight, it neglected to modify the judgment according to its own suggestion so as to show the fact. That only the company's interest was taxed is shown by the reduction of the assessment on account of the condition. Of course it does not matter what form of words the judgment employs when its meaning is thus declared by the court having the matter under its control.

*In the next place as to the interest of the[382] United States in the land. This is a mere condition subsequent. There is no easement or present right *in rem*. The obligation to keep up the dock and to allow the United

States to use it carries active duties, and is purely personal. The property is subject to forfeiture, it is true, if the obligation is not fulfilled. But it is only by forfeiture that the rights of the United States can be enforced against the *res*. It would be a very harsh doctrine that would deny the right of the states to tax lands because of a mere possibility that they might lapse to the United States. The contrary is the law. The condition cannot be extinguished by the state, but the fee is in the dock company, and that can be taxed and, if necessary, sold, subject to the condition. See *Northern P. R. Co. v. Myers*, 172 U. S. 589, 598, 43 L. ed. 564, 567, 19 Sup. Ct. Rep. 276; *Maish v. Arizona*, 164 U. S. 599, 607-609, 41 L. ed. 567, 570, 571, 17 Sup. Ct. Rep. 193; *Central P. R. Co. v. Nevada*, 162 U. S. 512, 525, 40 L. ed. 1057, 1061, 16 Sup. Ct. Rep. 885. The title of the dock company was not inalienable, as that of the railroad was held to be in *Northern P. R. Co. v. Townsend*, 190 U. S. 267, 47 L. ed. 1044, 23 Sup. Ct. Rep. 671.

Finally, we are of opinion that the land is not exempt as an agency of the United States. The dock company disclaimed that position for itself as a corporation, but asserts it for the land. The position is answered technically, perhaps, by what we have said already. The United States has no present right to the land, but merely a personal claim against the corporation, reinforced by a condition. But, furthermore, it seems to us extravagant to say that an independent private corporation for gain, created by a state, is exempt from state taxation, either in its corporate person or its property, because it is employed by the United States, even if the work for which it is employed is important and takes much of its time. *Thomson v. Union P. R. Co.* 9 Wall. 579, 19 L. ed. 792; *Union P. R. Co. v. Peniston*, 18 Wall. 5, 21 L. ed. 787.

Judgment affirmed.

[383]*HELENA WATERWORKS COMPANY,
Appt.,
v.

CITY OF HELENA.

(See S. C. Reporter's ed. 383-394.)

Contracts—impairment of obligation—implied contract of municipality not to build waterworks—agreed case.

1. A city does not impliedly contract not to

construct its own waterworks system by requiring a waterworks company, as a condition of its franchise, to provide all the inhabitants of the city with a water supply on the terms and conditions therein expressed, when read in connection with a previous provision requiring the company to furnish water to those desiring to purchase it,—at least, after the five years have expired during which the company was bound by such franchise to furnish water to the city at a definite price, for which an appropriation was therein made.

2. Questions respecting the right of a municipality to impose a tax for the purpose of erecting a waterworks plant, or the alleged invalidity of any method of acquiring such works except by purchasing existing works, are excluded from consideration by a stipulation in the agreed statement of facts, on which the case was tried, that if the city has the right to erect and maintain an independent plant of its own, in view of the contract rights of a private waterworks company, it contemplates raising funds and revenues therefor in the manner provided by law, and will raise revenues within the limits of indebtedness authorized by the state Constitution and laws.

[No. 27.]

Argued October 28, 1904. Decided November 28, 1904.

APPEAL from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree reversing a decree of the Circuit Court for the District of Montana, in favor of complainant in a suit to restrain a municipality from acquiring a waterworks system except by purchasing an existing plant, and from incurring any indebtedness therefor, and remanding the cause, with instructions to dismiss the bill. *Affirmed.*

See same case below, 58 C. C. A. 381, 122 Fed. 1.

Statement by Mr. Justice **Day**:

This case was begun by a bill filed in the circuit court of the United States by the Helena Waterworks Company, successor to the Helena Consolidated Water Company, to restrain the city of Helena from erecting, purchasing, or acquiring a waterworks system for said city, and from acquiring water for such purpose, except it purchase the plant of the complainant company, and from incurring any indebtedness or expenditure of money for such purpose.

The rights in controversy are alleged to result from a contract made by the passage,

NOTE.—As to what laws are void as impairing obligation of contracts—see notes to *Franklin County Grammar School v. Bailey*, 10 L. R. A. 405; *Fletcher v. Peck*, 3 L. ed. U. S. 162; *McCanna & F. Co. v. Citizens' Trust & Surety Co.* 24 C. C. A. 20; *Montana Ore Purchasing* 195 U. S.

Co. v. Boston & M. Consol. Copper & S. Min. Co. 35 C. C. A. 12.

On the privilege of using streets, as a contract within the constitutional provision against impairing contract obligations—see note to *Clarksburg Electric Light Co. v. Clarksburg*, 50 L. R. A. 142.

and acceptance by the company, of a certain ordinance, number 248, passed and approved in January, 1890.

It is also alleged that the Helena Consolidated Water Company, predecessor of the complainant company, complied with all the terms of the ordinance, and expended large sums of money in erecting and maintaining the plant for supplying water to the inhabitants of the said city of Helena.

[384] It is averred that the said city has adopted certain ordinances and taken certain proceedings to acquire and build a water *system of its own, and that said ordinances and proceedings are in violation of the contract rights of the complainant company, guaranteed by § 11 of article 3 of the Constitution of the state of Montana, and § 10 of article 1 of the Constitution of the United States, and that the proceedings of the city in this behalf will amount to taking the property of the complainant company without just compensation, in violation of § 14 of article 3 of the Constitution of the state of Montana, and that its rights and property will be taken without due process of law, in violation of the 14th Amendment to the Constitution of the United States.

It is further averred that the taxation necessary for the construction of the city plant is in excess of any that can be lawfully levied for such purpose.

The case was tried upon an agreed statement of facts. In the circuit court a decision was rendered in favor of the water-works company. Upon appeal to the circuit court of appeals that court reversed the decision of the circuit court, and remanded the case, with instructions to dismiss the bill. 58 C. C. A. 381, 122 Fed. 1.

The terms of the ordinance relied upon, and so much of the agreed statement of facts as is necessary to a determination of the case, sufficiently appear in the opinion.

Mr. M. S. Gunn argued the cause, and, with Messrs. B. Platt Carpenter and Stephen Carpenter, filed a brief for appellant:

By virtue of the acceptance of ordinance No. 248, a contract resulted by which appellee agreed that it would not engage in the business of supplying water to its inhabitants during the term of said contract.

The power of the city of Helena to make such a contract cannot be controverted.

Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77.

If such contract was made, in view of the action already taken by the city and its avowed intention to become a competitor of appellant the decree of the circuit court

was proper, and should have been affirmed by the circuit court of appeals.

Ibid.; *Vicksburg Waterworks Co. v. Vicksburg*, 185 U. S. 65, 46 L. ed. 808, 22 Sup. Ct. Rep. 585.

The powers of a city are divided into two classes, namely, private and public. In the exercise of its private powers it is regarded the same as a private corporation.

Dill. Mun. Corp. § 66; *Illinois Trust & Sav. Bank v. Arkansas City*, 34 L. R. A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 271; *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; *People ex rel. Park Comrs. v. Detroit*, 28 Mich. 228, 15 Am. Rep. 202; *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453; *Bailey v. New York*, 3 Hill, 531, 38 Am. Dec. 669.

A city in providing its inhabitants with a supply of water exercises its private powers,—sometimes termed its business or proprietary powers.

Illinois Trust & Sav. Bank v. Arkansas City, 34 L. R. A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 271; *Little Falls Electric & Water Co. v. Little Falls*, 102 Fed. 663; *Baily v. Philadelphia*, 184 Pa. 594, 39 L. R. A. 837, 63 Am. St. Rep. 812, 39 Atl. 494; *Western Sav. Fund Soc. v. Philadelphia*, 31 Pa. 175, 72 Am. Dec. 730; *Lynch v. Springfield*, 174 Mass. 430, 54 N. E. 871; *Pikes Peak Power Co. v. Colorado Springs*, 44 C. C. A. 333, 105 Fed. 1; *Aldrich v. Tripp*, 11 R. I. 141, 23 Am. Rep. 434; *White v. Meadville*, 177 Pa. 643, 34 L. R. A. 567, 35 Atl. 693.

In the construction of contracts made with a municipal corporation in the exercise of its private, proprietary, or business powers, the same rules apply as in the construction of a contract with an individual or private corporation.

Illinois Trust & Sav. Bank v. Arkansas City, 34 L. R. A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 271; *Little Falls Electric & Water Co. v. Little Falls*, 102 Fed. 663; *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453; *Huidekoper v. Douglass*, 3 Cranch, 1, 2 L. ed. 347.

There is no duty devolving upon complainant, independent of contract, to continue the business of furnishing water. Unless the complainant has contracted not to do so, it has the right to remove its pipes and mains from the streets and abandon the operation of its plant at any time.

San Antonio Street R. Co. v. State, 90 Tex. 520, 35 L. R. A. 662, 59 Am. St. Rep. 834, 39 S. W. 926; *State ex rel. Knight v. Helena Power & Light Co.* 22 Mont. 391, 44 L. R. A. 692, 56 Pac. 685; *York & N. Midland R. Co. v. Queen*, 1 El. & Bl. 858; *Northern P. R. Co. v. Washington*, 142 U. S.

492, 35 L. ed. 1092, 12 Sup. Ct. Rep. 283; *Baily v. Philadelphia*, 184 Pa. 594, 39 L. R. A. 837, 63 Am. St. Rep. 812, 39 Atl. 494.

Where a city contracts for a supply of water for its inhabitants, or confers the right to furnish water to them, it is precluded from acquiring its own supply and system and engaging in the business of furnishing water to the inhabitants, in competition with the person or company with whom it has contracted.

Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; *Bienville Water Supply Co. v. Mobile*, 95 Fed. 539. See also *Westerly Waterworks Co. v. Westerly*, 75 Fed. 181; *White v. Meadville*, 177 Pa. 643, 34 L. R. A. 567, 35 Atl. 695.

What is implied in a statute, pleading, contract, or will is as much a part of it as what is expressed.

United States v. Babbit, 1 Black, 55, 17 L. ed. 94.

Every contract must be construed as if those terms which the law will imply were expressly introduced into it; and where a contract is so framed that it binds the party contracting to do an act, it will imply a correlative obligation on the other party to do what is necessary on his part to enable the party so contracting to fulfil his part.

Manistee Iron Works Co. v. Shores Lumber Co. 92 Wis. 21, 65 N. W. 863. See also *Delaware & H. Canal Co. v. Pennsylvania Coal Co.* 8 Wall. 288, 19 L. ed. 353; *Churchward v. Queen*, L. R. 1 Q. B. 195; *Coghlan v. Stetson*, 22 Blatchf. 88, 19 Fed. 727; *St. Louis & D. Land & Min. Co. v. Tierney*, 5 Colo. 582.

Assuming that the city had the power at the time of the passage and approval of ordinance No. 248 to acquire a water plant and supply to be owned and controlled by itself, and also to enter into a contract with others for a supply for itself and its inhabitants, having made a contract with the Helena Consolidated Water Company for a supply, its power was exhausted; and it could not acquire a plant and supply during the life of such contract. In other words, it could not adopt both methods, and the adoption of one precluded the adoption of the other.

White v. Meadville, 177 Pa. 643, 34 L. R. A. 567, 35 Atl. 695.

The rule that grants by the legislature or by a municipality are to be strictly construed, and any doubt or ambiguity resolved in favor of the public, which was invoked by the circuit court of appeals in this case, does not apply to a contract which is entered into with a municipality in the exercise of its business or proprietary powers. This rule only applies to the construc-

tion of grants by the sovereign power, and then only to such grants as are made without consideration.

3 Washb. Real Prop. 6th ed. p. 173.

It does not follow, from the fact that the franchise is not exclusive, that the city can compete with appellant.

Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77.

The fact that in the ordinance involved in the *Walla Walla Case* there was a provision authorizing the city to purchase or condemn the water supply and system of the Walla Walla Water Company does not distinguish that case from the case at bar, as the right to purchase or condemn existed independently of the provisions of the ordinance regarding the matter.

Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 41 L. ed. 1165, 17 Sup. Ct. Rep. 718.

Mr. Edward Horsky argued the cause, and, with Messrs. Edwin W. Toole, Thomas C. Bach, E. C. Day, and R. Lee Word, filed a brief for appellee:

This case is controlled by the decision in *Skaneateles Waterworks Co. v. Skaneateles*, 184 U. S. 354, 46 L. ed. 585, 22 Sup. Ct. Rep. 400.

There being no express surrender of the public right of appellee to put in its own plant, but, on the contrary, language used which expressly reserves it, how can any obligation be implied by which this right has passed, and appellee is compelled to desist from bringing in its own plant?

Sedgw. Stat. & Const. Law, p. 338; *Charles River Bridge v. Warren Bridge*, 11 Pet. 507, 9 L. ed. 808; *Rice v. Minnesota & N. W. R. Co.* 1 Black, 358, 380, 17 L. ed. 147, 153; *Leavenworth L. & G. R. Co. v. United States*, 92 U. S. 733, 23 L. ed. 634; *Slidell v. Grandjean*, 111 U. S. 412, 437, 28 L. ed. 321, 4 Sup. Ct. Rep. 475; *Barden v. Northern P. R. Co.* 46 Fed. 609, 154 U. S. 288, 38 L. ed. 992, 14 Sup. Ct. Rep. 1030.

Neither the facts presented nor the language used in the *Walla Walla Case* can be said to sustain complainant's claim that the appellee in this case agreed not to erect waterworks of its own.

Wright v. Nagle, 101 U. S. 791, 25 L. ed. 921; *Bienville Water Supply Co. v. Mobile*, 95 Fed. 539, 175 U. S. 110, 44 L. ed. 92, 20 Sup. Ct. Rep. 40; *Iron Mountain R. Co. v. Memphis*, 37 C. C. A. 410, 96 Fed. 113; *Colby University v. Canandaigua*, 96 Fed. 449; *Little Falls Electric & Water Co. v. Little Falls*, 102 Fed. 667. See also *North Springs Water Co. v. Tacoma*, 21 Wash. 517, 47 L. R. A. 214, 58 Pac. 773; *Thompson-Houston Electric Co. v. Newton*, 42 Fed. 723; *State v. Hamilton*, 47 Ohio St. 52, 23

N. E. 935; *Hamilton Gaslight & Coke Co. v. Hamilton*, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. Rep. 90; *Long v. Duluth*, 49 Minn. 280, 32 Am. St. Rep. 547, 51 N. W. 913; *Westerly Waterworks Co. v. Westerly*, 80 Fed. 611; *Skaneateles Waterworks Co. v. Skaneateles*, 161 N. Y. 154, 46 L. R. A. 687, 55 N. E. 562.

It can hardly be questioned but that, when this appellee granted complainant the franchise contained in ordinance No. 248, it acted as the agent of the state in granting a franchise vested in the state.

Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 680, 681, 29 L. ed. 527, 6 Sup. Ct. Rep. 273; *Austin v. Bartholomew*, 46 C. C. A. 327, 107 Fed. 349.

And in the construction of all such grants and franchises the rule is well settled that the grant or privilege must be clearly conferred, and that all doubts and implications will be resolved against the grant or privilege claimed, and in favor of the grantor.

Bartholomew v. Austin, 29 C. C. A. 568, 52 U. S. App. 512, 85 Fed. 359; *Richmond, F. & P. R. Co. v. Louisa R. Co.* 13 How. 71, 81, 14 L. ed. 55, 60; *Rice v. Minnesota & N. W. R. Co.* 1 Black, 358, 380, 17 L. ed. 147, 153; *Stein v. Bienville Water Supply Co.* 141 U. S. 67, 80, 35 L. ed. 622, 627, 11 Sup. Ct. Rep. 892. To the same effect are *Barden v. Northern P. R. Co.* 154 U. S. 288, 325, 326, 38 L. ed. 992, 1001, 14 Sup. Ct. Rep. 1030; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 696, 41 L. ed. 1165, 17 Sup. Ct. Rep. 718; *Detroit Citizens' Street R. Co. v. Detroit R. Co.* 171 U. S. 48, 43 L. ed. 67, 18 Sup. Ct. Rep. 732; *Freeport Water Co. v. Freeport*, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 493.

There is here a franchise contract by which the appellant is allowed to furnish water to the inhabitants, if they desire to take it, at the maximum rate fixed. This brings the question involved squarely within the decision of this court in *Joplin v. Southwest Missouri Light Co.* 191 U. S. 150, 48 L. ed. 127, 24 Sup. Ct. Rep. 43.

Mr. Justice **Day** delivered the opinion of the court:

As the ordinance under consideration contains no express stipulation that the city shall not build a plant of its own to supply water for public and private purposes, and the grant is expressly declared not to be exclusive of the right to contract with another company, this case, unless it can be distinguished, is ruled by recent decisions of this court. *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685-696, 41 L. ed. 1165-1168, 17 Sup. Ct. Rep. 718; *Joplin v.* [388]

Southwestern Missouri Light Co. 191 U. S. 150, 48 L. ed. 127, 24 Sup. Ct. Rep. 43; *Skaneateles Waterworks Co. v. Skaneateles*, 184 U. S. 354, 46 L. ed. 585, 22 Sup. Ct. Rep. 400. These cases hold that the grant of the franchise does not of itself raise an implied contract that the grantor will not do any act to interfere with the rights granted to the waterworks company, and that, in the absence of the grant of an exclusive privilege, none will be implied against the public, but must arise, if at all, from some specific contract, binding upon the municipality.

As stated by appellant's counsel: "The position taken by appellants is, that by ordinance 248 the city has precluded itself from engaging in the commercial business of furnishing water to its inhabitants. We maintain that by the contract contained in this ordinance the Helena Consolidated Water Company [predecessor of appellant] for itself, its successors, and assigns, expressly agreed to furnish water to all of the inhabitants of the city during the term of twenty years; and that by reason of the contractual obligation thus assumed by the company there is the implied promise or undertaking on the part of the city that it will not, during such period, become a competitor of appellant." A consideration of this contention requires an examination of the sections of the ordinance pertinent to a determination of the question:

"Sec. 1. There is hereby granted to the Helena Consolidated Water Company, and its successors and assigns, for the full term of twenty years from the passage hereof, the license and franchise of laying and maintaining water mains and pipes in and through all of the streets, alleys, avenues, and public grounds of the city of Helena for the purpose of conveying and distributing water throughout the said city, and for the purpose of selling the same to all persons, bodies, or corporations within the said city desiring to purchase the same, and to said city for fire, sewerage, and other purposes, in case said city desires to purchase the same, subject, however, to the provisions of this ordinance, hereinafter contained, establishing maximum rates, and generally to have and exercise all the rights, privileges, and franchises necessary to the proper and successful furnishing of water to the inhabitants of said city if required; provided, however, that nothing herein contained shall be so construed as to give to the said Helena Consolidated Water Company, or its successors or assigns, the exclusive right of occupying the streets, avenues, alleys, and public grounds of said city with water mains and pipes, or the exclusive right of conveying, distributing, or selling the same [389]

throughout the said city, or of furnishing the same to said city, except as hereinafter set forth."

"Sec. 3. All pipes and mains, including service pipes connected therewith, shall be laid at the depth of 5 feet below the established grade, and shall be laid under the supervision of the street commissioner of said city as to grade and location in streets; and all repairs and extensions of such pipes and mains shall be done under the supervision of said street commissioner as to grade and location in streets. Nothing contained herein shall preclude said city of Helena from regrading or changing the grade of any street or streets within said city, or from the construction or maintenance of sewer work, or other works or plants of a public nature, or from letting, giving, or granting any franchises, rights, or easements to any person or persons, corporation or corporations, whomsoever, so long as such franchises, rights, and easements do not interfere with the franchises, rights, and easements hereby granted. And that said Helena Consolidated Water Company must and shall look solely and exclusively to the person or persons, corporation or corporations, to whom such franchises, rights, and easements have been given by said city for any and all damages the said Helena Consolidated Water Company may *sustain by reason of any interference with any of its pipes, mains, or hydrants, or any exposure of the same caused by such person or persons, corporation or corporations."

"Sec. 6. The said Helena Consolidated Water Company shall furnish and provide a full, ample, and sufficient supply of good, pure, wholesome, and clear water for the use and wants of the inhabitants of said city, and to provide said city with water for fire, sewerage (maintenance and construction), and for other purposes; and such supply shall be full, ample, and sufficient for the present population of said city, and for the future population of the said city, as the same may be from time to time during the full term of five years; and said water shall be pure, wholesome, and free from animal, vegetable, or mineral substances, such as would render it unhealthy or unfit for domestic use."

"Sec. 26. It is hereby declared and understood to be of the essence of the agreement and the acceptance hereof that the said Helena Consolidated Water Company shall, at all times during the term of such agreement, provide all the inhabitants of the city, whatever their number may be, with a full, ample, and sufficient supply of good, pure, and wholesome and clear water, and shall convey, distribute, and sell to them upon the

terms and conditions herein provided and expressed."

By § 8 the company was required to provide 20 miles of mains within the limits of the city, and by § 10 the company was required to lay and maintain additional mains, of such sizes, at such times, and upon such streets as the city council might, from time to time, direct. Section 17 provided that the company shall not refuse to permit connections to be made by, or to sell water to, persons offering to pay for the same.

Section 16 of the ordinance fixes maximum rates for water to be furnished to the inhabitants of the city. Section 21 makes appropriation for the term of five years from and after January 1, 1890, of certain sums for hydrants and the use of water for the benefit of the city. By the 1st section *of [391] the ordinance, the company is granted the use of the streets, alleys, and avenues and public grounds of the city for the laying and maintenance of its pipes and mains for the purpose of conveying water and selling it to those "desiring" to purchase the same, and to the city for fire and other purposes in case the city "desires to purchase the same."

Certainly, there is nothing in this section that savors of a contract beyond the obligation imposed upon the company, in consideration of the franchise and privileges granted, to furnish water at certain maximum rates to private persons or to the city, when such persons or the municipality desire to purchase the same. When we come to consider § 6 we find an engagement whereby the obligation of the company to furnish water to the city is limited to the term of five years; and in § 21 we find an appropriation made to cover the compensation to be paid by the city for the term of five years for the use of water for public purposes. If these sections can be construed to amount to a contract between the city and the company, binding the city to take its entire supply of water from this company for five years, which would be broken by the erection or building of a plant by the city to supply itself with water, it had expired before the beginning of this suit, and the contract, if it existed after the expiration of the term named in § 6, must be found in other sections of the ordinance. The contention is that, as by § 26 the water company was bound during the term of the agreement, which, it is claimed, is twenty years, to provide all the inhabitants of the city, whatever their number, with a water supply, this contract will be impaired, and its benefits to the company destroyed, if the city should erect an independent plant of its own. But, in our view, this section must be read with § 1, which requires the company

to furnish water to such inhabitants of the city as desire to purchase the same; and there is nothing in this agreement which binds the city to take water from the company beyond the term of five years, expressly provided in § 6, and for which, upon specific

[392] *terms as to prices, an appropriation was made in § 21. There is nothing in § 26 nor in § 1 undertaking to bind the inhabitants of the city to take water from the company. The city has not and, of course, could not undertake to make any contract upon the subject for the private supply of individuals in the city beyond securing a maximum rate of charge for water supplied. The engagement for their benefit requires the company, during the term of the franchise, to supply water at not exceeding certain maximum prices, which were fixed by the ordinance. Properly construed, we think this ordinance shows an agreement upon the part of the company to furnish water to the inhabitants of the city at not exceeding certain maximum rates, and to the city itself, upon terms to be agreed upon, made definite, as far as the city was concerned, for the term of five years. As thus interpreted we do not find anything in this contract that prevents the city, certainly after the expiration of five years, from constructing its own plant. It has not specifically bound itself not so to do, and, as has been frequently held in this court, nothing is to be taken against the public by implication. *Hamilton Gaslight & Coke Co. v. Hamilton*, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. Rep. 90; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 41 L. ed. 1165, 17 Sup. Ct. Rep. 718, and cases cited in the opinion. Had it been intended to exclude the city from exercising the privilege of establishing its own plant, such purpose could have been expressed by apt words, as was the case in *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77. It is doubtless true that the erection of such a plant by the city will render the property of the water company less valuable, and perhaps, unprofitable; but if it was intended to prevent such competition, a right to do so should not have been left to argument or implication, but made certain by the terms of the contract. The right to tax within certain limits to procure a supply of water for the municipality, which shall be owned and controlled by the city, is authorized by the Constitution of Montana, article 13, § 6. Paragraph 4800 of the Political Code of

[393] Montana provides for the carrying into *effect of this constitutional power to tax for a system of waterworks to be owned and controlled by the municipality. The feature of the law requiring the purchase of exist-

ing waterworks instead of building an independent plant by the city was held unconstitutional by the supreme court of Montana in *Helena Consol. Water Co. v. Steele*, 20 Mont. 1, 37 L. R. A. 412, 49 Pac. 382.

The privilege of building other works was, in the absence of some binding contract forbidding the exercise of the power, clearly within the city's constitutional and statutory rights. We cannot find that the city has precluded itself from exercising this right by anything shown in this case. This conclusion renders it unnecessary to decide whether the city's right to construct a plant of its own was expressly saved in § 3 of the ordinance reserving the right to construct and maintain "sewer work, or other works of a public nature."

This action is also brought by the water company as a taxpayer; and it is claimed that the city had no right to acquire a water supply and build its waterworks except by acquiring the plant of the company.

In the findings of fact it was expressly stipulated:

"That the city of Helena contemplates and intends to do all acts and things necessary to secure a water supply and system to be owned and controlled by the said city of Helena, and that it contemplates and intends to raise funds and revenue therefor in the manner provided by law, and to use the same for said purpose, and to furnish and supply the city of Helena and the inhabitants thereof with water from its said plant, and that it contemplates and intends to purchase and secure a sufficient quantity of water for said purpose, and that complainant does not obtain any of its water supply from either Beaver, McClellen, or Prickly Pear creeks.

"That the ordinances Nos. 467 and 483, mentioned in paragraph 27 of the complainant's bill of complaint, were duly passed and adopted and approved, and that unless said defendant, the city of Helena, is enjoined and restrained from acquiring a water supply, plant, and system, it will proceed *to acquire the same under said [394] ordinances or such others as are necessary for said purpose, as hereinbefore stated, and will engage in furnishing the said defendant, the city of Helena, and its inhabitants, with water, suitable and proper for its use, and that to do so will depreciate the value of complainant's franchise and property, as stated in paragraph 28 of the complaint, but that no injury of which complainant can complain will result therefrom if defendant city has the rights claimed by it. . . . That the revenue for said purpose will be created and raised by borrowing money or raising funds within the limit of indebtedness, as heretofore or hereafter to be extend-

ed, in accordance with the requirements of the Constitution and provisions of the statutes of the state of Montana in that behalf, unless it shall be adjudged that it has no legal or equitable right to do so, on account of the facts and admission hereinbefore stated and made."

We agree with the circuit court of appeals that, by this stipulation, the controversy was narrowed to the question of the right of the city to erect and maintain an independent plant of its own, in view of the alleged contract rights of the complainant. For that purpose, if it has the right so to do, it is conceded "it contemplates to raise funds and revenues therefor in the manner provided by law," and will raise revenues within the limits of indebtedness authorized by the Constitution and laws of Montana. This concession renders it unnecessary to notice the allegations of the complaint as to the right to tax for the purpose of erecting such works, or the alleged invalidity of any method of acquiring waterworks for the city except by purchase from the complainant.

Judgment affirmed.

[395] *JOHN F. HILL, *Plff. in Err.*,

v.

WARREN E. McCORD.

(See S. C. Reporter's ed. 395-408.)

Courts—conclusiveness of findings of fact—public lands—confirmation of premature commutation entry.

1. The conclusiveness on the courts of a finding of the Land Department, made in allowing a homestead entry, of the sufficiency of settlement, residence, and improvements, is not affected by a later decision, in a second contest between the same parties, that the alienation of the land was a bar to supplemental proofs offered in aid of a premature commutation entry.
2. A finding of a state court that, when a commutation entry under the homestead laws was allowed, neither the entryman nor the land officers had actual knowledge of the amendment of U. S. Rev. Stat. § 2301, by the act of March 3, 1891 (26 Stat. at L. 1098, chap. 561, U. S. Comp. Stat. 1901, p. 1406), which made such commutation premature, is a finding of fact, and, therefore, conclusive on the Federal Supreme Court, on a writ of error to the state court.

NOTE.—On the conclusiveness and effect of the decisions of Land Department—see notes to *Hartman v. Warren*, 22 C. C. A. 38; *Carson City Gold & S. Min. Co. v. North Star Min. Co.* 28 C. C. A. 344; *Uinta Tunnel Min. & Transp. Co. v. Creede & C. C. Min. & Mill. Co.* 57 C. C. A. 207.

On what questions the Federal Supreme
195 U. S.

3. The right to confirmation under the act of June 3, 1896 (29 Stat. at L. 197, chap. 312, U. S. Comp. Stat. 1901, p. 1409), of a commutation entry under the homestead laws, which was only invalid because prematurely made, in actual ignorance of the amendment of U. S. Rev. Stat. § 2301, by the act of March 3, 1891 (26 Stat. at L. 1098, chap. 561, U. S. Comp. Stat. 1901, p. 1406), is not defeated by the entryman's subsequent efforts to protect his grantees by taking a reconveyance, and resliding again upon the land, for the purpose of enabling him to make proof to secure the title for them.

[No. 49.]

Argued November 3, 4, 1904. Decided December 5, 1904.

IN ERROR to the Supreme Court of the State of Wisconsin, to review a decree affirming a decree of the Circuit Court of Douglas County, in that State, in favor of plaintiff, in a suit to establish a trust in certain real property. *Affirmed.*

See same case below, 117 Wis. 306, 94 N. W. 65.

Statement by Mr. Justice **Brewer**:

This was a suit in equity commenced in the circuit court of Douglas county, Wisconsin, by Warren E. McCord, to obtain a decree adjudging the defendant, now plaintiff in error, John F. Hill, the holder of the legal title to the northwest quarter of section seventeen, in township forty-eight north, of range eight west, in Bayfield county, Wisconsin, in trust for the plaintiff. A demurrer to an amended complaint was sustained by the circuit court, but this ruling was reversed by the supreme court of the state. 111 Wis. 499, 84 N. W. 27, 85 N. W. 145, 87 N. W. 481. Thereafter an answer was filed, a hearing had, resulting in a decree for the plaintiff, which was affirmed by the supreme court (117 Wis. 306, 94 N. W. 65), and thence the case was brought here on error.

The following facts were found by the trial court, and the findings were sustained by the supreme court: One Philip W. Jacobus made an actual settlement on the land in controversy on January 28, 1891, and actually established his residence thereon February 4. The land was not opened for entry until February 23, 1891, and on that day Jacobus made application at the local land office to enter it as a homestead. On

Court will consider in reviewing the judgments of state courts—see note to *Missouri ex rel. Hill v. Dockery*, 63 L. R. A. 571.

On the rights acquired by homestead settlements and entries on public lands of the United States—see note to *McCune v. Essig*, 59 C. C. A. 434.

the same day Hill filed a soldier's declaratory statement for the same tract. A contest was had before the local land officers, resulting in a decision in favor of Jacobus. On [396] appeal *to the Commissioner of the General Land Office, this decision was affirmed. Hill's declaratory statement was canceled, and the entry of Jacobus allowed on July 6, 1892. On September 20, 1892, Jacobus commuted his homestead entry, making and filing in good faith due, regular, and truthful proofs of settlement, occupation, and improvements, paying \$400, and receiving a receiver's receipt and a certificate of entry certifying that he had purchased the land, had made full payment, and was entitled, on presentation of the certificate to the Commissioner of the General Land Office, to receive a patent.

On December 27, 1892, McCord and one Daniel McLeod purchased the land in good faith of Jacobus, paying him the sum of \$4,250, and receiving a warranty deed. The negotiations between these grantees and Jacobus commenced on or about December 17, 1892, and prior to that time they had no interest in the land, and had no negotiations with him. While negotiating with Jacobus they asked Hill, at the time residing on a part of the tract, whether he had any claim upon the land, and whether Jacobus had good title thereto; and Hill then and there said to them that he had been fairly beaten in his contest with Jacobus, that he had no claim, and that if McCord and McLeod would buy the tract he would make no claim. At that time Hill knew that they were looking at the land with a view of purchasing it from Jacobus, and that the inquiry was made of him with reference to that purchase; and they did in fact rely upon Hill's statement, and purchased the land and paid for the same by reason thereof.

A few days after the deed, and on January 4, 1893, for the purpose of putting the understanding between themselves and Hill in writing, the grantees had this instrument executed and acknowledged by Hill:

For the purpose of making a settlement with John F. Hill, and his relinquishment on the N. W. $\frac{1}{4}$ of section 17, township 48, range 8 W., we hereby make him a present of a certain lot of logs, now skidded on said land, and give him permission till the 1st day of May, A. D. 1893, in which to enter on [397] said land to remove said logs, and to occupy the house on said land, and to remain on said land until that date, but not thereafter. Said logs amount to about 30,000 feet; and he agrees not to cut, nor allow any of his men to cut or destroy, any other timber. And in consideration of said logs, I, John F.

252

Hill, being duly sworn, on oath, says that *he is* the man who made a soldier's application for said N. W. $\frac{1}{4}$ of 17-48-8 W.; and I make this affidavit for the purpose of relinquishing all my right, title, and interest in and to said claim, which I do unto the United States. Signed, sealed, and delivered and agreed upon this 4th day of January, A. D. 1893. Daniel McLeod.

In presence of— W. E. McCord. [Seal.]
W. H. Packard. John F. Hill. [Seal.]
Tracy Lyon.

Prior to the commutation, and on March 3, 1891, Congress had passed an act amending § 2301 of the Revised Statutes so as to read as follows:

"Nothing in this chapter shall be so construed as to prevent any person who shall hereafter avail himself of the benefits of § 2289 (U. S. Comp. Stat. 1901, p. 1388), from paying the minimum price for the quantity of land so entered, at any time after the expiration of fourteen calendar months from the date of such entry, and obtaining a patent therefor, upon making proof of settlement and of residence and cultivation for such period of fourteen months." 26 Stat. at L. 1098, chap. 561, U. S. Comp. Stat. 1901, p. 1406.

Neither Jacobus nor the land officers had any actual knowledge or information of this enactment at the time of the commutation. On May 15, 1893, the Assistant Commissioner of the General Land Office of the United States, having had his attention called to the act, notified Jacobus that he must furnish supplemental proofs showing residence and cultivation for a period of fourteen months subsequent to July 6, 1892, together with an affidavit that he had not alienated the land. Of course, compliance with this was impossible, for Jacobus had already made a conveyance. On September 1, *1893, [398] McCord and McLeod, with their wives, made to Jacobus a deed of conveyance of the land for an expressed consideration of \$4,300, and Jacobus at the same time executed to them a mortgage upon the lands to secure the payment of the purchase money. On or about September 12, 1893, Jacobus caused to be made and filed in the local land office, in response to the order of supplemental proofs, certain affidavits and proofs, from which it appeared that the land was conveyed to McCord and McLeod and reconveyed, as hereinbefore stated; that Jacobus retained 2 acres of the land, and shortly after the sale of the said premises, and on or about February 20, 1893, he again went upon the land, and from that time up to the time of the filing of the affidavits continued to reside upon and improve the land. It did not appear that the

purpose of the reconveyance and the return of Jacobus to the land was to obtain a title for the benefit of McCord and McLeod.

On or about September 30, 1893, Hill filed in the local land office contest affidavits and objections to the receiving of said offered supplemental proofs. A hearing was had upon this contest and a large number of witnesses sworn. On August 9, 1894, the local land officers decided the contest in favor of Hill, and filed an opinion, in which they held that the residence of Jacobus up to the time of the sale and conveyance to McCord and McLeod in December, 1892, was fairly satisfactory, but that his residence after the sale and conveyance was for the sole purpose of enabling him to make proof to secure title for them, and that the land was reconveyed to him for that purpose alone. On appeal to the Commissioner of the General Land Office the findings of the local land officers were affirmed. On further appeal to the Secretary of the Interior the prior decisions were, on April 28, 1896, affirmed without any restatement of facts. On June 3, 1896, Congress passed an act containing the following provisions (29 Stat. at L. 197, chap. 312, U. S. Comp. Stat. 1901, p. 1409):

[399] "That whenever it shall appear to the Commissioner of the General Land Office that an error has heretofore been made by the officers of any local land office in receiving premature *commutation proofs under the homestead laws, and that there was no fraud practised by the entryman in making such proofs, and final payment has been made and a final certificate of entry has been issued to the entryman, and that there are no adverse claimants to the land described in the certificates of entry, whose rights originated prior to making such final proofs, and that no other reason why the title should not vest in the entryman exists except that the commutation was made less than fourteen months from the date of the homestead settlement, and that there was at least six months' actual residence in good faith by the homestead entryman on the land prior to such commutation, such certificates of entry shall be in all things confirmed to the entryman, his heirs and legal representatives, as of the date of such final certificate of entry, and a patent issue thereon; and the title so patented shall inure to the benefit of any grantee or transferee in good faith of such entryman subsequent to the date of such final certificate; *Provided*, That this act shall not apply to commutation and homestead entries on which final certificates have been issued, and which have heretofore been canceled, when the lands made vacant by such cancelation have been re-entered under the homestead act.

195 U. S.

"Sec. 2. That all commutations of homestead entries shall be allowed after the expiration of fourteen months from date of settlement."

Thereupon Jacobus made a motion before the Secretary of the Interior for a review of the decision of April 28, 1896, and also to confirm his entry under the authority of said act of June, 1896, which motions were denied. A patent was subsequently issued to Hill.

Mr. W. F. Bailey argued the cause, and, with *Mr. W. H. Stafford*, filed a brief for plaintiff in error.

Mr. Louis K. Luse argued the cause, and, with *Messrs. Lyman T. Powell* and *A. L. Sanborn*, filed a brief for defendant in error.

**Mr. Justice Brewer* delivered the opinion. [400] ion of the court:

There are two well-settled rules of decision, invoked respectively by the parties. One, that findings of fact made by the Land Department in the progress of a contest before it are conclusive upon the courts; the other, that questions of fact decided by a state court are not subject to review by this court in proceedings on error.

Upon the record these questions of fact and law appear: First. Was the original entry allowed to Jacobus on July 6, 1892, rightful? In other words, was his evidence of settlement, occupation, and good faith true, and, if so, did it entitle him to priority over Hill, his contestant? Second. If that entry was valid, was the commutation entry made on September 20, 1892, illegal? Third. If so, was the defect which invalidated it subject to removal under the act of June 3, 1896? Fourth. If removable, was there anything in the conduct of Jacobus or his grantees after the original entry to prevent the removal?

With reference to the first question, it appears that the original entry to Jacobus followed a contest between himself and Hill. In that contest testimony was taken before the local land officers upon the question whether Jacobus had performed the acts required of a settler upon public lands, and, upon a review, the Commissioner of the General Land Office, on April 29, 1892, found in favor of his settlement, residence, and improvements, and allowed the entry. No appeal was taken from this decision, and if nothing else appeared the findings would obviously be conclusive in the courts as between Jacobus and Hill. It is undoubtedly true that, until the legal title has passed from the government, proceedings in the land office are *in fieri*, and a question, whether of fact or law, may be reopened for consideration. *Michigan Land & Lumber Co. v. Rust*, 168 U. S. 589-592, 42

L. ed. 591, 592, 18 Sup. Ct. Rep. 208, and cases cited. It is insisted that the validity [401] of the original entry was relitigated *in the land office in pursuance of the contest made by Hill in October, 1893, and a different conclusion reached. While the power of re-examination is not to be doubted, yet a decision upon a question of fact, once made in a special proceeding finally terminated, should not be regarded as overthrown by findings in a subsequent proceeding in the Department unless it appears that those findings directly overrule, or are necessarily inconsistent with, the prior decision. The application of Hill, in 1893, to contest the entry of Jacobus, charged as a basis of contest that Jacobus never settled on the land in good faith, but for the purpose of speculation; that he did not reside on the land during the next six months preceding the making of his final proof, and that he had sold the land to one W. E. McCord. A hearing was had upon this contest before the local land officers, and quite a volume of testimony taken. Their decision was adverse to Jacobus. It was affirmed by the Commissioner of the General Land Office, and reaffirmed by the Secretary of the Interior. In their decision the local land officers stated the questions to be considered in these words:

"Letter 'H' of November 18, 1893, directed this office to order a hearing on the charges.

"The two questions to be passed upon are: (1) Did Jacobus abandon the land? (2) Was the sale of the land to McCord and McLeod a bar to the offering of supplemental proof?"

And upon the first question they found as follows:

"Upon the first point the testimony of the witness is extremely conflicting. It is admitted by Jacobus that he worked at his trade in Superior and Iron River most of the time during his occupancy of the land, but it seems also fairly well established by the testimony of Mrs. Jacobus and numerous other witnesses that her residence was upon the land, barring certain absences on account of sickness and visits. Their cabin and its housekeeping equipment were superior to those of most homesteaders, and the clear- [402] ing, in extent and *cultivation, compared favorably with that of others in the same neighborhood.

"After learning that supplemental proof would probably be required, Mrs. Jacobus returned to the land in February, 1893, where she remained about a week, when she returned to Iron River and remained for some weeks while being treated for rheumatism. She made a brief visit to the claim in March, went there again in the latter part of May, remaining two weeks, and returned for the same time in July. This was apparently

her last stay upon the land until after supplemental proof was offered, September 20. A small crop of vegetables and hay was raised that season, as in the two years before.

"Upon the whole, the residence of Jacobus upon the land was fairly satisfactory until after the offering of his first proof; but it is clear that his subsequent residence was for the sole purpose of enabling him to make proof in order to secure title for his transferees."

After this they considered the effect of the sale of the land to McCord and McLeod, and in so doing commented upon the character of the occupation by Jacobus and his wife during the spring and summer of 1893, closing with a decision in these words: "We are of the opinion therefore, that Jacobus' supplemental proof cannot be sustained, and that the entry should be canceled and a preference right of entry awarded the contestant, Hill."

Apparently the character of the occupation and improvements by Jacobus prior to the original entry of July 6, 1892, was not a matter considered by the local land officers, although it is true that there was some testimony respecting it. They did not pretend to disturb the approval of the sufficiency of Jacobus' occupation and improvements made in allowing that entry after the conclusion of the original contest between Hill and Jacobus. They assumed that that matter was already settled. This is evident from the two questions which they say were presented, and if they considered it at all, they doubtless *thought the testimony was not [403] such as to justify any change in the previous conclusion. This decision was affirmed by the Commissioner of the General Land Office. In his opinion, after reciting the contest, the decision, and the grounds of appeal, the fact of the commutation of the homestead entry, the direction to Jacobus to furnish supplemental proof, as the commutation was premature, he says:

"It is shown by the evidence that defendant had a small log house on the land; that it was well finished and well furnished; that he had about 2 acres cleared; that the improvements were worth about \$200. He did not have any stock of any description, no chickens or other poultry; that on December 27, 1892, defendant sold said land to David McLeod and W. E. McCord for \$4,250 cash.

"On the question of residence the testimony is very conflicting.

"Defendant's wife stayed on the land a part of the time and defendant worked in his barber shop in the town of Iron River, and stayed there nearly all the time, working at his trade; he made occasional visits to the land on the Sabbath day.

"It also appears that the defendant rented three rooms in Iron River after he had sold the land, and he, with his wife, moved into them; that after defendant learned that he was required to furnish supplemental proof, because his commutation was premature, his wife moved back to the land, but defendant still remained in Iron River, making occasional visits to the land on the Sabbath and returning the same day."

Obviously the time of occupation referred to was after the commutation. This is made clear by a comparison of this opinion with that of the local land officers. If other grounds were relied on than those stated in the opinion of the local land officers, they would have been distinctly stated, and the fact that the decision was based upon the character of the occupation and improvements prior to the original entry would [404] have been made clear. This conclusion is strengthened by the final declaration of the Commissioner:

"The sale and conveyance of the land is clearly proven, and it is also as clearly shown that the land was reconveyed to defendant so that he could submit his final supplemental proof for the benefit of McLeod and McCord; hence your opinion is affirmed."

This decision of the Commissioner of the General Land Office was sustained by the Secretary of the Interior in an opinion which contains no recital of facts, but simply says:

"Said decision fairly sets forth all the facts in this case, and the conclusion therein reached is sustained by the testimony, and is in conformity with law and the decisions of the Department, and is hereby affirmed."

In the final opinion of the supreme court of the state is this statement:

"We still think it plain, therefore, that no questions involving Jacobus' proceedings up to and including the final proof of September, 1892, were passed upon in the consideration of the contest had in 1894. Indeed, this seems to be the view of appellant's counsel as well, for he declares in his brief that 'no question of *mala fides* was found in the making of proofs [of September, 1892], nor was the subject considered. Simply from the evidence, which was the same as the affidavits, they determined the second question which they stated at the outset, that the sale of the land to McCord and McLeod was a bar to the offering of supplemental proof.'" [117 Wis. 313, 94 N. W. 67.]

While no such admission is found in the brief filed in this court, possibly the omission may have been induced by the stress of the case.

We agree, therefore, with that court, that there is nothing in the record to justify a conclusion that the Land Department ever

changed its finding, made in allowing the original entry, of the sufficiency of Jacobus' occupation and improvements up to that time.

It is also worthy of notice in passing that the supreme court, in its opinion, held that [405] the representations and instrument made and executed by Hill estopped him from questioning the validity of the original entry, so far, at least, as against the plaintiff, although they would not bar the United States from reclaiming the land.

We proceed, therefore, to a consideration of the other questions. At the time the commutation was allowed neither Jacobus nor the land officers had actual knowledge of the act of March 3, 1891. Such is the finding of the state court, and, being a question of fact, this finding is conclusive. Prior thereto a commutation made as this was would have been valid, and there is neither finding nor testimony that Jacobus or the land officers acted in bad faith in the matter. There was simply a proceeding, theretofore legal and proper, taken in actual ignorance of a restraining statute. The act of 1896 was obviously passed to reach such a case as this, in which a commutation was allowed within less than fourteen months from the date of the homestead entry, and to do away with the objection on account of the matter of time. Certain provisions were incorporated in order to prevent injustice to other parties. But, as between the government and the entryman, its purpose was to give validity to the commutation if it would have been valid had not the act of 1891 been passed.

Upon what ground did the Land Department set aside the commutation entry, and afterwards refuse to reinstate it? The original entry was July 6; the commutation September 20,—not three months thereafter. The act of 1891 allowed commutation only fourteen months or over after the entry. The commutation, therefore, was illegal. Within less than six months after the original entry, and four months after the commutation, Jacobus sold and conveyed the land, and his grantees became thereafter the parties solely interested. Pre-emption and homestead entries by statute must be made for the exclusive use and benefit of the parties making the entries (Rev. Stat. §§ 2262, 2290), and in each case an affidavit to that effect is required. Whatever Jacobus did after his conveyance in December, 1892, was not for his [406] exclusive use and benefit. He attempted to get around the limitations and requirement of the statute by taking a reconveyance from his grantees, giving to them, at the same time, a mortgage to secure the consideration stated in the deed, and by an affidavit stating that, at the time of his conveyance, in

December, he reserved about 2 acres of land where his house and other improvements were located, and that when he heard of the act requiring fourteen months' residence before commutation he again took possession of the tract, and continued in occupation and cultivation. This was held insufficient to avoid the restraint of the statute, and upon this ground the commutation entry was set aside. The local land officers, in their opinion, say:

"The bare statement of facts points to the conclusion that the sale of the land in December, 1892, was absolute, and that the subsequent residence of Jacobus upon the land was as the agent of the transferees, and for the purpose of acquiring title for them. This conclusion is strongly supported by the admission of Jacobus upon cross-examination.

"Jacobus, by the deed executed in December, 1892, divested himself of all right and title to the land. Granting, therefore, that the reconveyance of September 1st, 1893, was made in good faith by all parties, the slender residence of the wife, during the spring and summer of 1893, was not upon the homestead of Jacobus, but upon land in which he had no claim or interest, and the residence, such as it was, could not avail him in making supplemental proof. But we think all the circumstances—the time at which the conveyance from McCord and McLeod to Jacobus was made, the execution of the mortgage, and the evidence of Jacobus himself—show that the land was not reconveyed to Jacobus in good faith, but for the sole purpose of enabling him to make supplemental proof for the benefit of his grantees. We are of the opinion, therefore, that Jacobus' supplemental proof cannot be sustained, and that the entry should be canceled, and a [107] preference right *of entry awarded to the contestant, Hill."

While the Commissioner of the General Land Office, in his opinion, concludes:

"The sale and conveyance of the land is clearly proven, and it is also clearly shown that the land was reconveyed to defendant so that he could submit his final supplemental proof for the benefit of McLeod and McCord; hence, your opinion is affirmed, and defendant's homestead and his cash entry for the land involved is held for cancellation."

While these opinions may have correctly declared the law as it stood when they were delivered, we may remark, in passing, that Jacobus seems to have acted in an honest effort to protect his grantees from the consequences of a mistake made by himself and the local land officers at the time of the commutation.

When the act of 1896 was passed the matter was still pending in the Department, and

no entry had been made by Hill. The motions by Jacobus for a review and to confirm his entry were denied by the Secretary of the Interior, the ground of the decision being, as stated in a communication to the Commissioner of the General Land Office:

"The evidence in the cases at bar clearly shows that the entry was not made in good faith, and the proof submitted by the entryman was fraudulent, as fully set out in your office decision of January 23, 1895.

"It is likewise impossible to confirm the entry under the provisions of the act of June 3, 1896, for the same reason; namely, the practice of fraud in making proofs."

The reference in this to the decision of the Commissioner makes it clear that the fraud and the want of good faith mentioned were in the commutation entry and the supplemental proofs. Evidently the Secretary ruled that the act of 1896 did not confirm a previous premature commutation entry if the entryman was guilty of any fraud or wrong subsequent thereto in attempting to make good the title acquired thereby. We do not so understand the law. If, at the time of the commutation *entry, there had [408] been no fraud or lack of good faith, and the only defect was in the matter of time, we do not think the confirmation authorized by the act of 1896 is destroyed by anything like that shown to have been done by Jacobus in his effort to protect the title he had conveyed to McCord and McLeod. In other words, if the commutation entry was rightful save for the fact that it was premature, the act of 1896 does away with that objection and confirms the entry; and the right to that confirmation is not destroyed by that which the entryman may have done in a subsequent effort to protect his title.

We see no error in the proceedings, and the judgment is affirmed.

FANNIE N. DRESSER CRAMER *et al.*,
Plffs. in Err.,
v.

FRÉDÉRIC R. WILSON, *Def. in Err.*

(Sec S. C. Reporter's ed. 408-417.)

Error to state court—Federal question—constitutional law—full faith and credit.

1. The contention that a conveyance was either in fraud of creditors under the state law, or that a residuary estate remained in the grantor which would pass under an as-

NOTE.—On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to *Missouri ex rel. Hill v. Dockery*, 63 L. R. A. 571.

On conclusiveness of judgments generally—see notes to *Sharon v. Terry*, 1 L. R. A. 572;

signee's sale in proceedings in bankruptcy, presents a local, and not a Federal, question, and cannot, therefore, be considered by the Federal Supreme Court on writ of error to a state court.

2. Full faith and credit are not denied an order of a court of bankruptcy refusing to set aside the sale by an assignee, for inadequacy of price and want of notice of sale, by the refusal to treat such order as *res judicata* as to the bankrupt's interest in the property, where the order of sale directed the assignee to sell simply "the interest of such bankrupt and of said assignee," without attempting to adjudicate the amount of that interest, if any.

[No. 47.]

Submitted November 3, 1904. Decided December 5, 1904.

IN ERROR to the Supreme Court of the State of Illinois to review a judgment which, on a second writ of error, affirmed a judgment of the Superior Court of Cook County in that State in favor of defendant, in a suit to establish title to real property. *Affirmed.*

See same case below, 202 Ill. 83, 66 N. E. 869; on first writ of error, 152 Ill. 387, 38 N. E. 888.

Statement by Mr. Justice **Brown**:

This was a bill originally filed February 1, 1888, in the superior court of Cook county [409] by the plaintiff in error, Cramer,* under her then name of Fannie N. Dresser, against her sister, Lilly B. Dresser, Henry H. Gage, Julia Wilson, and two others for the partition of certain real estate in Chicago, for a settlement of equities or liens thereon, for a receiver, and for the removal of certain clouds upon complainant's title.

The material facts of the case are as follows: Shortly before the beginning of this suit Fannie N. Dresser was the record owner of the property in question through a patent from the United States. On January 31, 1888, the day before this suit was commenced, Fannie N. Dresser conveyed to her sister, Lilly B. Dresser, an undivided one third of the property in question. The court found this deed to have been collusive, and executed by an arrangement with the defendant Gage, who held certain tax deeds to the premises, found to be invalid, and for the purpose of filing this bill for partition, and the removal of a cloud upon the title caused by another tax deed, acquired by Frederick R. Wilson in 1864. His interest

in the property was conveyed by him to his sister, Julia Wilson, in 1877. Julia Wilson was made defendant to the bill as the owner of this tax title.

It appeared, however, that Julia Wilson died on December 15, 1887, leaving Frederick R. Wilson her sole legatee and executor. The suit was then abated as to Julia Wilson, and Frederick R. Wilson was substituted as defendant in her place. The deed to this property from Frederick R. Wilson to his sister was a conditional conveyance, but by agreement of the parties it was subsequently treated by them as absolute; and upon the death of Julia Wilson, in December, 1887, the property again became vested in Frederick R. Wilson as her only heir at law and next of kin, and as her sole devisee under her last will and testament. Shortly after the deed to Julia, Frederick R. Wilson went into bankruptcy (August 30, 1878), and Robert E. Jenkins was appointed his assignee. The property was subsequently ordered to be sold, and in 1889 was purchased from the assignee by one Taylor E. Snow for the sum of \$250. Both Jenkins, the assignee, and Snow, the purchaser, were *made parties defendant to the [410] bill, and subsequently filed answers and a cross bill.

It appeared that Gage, after the beginning of the suit, bought the interest of Lilly B. Dresser, and also that the purchase by Snow at the bankruptcy sale was made in his interest; so that the real parties to this litigation are Gage upon one side and Wilson upon the other.

Upon the first hearing, the court entered a decree of partition denying Wilson's claim of title, and holding that his interest passed to Snow by the assignee's sale. This decree was reversed by the supreme court of Illinois upon the ground that the plaintiff had not proved her title from the government to the property. Leave was given the parties to amend, and subsequently an amended bill was filed and answered. Upon the second hearing, the court held that the premises were the property of Frederick R. Wilson, and had been his from 1864 until 1877, when he conveyed them to his sister; that at the time of bankruptcy proceedings, in 1878, the title was in Julia Wilson, and that upon the death of Julia Wilson, in 1887, the title again vested in Frederick R. Wilson; that at the time Frederick R. Wilson was adjudged a bankrupt Julia Wilson was alive

Bollong v. Schuyler Nat. Bank, 3 L. R. A. 142; Wiese v. San Francisco Musical Fund Soc. 7 L. R. A. 577; Morrill v. Morrill, 11 L. R. A. 153; Bank of United States v. Beverly, 11 L. ed. U. S. 76; Johnson Steel Street R. Co. v. Wharton, 38 L. ed. U. S. 429; Southern P. R. Co. v. United States, 42 L. ed. U. S. 355.

As to full faith and credit to be given to
195 U. S.

state records and judicial proceedings—see Lindley v. O'Reilly, 1 L. R. A. 79, and note; Cummington v. Belchertown, 4 L. R. A. 131, and note; Rand v. Hanson, 12 L. R. A. 574, and note. And see notes to Wiese v. San Francisco Musical Fund Soc. 7 L. R. A. 578; Darby v. Mayer, 6 L. ed. U. S. 367; Mills v. Duryee, 3 L. ed. U. S. 411.

and vested with the title to this property, and that the defendant Snow acquired no title when he purchased all of the estate, real and personal, of the bankrupt, Frederick R. Wilson.

This decree was affirmed by the Illinois supreme court (202 Ill. 83, 66 N. E. 869), and it is to reverse that decree that plaintiffs have taken a writ of error from this court.

Messrs. Frederick W. Becker, Robert A. Childs, and Charles Hudson submitted the cause for plaintiffs in error.

Messrs. David K. Tone and George Gillette submitted the cause for defendant in error.

Mr. Justice **Brown** delivered the opinion of the court:

Upon the first hearing, the superior court entered a decree of partition, finding that the Dresser sisters were the owners of the property at the beginning of the suit, through a title derived from the government; that after the suit began Lilly B. Dresser conveyed her interest to Henry H. Gage; that Julia Wilson, to whom her brother, Frederick R. Wilson, had conveyed his interest in the property, died testate, leaving her interest in the property to Frederick R. Wilson, and that this interest subsequently passed to Snow by purchase from the assignee, Jenkins.

This decree was reversed by the supreme court (152 Ill. 387, 38 N. E. 888), which held that there was no evidence of a title in fee in complainants, derived from the government; that, although Frederick R. Wilson showed a deed to himself from the city of Chicago, dated May 24, 1864, and possession under such deed, he conveyed his interest to his sister, Julia Wilson, in 1877; that about a year thereafter he went into bankruptcy, and that at the assignee's sale nothing passed to the purchaser, Snow, but the interest of the bankrupt on August 30, 1878. "But," said the court, "the evidence shows that at that time he had no interest, having, more than a year prior to that date, July 6, 1877, conveyed it to Julia Wilson; and the evidence is undisputed as to the fact that [415] she took possession *under that deed, and retained it by her tenants to the date of her death, and that her tenants remained in such possession when this suit was begun." The court found that there was nothing to show that Julia Wilson had not died seised of the property, and that it was not until her death, in 1887, that defendant became repossessed of it. The case was reversed, and remanded with leave to amend the pleadings and put in additional testimony.

Upon a rehearing in the superior court,

a decree was entered in favor of the defendant, Wilson, establishing his title to the premises, subject to the repayment of certain taxes paid by Gage. Upon the second appeal to the supreme court that court held that, it having been shown that defendant and his sister had been in possession of the property for more than twenty years prior to the bringing of that suit, defendant had a good title by limitation, unless it was cut off and defeated by the assignee's sale to Snow; but that, as he had sold to his sister, Julia Wilson, in July, 1877, thirteen months before the bankruptcy, and she had taken possession, he had no title, and none passed to Snow by purchase from the assignee.

Complainants, however, took the position that the deed from Wilson to his sister was not absolute, but was made to secure a debt, and was constructively a mortgage, and that an equity of redemption remained in Frederick R. Wilson, which would pass to Snow as purchaser at the time of the assignee's sale. But the court held that, under the arrangement between the parties, the deed became absolute long before the defendant was adjudged a bankrupt. That, under the law of Illinois, when land has been conveyed by deed, absolute in form, though intended as security for the payment of a debt, the payment of the debt may be abandoned, and the deed treated as an absolute conveyance, although originally intended as a mortgage, and that such arrangement may be made by parol, and be binding. 202 Ill. 83, 66 N. E. 869.

It thus appears that the case turned upon the validity of the deed from the appellee to his sister, Julia Wilson. It was *insisted [416] that the deed was either fraudulent and void as against creditors, or that a residuary interest remained in Frederick R. Wilson, which would pass under the assignee's sale. This was a local, and not a Federal, question. The deed, having been made a year before the proceedings in bankruptcy were begun, and eleven years before the commencement of this suit, was not attacked as invalid under the bankrupt law of 1867 [14 Stat. at L. 517, chap. 176], then in force, but as a fraudulent conveyance under the state law. The question of fraud was ignored by the state court, although it was directly involved in the issue; and, hence, must be treated as overruled. It was admitted that, if the property were that of Julia Wilson at the commencement of the bankruptcy proceedings, nothing passed under the assignee's sale; and it was only upon the theory that it was the property of the bankrupt that the assignee could convey anything to the purchaser. To reverse the state court upon this point would be to hold that it improperly construed its own laws with reference to

fraudulent conveyances. The assignee's sale as a conveyance of the property of the bankrupt was not attacked in any way. He was a mere conduit through which the interest of Frederick R. Wilson, if he had any for himself or his creditors, passed to Snow. We have repeatedly held that, when the question in a state court is not whether, if the bankrupt had title, it would pass to his assignee, but whether he had title at all, and the state court decided that he had not, no Federal question is presented. *Scott v. Kelly*, 22 Wall. 57, 22 L. ed. 729; *McKenna v. Simpson*, 129 U. S. 506, 32 L. ed. 771, 9 Sup. Ct. Rep. 365. The same principle was applied to a different class of cases in *Blackburn v. Portland Gold Min. Co.* 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222; *De Lamar's Nevada Gold Min. Co. v. Nesbitt*, 177 U. S. 523, 44 L. ed. 872, 20 Sup. Ct. Rep. 715. In *Williams v. Heard*, 140 U. S. 529, 35 L. ed. 550, 11 Sup. Ct. Rep. 885, relied upon by the plaintiff in error, the property in dispute belonged admittedly to the bankrupts, and the question was whether it was of such a character as to pass to their assignee. Of course, this involved a construction of the bankrupt act.

[417] If there be any Federal question, it arises from the denial of the petition of the appellee filed in the bankruptcy court *September 17, 1889, about two months after the sale was confirmed, to set aside and vacate such sale for inadequacy of price and want of notice that the sale would take place. It is insisted that this denial was *res judicata* of Wilson's interest in the property, and that the refusal of the court to so treat it denied to the order of the bankruptcy court the full faith and credit to which it was entitled. But, on referring to the order of sale of June 27, 1889, we find that the assignee was directed to sell simply "the interest of such bankrupt and of said assignee," without attempting to adjudicate what that interest was, or whether he had any interest at all. It was left for other courts in other proceedings to determine what his interest, or that of his creditors, was on August 30, 1878, the day on which he was adjudged a bankrupt. That interest would, of course, pass to the assignee. We have already seen that the supreme court found he had none upon that day. The district court authorized the sale of such as he had, but made no attempt to determine or guarantee that he had an interest that would pass by the sale. The refusal to set aside the sale was largely a matter of discretion, and may have been justified by the consideration that the bankrupt was not injured by the fact that it had taken place. There was certainly no attempt to adjudicate the amount of his interest.

195 U. S.

The circumstance that, nine years after his adjudication in bankruptcy, he took title to the property as the devisee of his sister, does not lend any significance to the fact that, at the date of his bankruptcy, his sister was the owner, in possession by tenants, and that the supreme court found her title to be absolute.

The decree of that court is, therefore, affirmed.

*UNITED STATES, Appt., [418]

v.

CHARLES M. THOMAS. (No. 94.)

CHARLES M. THOMAS, Appt.,

v.

UNITED STATES. (No. 95.)

(See S. C. Reporter's ed. 418-427.)

Navy—equalization of Army and Navy pay—sea service.

1. The allowances of increased pay to Army officers serving in certain insular possessions of the United States and in Alaska, and to such officers serving beyond the limits of the United States, which are given respectively by the Army appropriation bills of May 26, 1900 (31 Stat. at L. 211, chap. 586), and March 2, 1901 (31 Stat. at L. 903, chap. 803, U. S. Comp. Stat. 1901, p. 896), do not inure to naval officers discharging their ordinary sea duties, by reason of the Navy personnel act of March 3, 1899 (30 Stat. at L. 1007, chap. 413, U. S. Comp. Stat. 1901, p. 1072), equalizing the pay of Army and Navy officers, since to hold otherwise would render meaningless the proviso of § 13 of that act, that naval officers when "detached for shore duty beyond seas" shall receive the same pay as Army officers detached for the same duties.
2. A naval officer is not entitled to sea pay while occupied in traveling on duty partly on a merchant steamer and partly on land, and in reporting to the Navy Department, since this is not sea service within the meaning of U. S. Rev. Stat. § 1571, U. S. Comp. Stat. 1901, p. 1079, declaring that "no service shall be regarded as sea service except such as shall be performed at sea, under the orders of a department, and in vessels employed by authority of law."

[Nos. 94, 95.]

Argued October 11, 1904. Decided December 5, 1904.

A PPEALS from the Court of Claims to review a decree made on rehearing allowing in part, and disallowing in part, claims for additional pay to a naval officer, under the Navy personnel act. *Reversed* and remanded, with directions to reinstate the original judgment.

See same case below, 38 Ct. Cl. 113. On motion for new trial. 38 Ct. Cl. 719.

Statement by Mr. Justice **Brown**:

This was a petition for certain allowances claimed to be due petitioner as a captain in the United States Navy, under act of March 3, 1899 (30 Stat. at L. 1007, chap. 413, U. S. Comp. Stat. 1901, p. 1072), equalizing the pay of Army and Navy officers, and known as the Navy personnel act. The findings of fact are too long to be here reproduced, but the several items claimed by petitioner, and from the disposition of which these appeals are taken, are cited by counsel in their brief and by the court of claims as follows:

1. From May 26, 1900, to March 1, 1901, he was paid sea pay of a captain, at \$4,500 a year, and claims 10 per cent increase of this pay for services in the Philippines and in China, under the acts of May 26, 1900, and March 2, 1901. 31 Stat. at L. 211, chap. 586, and 31 Stat. at L. 903, chap. 803, U. S. Comp. Stat. 1901, p. 896.

2. From March 2, 1901, to June 11, 1901, he was paid the sea pay of a captain,—[419] \$4,500 a year,—and claims 10 per cent *increase of this pay for service outside the United States, under the provisions of the act of March 2, 1901.

3. From June 12, 1901, to September 30, 1901, he was paid sea pay at \$4,500 a year, and claims 10 per cent increase under the act of March 2, 1901, for service outside the United States. During this time he was in the waters of the San Francisco bay, traveling from San Francisco to Puget sound, and in the waters of Puget sound. This claim is made provisionally in case his service in Chinese and Philippine waters is not considered to be service "in China" and "in the Philippine islands," entitling him to 10 per cent increase from May 26, 1900, to March 1, 1901. In that event he would claim that his service in waters of the United States was beyond the limits of the states comprising the Union.

4. Between December 2, 1899, when relieved as commanding officer of the U. S. S. Lancaster, and ordered to report to the Navy Department, and February 7, 1900, when he took command of the U. S. S. Baltimore at Hong Kong, China, he was paid only shore pay,—\$3,825 a year,—15 per cent less than sea pay. He claims sea pay,—\$4,500 a year, during that time.

The last item was disallowed. The first three items were at first disallowed, but, on a rehearing, were allowed and final judgment rendered for \$568.29. 38 Ct. Cl. 113, 719. Both parties appealed to this court.

Assistant Attorney General **Pradt** argued the cause, and, with Mr. John Q. Thompson, filed a brief for the United States.

Messrs. **George A. King** and **William B. King** argued the cause and filed a brief for Thomas.

Mr. Justice **Brown** delivered the opinion of the court:

This case depends upon the construction given to § 13 *of the Navy personnel act, de-[420] clarating that "after June 30, 1899, commissioned officers of the line of the Navy and of the medical and pay corps shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for officers of corresponding rank in the Army." The object of this act can best be understood by considering the prior legislation of Congress upon the same general subject, and the circumstances under which the act was passed. By the act of July 16, 1862 [12 Stat. at L. 585, chap. 183] (Rev. Stat. § 1466, U. S. Comp. Stat. 1901, p. 1030), the relative rank of Army and Navy officers was fixed by declaring that rear admirals shall rank with major generals, commodores with brigadier generals, captains with colonels, commanders with lieutenant colonels, lieutenant commanders with majors, lieutenants with captains, etc.

It was, however, a source of dissatisfaction to Navy officers that some of them did not receive the same pay as corresponding officers of the Army, although others received a larger pay. Thus, by §§ 1261 and 1556 (U. S. Comp. Stat. 1901, pp. 893, 1067), the highest pay of a rear admiral, when at sea, was \$6,000, while a major general received \$7,500; a commodore received \$5,000 when at sea, while a brigadier general received \$5,500. A captain, however, when at sea received \$4,500, while a colonel received but \$3,500.

To remove this dissatisfaction Congress passed the Navy personnel act, assimilating the pay of Navy officers to Army officers of corresponding rank, with a proviso, however, "that no provision of this act shall operate to reduce the present pay of any commissioned officer now in the Navy; and in any case in which the pay of such an officer would otherwise be reduced he shall continue to receive pay according to existing law."

The effect of this legislation was to raise the pay of certain Navy officers to that received by Army officers of corresponding rank, and to leave undisturbed the present pay of certain other Navy officers, who were already receiving higher pay than Army officers of the same rank.

The intention of Congress was evidently to put officers of *the Army and Navy on the[421] same footing with respect to their general pay, and to make the act prospective in its application to future legislation, so that if Congress should thereafter raise the general

pay of Army officers as fixed by Revised Statutes, § 1261, U. S. Comp. Stat. 1901, p. 893, a like increase should apply to Navy officers. It does not, however, follow that Congress may not increase the pay of Army officers for services in particular places or under special circumstances, without thereby intending that the same increase shall apply to naval officers performing the same service under like circumstances. Thus, if the act should allow Army officers increased pay when ordered to sea or to a foreign port, it would not follow that naval officers would be entitled to a like increase, since such service would be wholly exceptional in the case of Army officers, while it is the natural and normal duty of Navy officers to engage in sea service, cruise in foreign waters, and lie up in foreign ports. It never could have been the intention of Congress to disable itself from awarding to a particular class of Army officers an increase of pay for exceptional services without thereby increasing the pay of Navy officers, whose lives are largely passed in performing like services.

Confirmation of this view is found in the 2d proviso of § 13, "that when naval officers are detailed for shore duty beyond seas they shall receive the same pay and allowances as are or may be provided by or in pursuance of law for officers of the Army detailed for duty in similar places." Here is a distinct recognition of the fact that when naval officers are detailed for a special or unusual duty beyond seas, they shall receive the same pay as Army officers detailed for the same duties. This provision, however, would be wholly unnecessary if the act were given the broad application contended for, since the increased pay allowed to Army officers for duty beyond seas would apply to naval officers, without a special proviso to that effect. Shore duty beyond seas being an exceptional duty, both to officers of the Army and Navy, and being probably attended by increased expenditures, and dangers incident [422] to *a tropical climate, it is very natural that Congress should award them both increased compensation.

The principal questions in this case, however, arise from the Army appropriation bills of May 26, 1900, and March 2, 1901, making appropriation for the support of the Army for the year ending June 30, 1901, and 1902, the first of which contains the following proviso:

"*Provided*, That hereafter the pay proper of all officers and enlisted men serving in Porto Rico, Cuba, the Philippine islands, Hawaii, and in the territory of Alaska, shall be increased 10 per cent for officers and 20 per cent for enlisted men, over and above the rates of pay proper as fixed by law in time of peace." 31 Stat. at L. 211, chap. 586.

195 U. S.

Here is an increase of 10 per cent allowed to Army officers serving in certain designated places. Doubtless if naval officers were detailed for shore duty in any of these islands they would receive a like increase of pay, under the proviso of § 13 of the personnel act, heretofore quoted. But, unless they are detailed for shore duty, it is impossible to hold that they are entitled to extra pay, without treating as obsolete the above proviso requiring such detail.

The act of March 2, 1901 (31 Stat. at L. 903, chap. 803, U. S. Comp. Stat. 1901, p. 896), making appropriation for the support of the Army for the fiscal year ending June 30, 1903, contains the following proviso:

"*Provided*, That hereafter the pay proper of all officers and enlisted men serving beyond the limits of the states comprising the Union, and the territories of the United States contiguous thereto, shall be increased 10 per centum for officers and 20 per centum for enlisted men, over and above the rates of pay proper as fixed by law for time of peace, and the time of such service shall be counted from the date of departure from said states to the date of return thereto:

"*Provided further*, That the officers and enlisted men who have served in China at any time since the 26th day of May, 1900, shall be allowed and paid for such service the same increase of pay proper as is herein provided for."

*Under this proviso an Army officer ordered [423] to the Philippine islands receives an increase of pay from the day he leaves San Francisco until he returns there. This allowance was undoubtedly based upon the consideration that service, both in the Philippines themselves and upon the voyage going and returning, was an exceptional service, attended by peculiar hardships; but to say that Navy officers shall be entitled to the same increase is practically to add 10 per cent to their sea pay from the moment they leave a port of the United States until they return thereto; in other words, to increase their normal sea pay 10 per cent whenever they are serving beyond the limits of the states.

So far as applied to naval officers, it goes further than this. The act of 1901 does not, as did the act of 1900, limit the increase of pay to officers serving in our island possessions and in Alaska, but extends it to all serving beyond the limits of the United States, so that, if applied to naval officers, whenever a vessel is ordered to sea beyond the 3-mile limit, be it only upon a practice cruise or a voyage from Pensacola to New York, every officer on such vessel is entitled to a 10 per cent increase of his ordinary pay from the day he sets sail until the day he returns.

It is not for a moment to be supposed that Congress contemplated any such sweeping innovation. This construction would not only render nugatory and obsolete the proviso of the personnel act that officers, to be entitled to Army pay, shall be detailed for shore duty, but largely discriminates in favor of naval officers by adding 10 per cent to their pay for their normal sea duties without a corresponding addition to the pay of Army officers for the performance of *their* normal duties, which are upon land; in other words, instead of assimilating the pay of Army and naval officers, it actually dissimilates them.

In our opinion the proviso that naval officers shall be entitled to Army pay "when detailed for shore duty beyond seas" is not repealed or rendered inoperative by anything [424] contained in the acts of May 26, 1900, and March 2, 1901, and that naval officers are not entitled to an increase of pay while discharging their ordinary sea duties.

It is significant in this connection to notice that in the appropriation act of March 2, 1901, for the support of the Army for the fiscal year of 1902, there was an item of \$500,000, for an "additional 10 per centum increase on the pay of officers serving at foreign stations." 31 Stat. at L. 903, chap. 803. This was followed by a similar provision in the appropriation act of June 30, 1902, for the year of 1903, the amount appropriated being \$451,456 (32 Stat. at L. 507-512, chap. 1328), and in the Army appropriation act of March 2, 1903, for the year 1904, there was also an item of \$200,000, for the same purpose. 32 Stat. at L. 933, chap. 975. So also in the appropriation act of April 23, 1904 (33 Stat. at L. 259-266), for the year 1905, there is an item for an additional 10 per centum increase on the pay of commissioned officers serving in the Philippine islands, the island of Guam, Alaska, China, and Panama, of \$167,426.30.

Notwithstanding these repeated provisions for the increase of Army pay, Congress has never made an appropriation for the largely increased pay to which naval officers would be entitled under the acts of 1900 and 1901, or otherwise recognized their claim for increased pay to which such officers would be entitled upon the theory of the petitioner in this case. This omission lends support to the theory that Congress supposed that the ordinary sea services of naval officers were sufficiently compensated by the addition of 15 per centum to their shore pay.

2. Different considerations apply to the claim of petitioner to sea pay from December 2, 1899, to February 7, 1900. Claimant was relieved as commanding officer of the

Lancaster, then at Barbadoes, December 2, 1899, and ordered to report to the Navy Department, where he arrived, by merchant steamer, December 12, 1899. Upon the following day he was ordered to proceed to Hong Kong, for duty on the Asiatic station, and sailed by merchant steamer from San Francisco, *January 6, 1900. He reported in [425] obedience to his orders, and was assigned to the command of the Baltimore at Hong Kong, February 7, 1900. Between December 2, 1899, and February 7, 1900, petitioner was occupied in traveling on duty, partly on merchant steamer and partly on land, and in reporting to the Navy Department. During this time his pay was reduced 15 per cent from the regular sea pay, in accordance with the first proviso of the personnel act, which declares that "such officers, when on shore, shall receive the allowances, but 15 per centum less pay than when on sea duty."

The order detaching him from the Lancaster was as follows:

Sir: You are hereby detached from duty in command of the U. S. T. S. Lancaster, will proceed immediately to Washington, D. C., and report at the Navy Department, at that place, for special temporary duty.

Hold yourself in readiness for orders to sea duty.

This employment on shore duty is required by the public interest.

Respectfully,

(Sgd.) A. S. Crowinshield,

Acting Secretary.

Captain Charles M. Thomas, U. S. N.,
U. S. T. S. Lancaster.

The next day, after reporting to the Navy Department under this order, he was ordered to proceed to San Francisco, California, and thence to Hong Kong. It thus appears that while he was not regularly detailed for shore duty, he was ordered to report at the Navy Department for a special temporary duty, and the final sentence of the letter indicates that it was regarded as an employment on shore duty. He was allowed by the Department \$50 traveling expenses from Barbadoes to New York, but was not allowed either mileage or sea pay. The court of claims, however, allowed him mileage under § 13 of the Navy personnel act, and *a clause of the [426] Army appropriation act of March 3, 1899 (30 Stat. at L. 1034, 1068, chap. 423), providing "that hereafter the maximum sum to be allowed and paid to any officer of the Army shall be seven cents per mile, distances to be computed over the shortest usually traveled routes;" but mileage seems not to have been claimed for his traveling from Washington

to Hong Kong, by reason of the further provision of the same act "that actual expenses only shall be paid to officers when traveling to and from our island possessions in the Atlantic and Pacific oceans." The government apparently acquiesced in this allowance of mileage, as it made no appeal therefrom.

But the court of claims further held that, under Rev. Stat. § 1571, U. S. Comp. Stat. 1901, p. 1079, he was not entitled to sea pay, because, by that section, "no service shall be regarded as sea service except such as shall be performed at sea, under the orders of a department, and in vessels employed by authority of law."

This construction must necessarily be correct, unless we are prepared to hold that a steamer upon which a naval officer takes passage under the orders of the Department is a "vessel employed by authority of law." Obviously, it does not admit of this construction. A person who takes passage upon a steamer or a seat in a railway carriage does not "employ" such steamer or carriage in any just sense. We think the term "vessels employed by authority of law" is restricted to vessels owned or chartered by the government, or otherwise engaged in the service of the United States.

Sea duty being duty at sea upon such vessels, an allowance for mileage is obviously inconsistent with such duty, as the pay of the officer necessarily includes travel upon such vessels; while it is appropriate to shore duty, since travel upon such duty is performed either upon land or upon vessels not engaged in government service.

There is nothing in the Navy personnel act inconsistent with or repealing Rev. Stat. § 1571, U. S. Comp. Stat. 1901, p. 1079, and the case of *Gibson v. United States*, 194 U. S. 182, 48 L. ed. 926, 24 Sup. Ct. Rep. 613, is not in point. In that case it was held that the personnel act did repeal §§ 1578 [427] and 1585 (U. S. Comp. Stat. 1901, pp. 1083, 1085), allowing sea rations, because the later act covered the same subject, and superseded the provisions of those sections. There is no such conflict between § 1571 (U. S. Comp. Stat. 1901, p. 1079) and the personnel act.

The ruling of the Court of Claims in this last particular was correct; but for the error in the previous ruling the decree must be reversed.

On January 3, 1905, Mr. Justice Brown announced that the judgment of December 5, 1904, was amended by remanding the case with directions to reinstate the original judgment for \$97.42.

195 U. S.

HENRY LOCKHART, *Appt.*,
v.

H. C. LEEDS, J. A. Johnson, Julia Johnson,
et al., *Appellees*.

(See S. C. Reporter's ed. 427-438.)

Pleading--definiteness of allegations--general and special prayers for relief--trustees ex maleficio -- injunction pendente lite.

1. The failure to file notice of a mining location within ninety days after discovery is stated with sufficient certainty to have been due to the failure to discover, until after that time, a conspiracy to defeat complainant's rights, whereby his partner was to fail in his duty to file such notice, by averments in the bill that the location was made July 10, that the conspiracy was secret, and was entered into about October 1, and that the complainant would have complied with the mining laws had it not been for such conspiracy.
2. Relief under a general prayer in a bill which states all the facts should not be denied because it is asked upon a different theory of the law than that upon which a special prayer for relief is based, where both prayers are based upon the same facts, clearly set forth in the bill.
3. A bill makes a sufficient showing to entitle complainant to treat the legal holders of a mine as trustees *ex maleficio*, and to recover from them, as such trustees, the materials taken from the mine, where it avers that their title was acquired under a relocation made in pursuance of a fraudulent conspiracy with complainant's partner, whereby that partner was to fail in his duty to perfect the original location.
4. A case for an injunction restraining further mining during the pendency of the suit is made by a bill which seeks to treat as constructive trustees persons, some of whom are insolvent, who have acquired title to a mining claim by a relocation made in pursuance of an alleged fraudulent and secret conspiracy with complainant's partner, whereby that partner was to fail in his duty to perfect the original location.

[No. 10.]

Argued October 20, 1904. Decided December 5, 1904.

APPEAL from the Supreme Court of the Territory of New Mexico to review a judgment which affirmed a decree of the District Court for Bernalillo County, in that Territory, sustaining a demurrer to, and dismissing, a bill filed for the purpose of obtaining relief against persons whose title to

NOTE.—On the right of tenant, agent, or person standing in other fiduciary relation to relocate a mining claim for his own benefit to the exclusion of the other party—see note to *McCarthy v. Speed*, 50 L. R. A. 184.

As to when the relation of trustee *ex maleficio* arises—see note to *Angle v. Chicago*, St. P. M. & O. R. Co. 38 L. ed. U. S. 55.

mining property was acquired by virtue of a relocation made in pursuance of an alleged fraudulent conspiracy to defeat complainant's rights, whereby his partner was to fail in his duty to perfect the original location. *Reversed* and remanded, with directions to overrule the demurrer and grant leave to answer.

See same case below (N. M.) 63 Pac. 48.

Statement by Mr. Justice **Peckham**:

[428] The appellant filed his bill in this suit, in the proper court of New Mexico, for the purpose of obtaining relief against the defendants mentioned therein. The defendants demurred on several grounds, among which was that the complainant's remedy, if any, was at law, and that the bill did not state a case for a court of equity. The demurrer was sustained and the bill dismissed, and the judgment of dismissal was affirmed by the supreme court of New Mexico, and the complainant thereupon appealed to this court. Among other things the bill averred that, about May 7, 1893, the complainant and one Johnson and the defendant Pilkey entered into an agreement in Bernalillo county, New Mexico, by which they were to become partners in the enterprise mentioned in the agreement; and that, for the consideration mentioned therein, Pilkey was to start out to discover, if possible, and to locate for the purpose of operation by the parties, any mining claim of gold, silver, or other metal; and that, in order to enable Pilkey to carry out his portion of the agreement, he was to be furnished certain tools, etc., and some money. If he discovered any such mine, it was his duty to locate the same, and to send in to the other partners specimens of the ore, in order that its value might be determined. Work was to be begun within twenty days after the signing of the agreement. Any fraud by Pilkey was to forfeit his share, which was to be one-third interest in any mine discovered and worked.

The agreement was to continue for a year, and all discoveries and locations of any mines during that time by Pilkey were to be under the agreement mentioned. After the making of this agreement, Pilkey started out to prospect and to discover, if possible, a mining claim of the character mentioned. The parties were aware, at the time of the execution of the agreement, of the existence of the place where Pilkey went for the purpose of prospecting and discovering a mine, and that there possibly might be a valuable claim at that place. Accordingly, Pilkey at once went to the spot, and, on or about the 10th of July, 1893, he discovered the claim at that place, and it turned out to be a valuable mine. He located the mine according to the

agreement, and posted the notice thereon provided by the laws of the United States and New Mexico, and proceeded to do work thereon pursuant to the provisions *of those laws, [429] but did not do all the work made necessary by them. The bill then alleges that Pilkey commenced to sink a shaft or cut upon the mineral-bearing lode, and did work enough thereon to arrive at mineral-bearing ore in place, within less than ninety days from the time of taking possession of the lode; and it is then averred that the parties were ready, able, and willing in all things to comply with the laws spoken of, "and would have so done except for the wrongful, fraudulent, and unlawful acts of the defendants hereinafter mentioned." Some time about the 1st of October, 1893, Pilkey, while so in possession of the lode, wrongfully and fraudulently conspired, combined, and confederated with the defendants to defraud plaintiff; and they agreed that said Pilkey, in violation and fraud of the rights of the plaintiff in and to the mine, should transfer, convey, and deliver possession of the mine to the defendants, or one of them, without the knowledge or consent of plaintiff and the said Johnson. This was done. It was also agreed that they should do all other acts necessary to transfer the right to defendants. Pilkey was to have a certain proportion of interest in the mine, and the defendants, the balance. The defendants also caused and procured the defendant Pilkey to stop work upon the mine, under the agreement already referred to; and it was also agreed that Pilkey should fail and neglect to record, in the proper office, a copy of the location notice posted by him on the ground. The defendants also covered up and concealed the work which had been done on the ground by Pilkey; and they posted another notice thereon, and called the mine the "Washington" mine, and filed a copy of the same for record, December 13, 1893, without the knowledge or consent of the plaintiff or his copartner, Johnson; and they made the location for the benefit of themselves as locators, under the mining laws of the United States. For the purpose of concealing the interest of Pilkey in such pretended location, it was agreed that each of the four defendants named should be entitled to a fifth interest, and that Pilkey should be entitled to the remaining fifth, which last-named interest should *be claimed and held by Walker [430] in trust for Pilkey. Johnson subsequently transferred all his interest, under the agreement of copartnership between plaintiff, Johnson, and Pilkey, to the complainant, who was, at the time of the commencement of the suit, the owner of Johnson's interest under the assignment. The bill further states that, after the removal by the defendants of the original location notice posted by Pilkey, as

already stated, the complainant procured a copy thereof, and had the same recorded in the office of the recorder of the county, on December 9, 1893. The complainant averred that, by virtue of the premises, he became and was, at the commencement of the suit, the equitable owner of said mine, and of the gold and silver ores therein contained, so discovered and located by Pilkey under the agreement; and that he was equitably entitled, as against the defendants, to the possession and enjoyment of the same, and to the preferential right to acquire the legal title from the United States; and that the pretended location of the mine under the name of the Washington mine, by and in the names of the defendants named, was wholly inoperative and void; and that Pilkey, by reason of his participation in a fraudulent conspiracy with the defendants, forfeited all right or interest in the said mine pursuant to the agreement made by Pilkey with complainant and Johnson; and complainant averred that he was equitably the owner of and entitled to such interest. He further averred that the defendants refused to permit complainant to enter upon the property or to work the same; and that the defendants claim title to the mining property under and by virtue of their agreement with Pilkey, and their pretended location of the same as the Washington lode. It is further averred that the defendants were engaged in mining, extracting, and converting to their own use, the ores and minerals contained in the mine, and had mined and removed ores and minerals of great value therefrom, and had converted to their own use all such mineral; and that, unless enjoined, they would remove all the ores and minerals, and thereby the entire substance *and value of the property would be destroyed, and the complainant would sustain irreparable injury, as the defendants, or some of them, were wholly insolvent. To this bill the defendants demurred, as already stated.

Mr. J. H. McGowan argued the cause and filed a brief for appellant:

If there be any one ground upon which a court of equity affords relief with more unvarying uniformity than on any other, it is an allegation of fraud, whether proven or admitted.

Atkins v. Dick, 14 Pet. 114, 10 L. ed. 378.

In *United States v. American Bell Teleph. Co.* 128 U. S. 315, 32 L. ed. 450, 9 Sup. Ct. Rep. 90, this court held that it is sufficient, in stating the facts constituting fraud in a bill in equity, if the main facts or incidents which constitute the fraud be fairly stated, so as to put the defendant upon his guard and apprise him what answer may be required of him.

195 U. S.

The rule is also given in Gould's Eq. Pr. § 176, to the effect that where the facts constituting the cause of action are supposed to lie in the knowledge of the defendant, but not of the plaintiff, less particularity of statement is required than would otherwise be necessary.

In Enc. Pl. & Pr. § 271, it is laid down that where the facts to be alleged are peculiarly known, or presumed to be known, to the opposite party, less certainty and particularity are required than in ordinary cases.

See also Shipman, Eq. Pr. § 231.

It is a rule of equity pleading, that if the special prayer does not warrant a decree for the complete relief which the case discloses should be granted, the court may yet afford a relief under the general prayer agreeable to the case made by the bill.

Story, Eq. Pl. § 40.

In cases where the facts established by proofs or admission clearly indicate to the court the character of the relief equity should apply, the court will grant the relief under a general prayer, although such relief is not specially prayed.

Stanley v. Valentine, 79 Ill. 544; *Hopkins v. Snedaker*, 71 Ill. 449; *Espinola v. Blasco*, 15 La. Ann. 426; *Hilleary v. Hurdle*, 6 Gill, 105; *McIntyre v. Philadelphia*, 24 Pa. Co. Ct. 439; *Van Voorhis v. Bond*, 110 Mich. 3, 67 N. W. 974; *Webster v. Harris*, 16 Ohio, 490; *Holden v. Holden*, 24 Ill. App. 106.

Mr. W. B. Childers argued the cause and filed a brief for appellees:

The bill should state the right, title, or claim of the complainant with accuracy and clearness, and should in like manner state the injury or grievance of which he complains, and the relief which he asks of the court.

Story, Eq. Pl. §§ 241, 242, 246.

The facts which determine whether the remedy is at law or in equity are not distinctly alleged.

Dillon v. Barnard, 21 Wall. 437, 22 L. ed. 676.

The recovery must be had on the case made by the pleadings, or not at all.

Grosholz v. Newman, 21 Wall. 488, 22 L. ed. 472.

There must be a sufficient equity apparent on the face of the bill to warrant the relief prayed for; and the material facts on which the complainant relies must be so distinctly alleged as to put them in issue.

Harding v. Handy, 11 Wheat. 103, 6 L. ed. 429; *Harrison v. Nixon*, 9 Pet. 483, 9 L. ed. 201.

No decree can be founded on matters not in issue between the parties. If the bill sets up a case of fraud, the complainant is not entitled to relief by establishing some one or

more of the facts independent of fraud, although the facts might create a case under a wholly distinct head in equity.

Bradley v. Converse, 4 Cliff. 366, Fed. Cas. No. 1,775.

The objection is by demurrer.

Pelham v. Edelmeyer, 15 Fed. 262. See also *Foster v. Goddard*, 1 Black, 506, 17 L. ed. 228; *Socola v. Grant*, 15 Fed. 487; *Eyre v. Potter*, 15 How. 42, 14 L. ed. 592; *Koehler v. Black River Falls Iron Co.* 2 Black, 715, 17 L. ed. 339.

It is not permissible for a complainant to unite in his bill two inconsistent causes for equitable relief.

Wilkinson v. Dobbie, 12 Blatchf. 298, Fed. Cas. No. 17,670.

As to what particularity is necessary in allegations of fraud, see—

United States v. Atherton, 102 U. S. 372, 26 L. ed. 213; *Ambler v. Choteau*, 107 U. S. 589, 27 L. ed. 324, 1 Sup. Ct. Rep. 556; *Voorhees v. Bonesteel*, 16 Wall. 16, 21 L. ed. 268; 9 Enc. Pl. & Pr. 687.

Charging generally that what was done was "colorable," a "fraud," a "breach of trust," and a "scheme," constitutes allegations of legal conclusions merely, which a demurrer does not admit.

Fogg v. Blair, 139 U. S. 127, 35 L. ed. 107, 11 Sup. Ct. Rep. 476. See also *St. Louis & S. F. R. Co. v. Johnston*, 133 U. S. 577, 33 L. ed. 686, 10 Sup. Ct. Rep. 390.

Mere words in and of themselves, and even as qualifying adjectives of more specific charges, are not sufficient ground of equity jurisdiction, unless the transactions to which they refer are such as, in their essential nature, constitute a fraud, or a breach of trust, for which a court of chancery can give relief.

Van Weel v. Winston, 115 U. S. 237, 29 L. ed. 384, 6 Sup. Ct. Rep. 22. See also *Brooks v. O'Hara Bros.* 2 McCrary, 644, 8 Fed. 532; *Phelps v. Elliott*, 35 Fed. 455; *Lafayette Co. v. Neely*, 21 Fed. 744.

Under the prayer for general relief, only such relief as is agreeable to the case made by the bill can be granted.

English v. Foxall, 2 Pet. 612, 7 L. ed. 531; *Hobson v. M'Arthur*, 16 Pet. 182, 10 L. ed. 930; *Boone v. Chiles*, 10 Pet. 177, 9 L. ed. 388; *Wilson v. Graham*, 4 Wash. C. C. 53, Fed. Cas. No. 17,804; *Allen v. Pullman's Palace Car Co.* 139 U. S. 662, 35 L. ed. 305, 11 Sup. Ct. Rep. 682; *Hayward v. Eliot Nat. Bank*, 96 U. S. 614, 24 L. ed. 857; *Georgia v. Stanton*, 6 Wall. 77, 18 L. ed. 725; 1 Dan. Ch. Pr. 386; Story, Eq. Pl. § 42; 3 Enc. Pl. & Pr. 350.

Pilkey had a right to convey a one-third interest in the Sampson,—there was nothing in his contract prohibiting it. A conveyance of any greater interest under the

allegations of the bill, while the Sampson location was in force, was simply void. It did not constitute a cloud on the title of his cotenants.

Hartford & S. Ore Co. v. Miller, 41 Conn. 112, 3 Morrison, Min. Rep. 353.

The rule applicable to this class of cases is that equity will interpose only when the pretended title which it is alleged constitutes a cloud, or the proceeding which it is apprehended will create one, is apparently valid on its face.

6 Am. & Eng. Enc. Law, 2d ed. p. 153.

There is no occasion for resort to a court of equity.

Whitehead v. Shattuck, 138 U. S. 150, 34 L. ed. 874, 11 Sup. Ct. Rep. 276.

Where the complainant himself has no title, or a doubtful title, he cannot have this relief.

Phelps v. Harris, 101 U. S. 374, 375, 25 L. ed. 856, 857; *Frost v. Spitley*, 121 U. S. 557, 30 L. ed. 1012, 7 Sup. Ct. Rep. 1129.

The legislature had no power to dispense with possession as a prerequisite to maintain such suits.

Whitehead v. Shattuck, 138 U. S. 151, 34 L. ed. 874, 11 Sup. Ct. Rep. 276.

The prayer that the defendants be enjoined from working the lode, and that complainant be declared the equitable owner, is nothing but a prayer to eject defendants and give the claim to complainant.

Fussell v. Gregg, 113 U. S. 554, 555, 28 L. ed. 994, 995, 5 Sup. Ct. Rep. 631; *Hipp v. Babin*, 19 How. 271, 15 L. ed. 633; *Parker v. Winnipiscogee Lake Cotton & Woolen Co.* 2 Black, 545, 17 L. ed. 333; *Grand Chute v. Winegar*, 15 Wall. 373, 21 L. ed. 174; *Lewis v. Cocks*, 23 Wall. 466, 23 L. ed. 70; *Killian v. Ebbinghaus*, 110 U. S. 568, 28 L. ed. 246, 4 Sup. Ct. Rep. 232.

Prior possession by Pilkey, and surrender of that possession as alleged in the bill, would, if proved, make a case for recovery in a suit at law. But if complainant had actual prior possession of the land, this is strong enough to enable him to recover it from mere trespassers who entered without any title.

Christy v. Scott, 14 How. 282, 14 L. ed. 422; *Burt v. Panjaud*, 99 U. S. 180, 25 L. ed. 451; *Campbell v. Rankin*, 99 U. S. 262, 25 L. ed. 436.

Upon proof of the Sampson location, and the sale of an interest in it by Pilkey, and the entrance of the defendants into possession, and the exclusion of complainant, a prima facie case would have been made out.

Union Consol. Silver Min. Co. v. Taylor, 100 U. S. 40, 25 L. ed. 342; *Freeman, Cotenancy & Partition*, §§ 166, 167, 290; *Erhardt v. Boaro*, 113 U. S. 534, 28 L. ed. 1115, 5 Sup. Ct. Rep. 560; *Belk v. Meagher*, 195 U. S.

104 U. S. 284, 26 L. ed. 737; *Welsh v. Barker*, 7 Colo. 178, 2 Pac. 921; *Morton v. Solambo Copper Min. Co.* 26 Cal. 527.

A court of equity will not specifically enforce this contract, as it lacks mutuality.

Geiger v. Green, 4 Gill, 472, 13 Morrison, Min. Rep. 329; *Radcliffe v. Warrington*, 12 Ves. 331; *German v. Machin*, 6 Paige, 292; *Boucher v. Vanbuskirk*, 2 A. K. Marsh. 346; *Moore v. Fitz Randolph*, 6 Leigh, 185, 29 Am. Dec. 208; *Pierce v. Pierce*, 55 Mich. 629, 22 N. W. 81, 13 Morrison, Min. Rep. 675; *Ducie v. Ford*, 138 U. S. 588, 34 L. ed. 1091, 11 Sup. Ct. Rep. 417.

If Pilkey abandoned this location, and permitted others to locate the ground, whether he took an interest with them or not, the complainant acquired no interest, and his remedy is for breach of contract, if any, at law.

Johnstone v. Robinson, 3 McCrary, 42, 16 Fed. 903; *First Nat. Bank v. Bissell*, 4 Fed. 698; *Tuck v. Downing*, 76 Ill. 71, 7 Morrison, Min. Rep. 83.

The original locator can treat his failure to perform or resume work as the basis of a valid relocation.

Warnock v. De Witt, 11 Utah. 324, 40 Pac. 205; *Saunders v. Mackey*, 5 Mont. 523, 6 Pac. 361.

A cotenant in the previous location can relocate and leave out his cotenants.

Strang v. Ryan, 46 Cal. 33, 1 Morrison, Min. Rep. 48; *Doherty v. Morris*, 11 Colo. 12, 16 Pac. 911; *Saunders v. Mackey*, 5 Mont. 523, 6 Pac. 361; *Hunt v. Patchin*, 13 Sawy. 304, 35 Fed. 816; *Page v. Summers*, 70 Cal. 121, 12 Pac. 120.

The failure to record the location notice worked a forfeiture of any rights which may have been acquired by posting the notice on the claim and doing the other acts of ownership.

Lindley, Mines, §§ 273, 330, 390; *King v. Edwards*, 1 Mont. 236, 4 Morrison, Min. Rep. 480; *Sisson v. Sommers*, 24 Nev. 379, 77 Am. St. Rep. 815, 55 Pac. 829; *Erhardt v. Boaro*, 113 U. S. 527, 28 L. ed. 1113, 5 Sup. Ct. Rep. 560; *Mallett v. Uncle Sam Gold & S. Min. Co.* 1 Nev. 188, 90 Am. Dec. 484; *Barringer & Adams, Mines & Mining*, 300; *Hamilton v. Huson*, 21 Mont. 9, 53 Pac. 101.

Mr. Justice **Peckham**, after making the foregoing statement, delivered the opinion of the court:

One phase of this controversy has already been before this court in *Lockhart v. Johnson*, 181 U. S. 516, 45 L. ed. 979, 21 Sup. Ct. [433] Rep. 665, which was an action *of ejectment brought by the plaintiff (who is the complainant herein) to recover possession of the mine above mentioned from the defendants herein.

195 U. S.

It was there held that the plaintiff could not maintain an action, as the facts showed that he had no legal title, and that the remedy he might have, if any, was in equity.

Upon the trial of the ejectment action the plaintiff offered to prove, in substance, the same facts as are set forth in this bill in regard to Pilkey's action under the agreement with plaintiff and Johnson, and the fraudulent conspiracy entered into by the defendants for the purpose of defrauding the plaintiff out of his right to such mine. The evidence was objected to and excluded on the ground that it did not show any legal title in the plaintiff, assuming its truth; that, in the courts of the United States, an action of ejectment was based upon the strict legal title, and if the plaintiff failed to show that it was in him, he must fail in such action. The defendants now contend that, if the plaintiff have any remedy, it is at law; and also that there is no cause of action stated in the bill. At the time of the trial of this suit, the ejectment action had not been decided by this court, the action having been here decided May 13, 1901. It must be regarded as determined by the decision in that case, that the complainant herein has no remedy at law, and, if he has none in this suit, he is without remedy for the gross fraud set out in the bill. All facts well pleaded in the bill are admitted by the demurrer, and the question, therefore, is whether the bill states facts sufficient to entitle him to relief in a court of equity.

The court below has held that the bill does not state with sufficient certainty the time when plaintiff discovered the alleged fraud set forth in the bill, in that it does not appear by any certain averment that the plaintiff did not discover such fraud before the expiration of the ninety days after the discovery of the lode, in which to file a copy of the notice of location in the recorder's office, which, if he had done, he might, by himself filing the copy, have thereby fulfilled all the provisions *of the statute relating to the lo-[434]cation and recording of the notice of claim. We entirely agree with the court below that the facts constituting the cause of action in equity must be distinctly alleged, so that the defendant may know what he has to meet, and so that he may, if he choose, put them in the issue. The rule must receive a reasonable interpretation, and must be so enforced as to further, and not obstruct, the administration of justice. We think the court below erred in holding that there was no sufficient averment as to the time of the discovery by plaintiff of the alleged fraud set forth in the bill, assuming such averment to have been necessary. He averred that Pilkey, acting under the agreement with plaintiff and Johnson, discovered the mine, and located

the same by posting the requisite notice on the ground on the 10th of July, 1893. He also averred that some time about the 1st of October (the exact time, however, he could not state) the defendants entered into the conspiracy and combination referred to. This was but a few days before the expiration of the statutory time in which to file a copy of the notice of claim in the recorder's office of the county. He averred that the conspiracy and combination was secret, and that, while the plaintiff and his copartner Johnson were able and willing to comply with all the laws of the United States and territory, they failed to do so because of the wrongful, fraudulent, and unlawful acts of the defendants thereafter mentioned. Those acts were a secret effacement of the work done by Pilkey, the taking down of the notice of claim posted on the ground by him, the failure to file a copy thereof, the posting of a claim on the part of the defendants, and the filing of a copy of such notice in the recorder's office on December 13, 1893.

We think the plain import of these averments is that the conspiracy and combination did not become known to the plaintiff until after the expiration of the ninety days from the discovery of the mine, in which to file a copy of the notice posted on the ground, in the recorder's office of the proper county. That is a sufficiently definite averment of [435] time, and *it is enough to show that the failure to file a copy of the notice within the necessary time was owing to the action of the defendants.

Under the agreement first mentioned between plaintiff, Johnson, and Pilkey, as copartners, it became the duty of Pilkey, in order to complete the location it was his duty to make, to file a copy of the notice in the recorder's office; and the parties to the agreement had the right to rely upon Pilkey to file the necessary copy for record; and it is plain that the failure to file on the part of the plaintiff was because of his ignorance of such failure on the part of Pilkey, consequent upon Pilkey's fraudulent conspiracy and agreement with the other defendants not to file it. After the discovery of the conspiracy, the plaintiff did procure a copy of the original notice posted by Pilkey on the ground, and filed the same in the office of the recorder on the 9th of December, 1893. Taking these allegations together, we think it hypercritical to hold that the bill does not, with sufficient distinctness, allege the fact that the plaintiff did not discover the fraud until after the expiration of the ninety days mentioned, and hence did not himself file the copy of the notice within that time.

All pleadings must be construed reasonably, and not with such strictness as to refuse to adopt the natural construction of

the pleading because a particular fact might have been more distinctly alleged, although its existence is fairly, naturally, and reasonably to be presumed from the averments made in the pleading.

The agreement between the plaintiff, Pilkey, and Johnson shows it to have been the duty of Pilkey to make the necessary filing for record, in order to complete the location of the mine, which he, in the agreement, was to do. The plaintiff had the right to rely upon Pilkey carrying out that agreement, and fulfilling his duty thereunder by making the necessary filing; and plaintiff alleges that he would have done all things made necessary by law had it not been for this fraudulent combination and conspiracy on the part of the defendants. We regard the allegations of the bill as sufficient in these particulars. [436]

Again, it is alleged that the bill prays that the location of what is called the Washington lode by the defendants be declared void, and that the plaintiff may have the possession of the claim; while the plaintiff now asks to have the defendants treated as constructive trustees, etc., which is inconsistent, as alleged, with the former prayer for relief. The bill contains a prayer for general relief in addition to the prayer for special relief, and under such prayer this relief may be given. It is objected that, under the prayer for general relief, no relief of that nature can be granted, inasmuch as it is opposed to the special relief asked for by the bill, and also because the general allegations in the bill do not justify such relief. All the facts upon which the plaintiff seeks relief from a court of equity are clearly stated in the bill. The facts constituting the fraud are set forth, and it is alleged that the parties doing the acts mentioned concealed them from the plaintiff for the purpose of defrauding plaintiff out of his interest and ownership in the mine. Having set out all the facts upon which the right to relief is based, the plaintiff asks specially for the possession, and also for the proceeds, of the mine, because, by reason of the facts, the location made by the defendants was a void location. Whether it was a void location or not was matter of law, arising from the facts appearing in the bill. Those facts were not changed in the slightest degree, nor were any inconsistent facts set up thereafter. The plaintiff now, under his prayer for general relief, contends that, although the location of the Washington lode by the defendants may have been so far valid as to create a title in the defendants, yet that, by reason of the fraud already distinctly set forth in the bill, the plaintiff was entitled to avail himself of that title, and to hold them as trustees *ex maleficio*, for his benefit.

There is nothing in the intricacy of equity pleading that prevents the plaintiff from obtaining the relief under the general prayer, to which he may be entitled upon the facts [437] plainly *stated in the bill. There is no reason for denying his right to relief, if the plaintiff is otherwise entitled to it, simply because it is asked under the prayer for general relief, and upon a somewhat different theory from that which is advanced under one of the special prayers. The cases of *English v. Foxall*, 2 Pet. 595, 7 L. ed. 531; *Boone v. Chiles*, 10 Pet. 177, 9 L. ed. 388; *Hobson v. M'Arthur*, 16 Pet. 182, 10 L. ed. 930; *Hayward v. Eliot Nat. Bank*, 96 U. S. 611, 24 L. ed. 855; *Georgia v. Stanton*, 6 Wall. 50, 18 L. ed. 721, are not opposed to the views just stated.

We agree that the relief granted under the prayer for general relief must be agreeable to the case made by the bill; and that, in substance, is what is held by the above cases. The case made by the bill consists of the material facts therein stated; and where all the facts are stated, it is no reason for denying relief under a general prayer, because it may differ from the theory of the law upon which the special prayer for relief is based, where both prayers are based upon the same facts, clearly set forth in the bill.

The defendants contend that, if Pilkey, under the fraudulent agreement alleged, and pursuant thereto, surrendered possession to the defendants, the latter became cotenants with the plaintiff, and he could maintain an action at law to recover possession from his cotenants. We have already held that the plaintiff could not, upon the facts, maintain ejectment. When Pilkey surrendered possession to defendants under this fraudulent agreement, and they entered and posted the notice and filed the copy, they did not enable plaintiff to maintain ejectment against them as upon his ouster of possession by defendants.

Neither plaintiff nor Johnson had ever had anything but a constructive possession through the possession of Pilkey; and when he fraudulently surrendered it to the other defendants, and they entered and completed their location, the plaintiff could not then sustain ejectment, as we have already held. This is not in opposition to the case of *Erhardt v. Boaro*, 113 U. S. 528, 28 L. ed. 1113, 5 Sup. Ct. Rep. 560. The question whether the relief should be at law or in equity was not there raised. The action was commenced [438] *in Colorado, and was in accordance with the usual form in actions for mining claims under the procedure in Colorado, and was brought to recover possession of a mine. There was no discussion as to the forum. The complaint simply followed the usual practice. Here we have already held, in the ejectment suit (181 U. S. 516, 45 L. ed. 195 U. S.

979, 21 Sup. Ct. Rep. 665), that the relief is not to be had by ejectment, but must be obtained in equity if at all. Under the circumstances we think it immaterial whether Pilkey surrendered possession before or after the expiration of ninety days from the discovery of the mine, July 10, 1893. All the acts of fraud set up in the bill, committed by the defendants, are, if proved, sufficient to entitle the plaintiff to treat them as trustees *ex maleficio*, and to recover from them, as such trustees, all the materials taken from the mine. See *Saunders v. Mackey*, 5 Mont. 523, 6 Pac. 361; *Doherty v. Morris*, 11 Colo. 12, 16 Pac. 911. Upon the case made by the bill, some of the defendants being insolvent, we think the plaintiff entitled to an injunction restraining the defendants from further mining during the pendency of the suit; an injunction to issue upon such security as may seem appropriate to the court below.

We decide this case solely upon the questions raised by the demurrer.

The judgments of the Supreme Court of New Mexico and of the trial court must be reversed, and the case remanded to the Supreme Court, with directions to remand it to the District Court for the Second Judicial District of the Territory of New Mexico, within and for the county of Bernalillo, with directions to overrule the defendants' demurrer, and with leave to answer upon such terms as may seem proper to that court.

So ordered.

*NORTHERN PACIFIC RAILWAY COM-[439]
PANY, *Appt.*,

v.

AMERICAN TRADING COMPANY.

(See S. C. Reporter's ed. 439-469.)

Carriers—contract to forward by designated vessel of connecting carrier — power of railway receivers — authority of general agent — excuse for nonperformance.

1. A special agreement by a carrier to transport a through shipment by the vessel of a connecting carrier sailing on a designated date results from the acceptance of a through rate for a shipment "to be forwarded" via such steamer, which rate was quoted with notice that it was of vital importance that

NOTE.—On the powers and duties of receivers—see notes to *Davis v. Gray*, 21 L. ed. U. S. 447; *McNulta v. Lochridge*, 35 L. ed. U. S. 797.

As to the authority of freight agent to make contracts for transportation—see note to *Miller v. South Carolina R. Co.* 9 L. R. A. 833.

Respecting bills of lading as contracts—see notes to *Louisville, E. & St. L. R. Co. v. Wilson*, 4 L. R. A. 244; *Browning, K. & Co. v. Goodrich Transp. Co.* 10 L. R. A. 416; *National Bank of Commerce v. Chicago, B. & N. R. Co.* 9 L. R. A. 263.

the shipment should be transported promptly, and should go forward by the earliest possible steamer without delay, in order to enable the shipper to fulfil a proposed agreement which it was about to make for the sale of the goods at the final destination, and which would require delivery there at a fixed date.

2. The general agent of the receivers of a railway company is acting as agent for such receivers, and not as the agent of a connecting steamship company, in agreeing to forward a through shipment by a steamer sailing on a specified day, where his only authority as agent of the steamship company was created by a contract between the railway and steamship companies, under which the railway company was to appoint agents, who should act for the steamship company to quote through rates and issue through bills of lading, and the application for a rate for such shipment was made to him as agent for the receivers, and the rate was quoted by him as such agent, and as such he signed a letter confirming the rate, and so described himself when informing the steamship company's agents at the connecting point that he had made a contract guaranteeing delivery by the designated steamer.
3. The making of a special agreement to forward a through shipment by the steamer of a connecting carrier sailing on a designated day is within the authority of the receivers appointed, in a suit to foreclose a railway mortgage, to continue to carry on the railway business.
4. The "general eastern agent" of the receivers of the Northern Pacific Railroad Company, who were ordered to continue its business, has the general powers of such an officer when acting for the railroad company itself, which includes the authority to make a special agreement to forward a through shipment by the steamer of a connecting carrier sailing on a designated day.
5. A special agreement in behalf of railway receivers to forward a through shipment by the steamer of a connecting carrier sailing on a designated day is not modified by the mere receipt, without objection, and the subsequent hypothecation, of the bill of lading containing, as a part of numerous conditions printed in small type, the statements that the carrier is not to be liable for any loss not occurring on its own road, and that the contract as executed is accomplished, and all liability thereunder terminates, upon the delivery of the property to the vessel, where the bill was not examined or read, and was accepted after the goods had passed from the control of the shipper, by a clerk who had no knowledge of these conditions, and no authority to consent to a modification of the contract already made.
6. Nonperformance of a special agreement of a carrier to forward a through shipment by the steamer of a connecting carrier sailing on a designated day is not excused by the refusal of the deputy collector of the port to grant a clearance while the freight was on board because it was contraband of war, where the contract was not unlawful when made, and was not rendered unlawful by any subsequent legislation, and was made with knowledge that difficulties might arise in the course of transportation because of the character of the freight.

7. The mistaken refusal of the deputy collector of a port to grant a clearance while certain freight was on board because it was contraband of war does not constitute a "restraint of princes, rulers, or people," within the meaning of a clause in the bill of lading, so as to excuse nonperformance of the agreement to forward the shipment by that vessel.

[No. 24.]

Argued October 26, 27, 1904. Decided December 5, 1904.

A PPEAL from the United States Circuit Court of Appeals for the Second Circuit to review a decree which reversed a decree of the United States Circuit Court for the Southern District of New York dismissing a petition in intervention in a suit to foreclose a railway mortgage, which seeks to require the receivers to pay damages for their failure to perform a special contract for the transportation of goods. *Affirmed.*

See same case below, 57 C. C. A. 533, 120 Fed. 873.

Statement by Mr. Justice Peckham:

The Northern Pacific Railroad Company made a certain mortgage which was foreclosed, and the Northern Pacific Railway Company purchased the property of the former company under the mortgage at the foreclosure sale, and, by the order of the court, the purchaser was required to pay all obligations or liabilities contracted or incurred by the court's receivers, who had been appointed in the foreclosure suit. The American Trading Company, the appellee herein, intervened in that suit, and, by its petition, asked that, by virtue of the decree in foreclosure, the purchaser, the Northern Pacific Railway Company, be required to pay damages for the failure of the receivers to perform a special contract for the transportation of goods from Newark, New Jersey, to Yokohama, in Japan. The case was tried before the United States circuit court, in New York city, which dismissed the petition. This decision was reversed by the circuit court of appeals for the second circuit, and the railroad company was directed to pay the damages therein stated to the American Trading Company, the intervening petitioner. The railroad company has appealed from such decree or order to this court. The case was tried upon the agreed statement of facts which follows:

1. In September, 1894, Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse were receivers of the Northern Pacific Railroad Company, under an order made in a suit bearing the same title as the present suit, in the United States circuit court for the [441] eastern district of Wisconsin, to which this

suit is ancillary. Under that order the receivers were authorized to continue, and were continuing, to carry on the business of the railroad in their charge.

2. The line of railroad in the possession of the receivers extended from Duluth, Minnesota, to Tacoma, Washington. The receivers had contracts with various carriers reaching points on their line, by which through bills of lading were issued from and to points not upon the line of the receivers' railroad, where the freight passed over some part of that line in transit. Among the carriers with whom the receivers had such arrangements was the Northern Pacific Steamship Company. This was an English company, operating a line of steamers between Tacoma and points in Japan and China, including Yokohama. The contract between the steamship company and the receivers was the contract originally made on March 30, 1892, between the Northern Pacific Railroad Company and the Northern Pacific Steamship Company, and ratified and adopted by the receivers, under the authority of an order of the circuit court of the United States, made on September 13, 1893.

The receivers held no stock in the steamship company, and had no other express contract relation with the steamship company. This stipulation is not to be accepted as an admission by the railroad company, or the receivers, or their counsel, that there were any relations between the receivers and the steamship company other than those growing out of the facts herein agreed upon.

For convenience in transacting their freight business in the eastern part of the United States, the receivers maintained an office in the city of New York, which was, in September, 1894, in charge of one George R. Fitch, who was their general eastern agent, and made arrangements for the transportation of freight over the receivers' line of railway and connections, including transportation to China and Japan.

[442] At the time of the transactions referred to in this statement *of facts, the said Fitch had not received, nor did he receive, any direct or independent appointment or authority from the Northern Pacific Steamship Company, to act as agent of that company. His only authority as agent of the steamship company was that created by, or arising from, the contract, exhibit A. Fitch knew that an arrangement had been concluded by the receivers and the steamship company, by which contracts for through shipment to Yokohama might be made by the agents of the receivers, and through bills of lading issued, and he had been instructed by the receivers to solicit freight for through transportation upon bills of lading, of which exhibit C, hereto annexed, is a

195 U. S.

copy; but Fitch did not know the terms of the contract between the steamship company and the receivers, and the trading company did not know what company operated the steamships between Tacoma and Yokohama, or that the steamship company was a separate and independent company or that there was any contract between the receivers and the steamship company.

It is further stipulated that Fitch had no express general authority to make contracts for through transportation, except as provided by the said bills of lading, and no authority to make the contract in question, unless such express authority be found in the telegrams, of which copies are hereinafter set forth; that the American Trading Company did not know the terms of his express authority, and that this stipulation is not to be taken as an admission by the railroad company, or the receivers, or their counsel, that his implied authority was greater than his express authority.

4. The American Trading Company is, and was in September, 1894, a corporation organized under the laws of the state of Connecticut, having its principal office in the city of New York, and carried on a general commercial business with Asiatic ports.

5. In September, 1894, the trading company applied to Fitch for a rate upon a proposed shipment of pig lead from New York to Yokohama, Japan, and informed him that it *was of vital importance that [443] the lead should be transported promptly, and go forward by the earliest possible steamer, without delay, in order to enable the trading company to fulfil a proposed agreement, which it was about to make for the sale of the lead in Japan, and which would require its delivery there at a fixed date. Fitch thereupon named a rate, and undertook to forward the lead from New York on or before September 29th, and via the Northern Pacific steamer Tacoma, sailing from Tacoma October 30, 1894.

6. Thereupon the trading company cabled to its agents at Yokohama, naming a price, and a date at which the lead could be delivered there; and thereupon its agents in Yokohama made a contract for the sale of the lead, which contract provided that it should be delivered in Yokohama by overland route, and the most direct connection at San Francisco, Tacoma, or Vancouver, and that, in case of unusual or extraordinary delay in transit, the contract should be null and void. Neither Fitch nor the receivers knew, until September 24th, that any contract for the sale of lead in Japan had been concluded by the trading company, and, except as hereinbefore and hereinafter stated, they never received any information in regard to its terms, as made or proposed.

Upon the conclusion of its Japanese contract, the trading company purchased 200 tons of pig lead in bond, from the Balbeck Smelting & Refining Company.

7. On September 19, 1894, Fitch, in confirmation of his previous statement, wrote and sent to the trading company the following letter:

Northern Pacific Railroad Company.
Thomas F. Oakes, Henry C. Payne, Henry C. Rouse, Receivers.

Geo. R. Fitch, General Eastern Agent, 319 Broadway.

Traffic Department.

New York City, Sept. 19, 1894.

American Trading Co. 182 Front St., City.

Gentlemen:—

I hereby confirm rate quoted you this [444] day, *and accepted by you on shipment of pig lead for export to Japan, as follows:

Pig lead, New York to Yokohama, Japan, \$15.00 per ton of 2,000 lbs., shipment not to consist of less than 400,000 lbs., and to be forwarded from New York on or before Sept. 29th, in accordance with shipping instructions given you by me, and to be forwarded from Tacoma, Wash., *via* Northern Pacific steamer sailing from thence October 30th. Kindly forward your acceptance of the above as early as possible. Thanking you for the favor, I remain,

Yours truly,
Geo. R. Fitch,
G. E. Agent.

The trading company wrote and sent in reply (accepting the proposition) the following letter:

Sept. 20th, 1894.

The Northern Pacific R. R. Co., New York City.

Dear Sirs:—

In reply to your esteemed favor, Sept. 19th, we beg to accept the rate quoted to us in your letter of Sept. 19th, namely, on 200 tons of pig lead, N. Y. to Yokomaha, Japan, \$15.00 per ton of 2,000 lbs., shipment not to consist of less than 400,000 lbs., to be forwarded from N. Y. on or before September 29th, in accordance with shipping instructions to be given by you, and to be forwarded from Tacoma, Washington, *via* Northern Pacific steamer sailing from that port Oct. 30th. Kindly let us know as soon as possible the shipping instructions, so that we can forward them to our supplier, and oblige, with best respects,

Very truly yours,
The American Trading Co.
(Signed) Frank P. Ball.

On September 22, 1894, Fitch wrote and

sent to the trading company the following letter, giving shipping instructions:

*Northern Pacific Railroad Company. [445]
Thomas F. Oakes, Henry C. Payne, Henry C. Rouse, Receivers.

Geo. R. Fitch, General Eastern Agent, 319 Broadway.

Traffic Department.

New York City, Sept. 22, 1894.

American Trading Co., No. 182 Front St., City.

Dear Sir:—

I hereby confirm routing given you over the telephone yesterday on your shipment of pig lead for export to Yokohama, Japan, as follows: To be shipped from Newark, N. J., *via* Penn. R. R., marked Anchor Line rail and Lake, care Northern Pacific, care A. O. Canfield, agent N. P. R. R., Tacoma, Wash. Please advise me, as soon as possible, who the shippers will be, that I may order the cars, and also see that same are rushed through without delay to connect with our steamer at Tacoma.

Yours truly,
Geo. R. Fitch, G. E. Agent.
A. H. P.

8. Before naming a rate for the transportation of the lead, Fitch had expressed some doubt as to whether it might not be excluded from transportation as contraband, in view of the war then existing between China and Japan. In fact the shipment of pig lead was not prohibited by the Treasury Department at Washington during the war between China and Japan, and on September 25th, 1894, the trading company made another shipment of pig lead *via* Pacific Mail steamer sailing from San Francisco, which was, without trouble or delay, transported and delivered in Yokohama.

9. In September, 1894, J. B. Baird was the second assistant general freight agent of the receivers and J. M. Hannaford was the general freight agent of the receivers; and telegrams of which the following are copies, relating to proposed shipments of pig lead, including the shipment in question, passed between the said Fitch and Baird and Hannaford, but were not disclosed to the American Trading Company:

*New York, September 14, 1894. [446]
J. B. Baird, second A. G. F. A.:—

Please wire quick lowest rate one hundred ton lots pig lead from Chicago and Duluth to Yokohama.

George R. Fitch.

September 14, 1894.

Geo. R. Fitch, 319 Broadway, New York, N. Y.:—

You may quote as low as sixty cents from
195 U. S.

Duluth and seventy cents from Chicago to Yokohama on pig lead in one hundred ton lots. Get more if possible.

J. B. Baird.

New York, September 17, 1894.

J. B. Baird, 2d A. G. F. A.:—

Your wire fourteenth. Shall I accept fifty cents on pig lead Duluth to Yokohama? Also name lowest rate on two hundred tons St. Louis to Yokohama.

Geo. R. Fitch.

September 18th, 1894.

Geo. R. Fitch, 319 Broadway, New York:—

Cannot accept less than sixty cents on pig lead Duluth to Yokohama. Will quote from St. Louis later.

0.900.

J. B. Baird. WDB.

September 19, 1894.

G. R. Fitch, 319 Broadway, New York:—

You may quote seventy cents on the pig lead in one hundred ton lots St. Louis to Yokohama. Advise if accepted.

0.900.

J. B. Baird. WDB.

New York, September 22, 1894.

J. B. Baird, N. P. R'y, St. Paul, Minn.:—

Wire best rate two hundred fifty tons pig lead Duluth to Shanghai.

Geo. R. Fitch.

September 22, 1894.

[447]*G. R. Fitch, 319 Broadway, New York:—

N. P. Steamship Co. have now declined to handle lead for Yokohama, Kobe, Hong Kong, or Shanghai. Please cancel your quotation.

0.900.

J. B. Baird. WDB.

On September 24, 1894, Fitch informed the trading company that he declined to ship the lead upon the ground that it might be contraband of war, and thereupon on the same day, the trading company wrote him a letter stating that they would hold his company responsible for any loss from failure to fulfil the contract, which letter is as follows:

September 24th, 1894.

Geo. R. Fitch, Esq., General Eastern Agent

N. P. R. R., No. 319 Broadway, City.

Dear Sir:—

Respecting your notice just received by us through your Mr. Post, that your company now decline to ship for us, *via* Tacoma, the 200 tons of pig lead specified in your contract with us, under date Sept. 19th, and confirmed by us under date Sept. 20th, we beg to advise that we shall hold your company responsible for any loss or damage we may suffer from the nonfulfilment of this contract with you.

We remain, dear sirs,

Very truly yours,

The American Trading Co.

(Signed) Wm. H. Stevens, Treas.

195 U. S. U. S., Book 49.

Thereupon, telegrams, of which the following are copies, were sent and received as indicated, in relation to the shipment in question, but were not disclosed to the trading company:

New York, Sept. 24, 1894.

J. B. Baird, N. P. R'y, St. Paul, Minn.:—

Shipment, lead to Yokohama, is now being made; shippers *refuse to accept with-[448]drawal; we have given shippers written contract.

Geo. R. Fitch.

New York, Sept. 24, 1894.

J. M. Hannaford, N. P. R'y, St. Paul, Minn.:—

Have notified American Trading Co. that shipment will be refused. They state they will hold us to contract. They are shipping hundred tons from Denver to Yokohama by steamer City of Rio from San Francisco, Oct. fourth, and expect to forward this shipment same way; will charge us difference in rate. Advise quick.

Geo. R. Fitch.

Sept. 25, 1894.

G. R. Fitch, 319 Broadway, New York:—

Your wire this date to Mr. Hannaford: Dodwell, Carlill, & Co. have consented to accept the lead already contracted. Do not contract for any more. Advise quick number of pounds contracted by you and say how it will be routed. Think we should receipt for lead subject to delay.

0/900.

J. B. Baird. WDB.

Dodwell, Carlill, & Co., mentioned in the last telegram, represented the steamship company.

10. Thereupon the refusal to accept the shipment was withdrawn, and the shipment was made under the contract, and the lead, consisting of 200 tons, was, in accordance with the shipping instructions given in Fitch's letter of September 22, 1894, shipped at Newark, New Jersey, in September 27th, 1894, by the Balbeck Smelting & Refining Company for the account of the American Trading Company. This was the first shipment ever made by the American Trading Company over the line of the Northern Pacific Railroad Company and its connecting carriers. The shipment was made in bond, for exportation at Tacoma, and was secured upon the cars by government locks and customs seals. On the afternoon *of [449] September 27, 1894, the shipment left Newark, and started on its journey, and was transferred *via* the Anchor Line, a carrier operating between eastern points and points on the Lakes, to Duluth, and carried from Duluth *via* the receivers' railroad to Tacoma, which it reached in time for shipment by the steamship company's steamer,

Tacoma, sailing October 30, 1894. On September 28th, a check for the freight upon the lead from Newark to Yokohama was handed by the trading company to Fitch, of which check, with its indorsements, the following is a copy:

The American Trading Co.

Check.

New York, Sept. 28th, 1894. No. 6096.
The National Bank of North America.
Pay to the order of the Northern Pacific
R. R. \$3,360.05. Thirty-three hundred
and sixty & 05/100 dollars.

The American Trading Co.
Wm. H. Stevens, Treas'r.

A. Proctor, Jr.,
Cashier.

Indorsements.

For deposit in
Ninth National Bank
to Cr. of Geo. R. Fitch,
Gen. East'n Ag't.

Ninth Nat'l Bank,
Indorsement,
guaranteed
of the City of N. Y.

The amount of the check was credited at the Ninth National Bank to the account of "George R. Fitch, General Eastern Agent," which was the style of the account opened by Fitch as agent of the Northern Pacific Railroad; and the account was never drawn upon in favor of the Northern Steamship Company; but all through freights received [450] *were deposited to the credit of this account and remitted to the railroad company, or its receivers, and were divided and distributed by them under their contract with the steamship company.

11. On September 28, 1894, a shipping receipt for the shipment was issued to the Balbeck Smelting & Refining Company, of which shipping receipt a copy is hereto annexed marked exhibit "B," and was delivered by the Balbeck Smelting & Refining Company to the American Trading Company, and was forthwith surrendered by the trading company to Fitch.

A bill of lading in the usual printed form, a copy of which is hercin annexed marked "C," was subsequently issued by Fitch to the American Trading Company. It was received by the clerk of the trading company without stated objection to its terms, but was not read or examined by him, or by any officer of the company, and was immediately hypothecated with the Hong Kong and Shanghai bank, as collateral security for moneys borrowed thereon by the trading company. The original of the bill of lading was negotiable and did not have stamped upon it the words "Not negotiable; shipper's

copy," which appear on the shipper's copy hereto annexed, but was similar to the shipper's copy in all other respects.

On September 29th, 1894, Fitch sent a copy of this bill of lading to Dodwell, Carlill, & Co., with a letter (not disclosed to the American Trading Company) of which the following is a copy:

Northern Pacific Railroad Company.
Thomas F. Oakes, Henry C. Payne, Henry C. Rouse, Receivers.

George R. Fitch, General Eastern Agent, 319 Broadway.

Traffic Department.

New York City, Sept. 29, 1894.

Dodwell, Carlill, & Co., Tacoma, Wash.

Gentlemen:—

I hand you herewith my B/L 1507 covering shipment of pig lead for export to Amer. Trading Co. Yokohama, Japan. As I have previously advised you, I have made*contract[451] guaranteeing delivery of this supplement at Yokohama by our S. S. Tacoma sailing Oct. 30th. Will you kindly see that this connection is made without fail.

Yours truly,

(S'g'd) Geo. R. Fitch, G. E. A.

The previous letter of advice, referred to by Fitch in the foregoing letter, is lost, and no copy of it exists. It appears, however, from the following letter of acknowledgment to have borne date on September 27th:

Tacoma, Wn., October 2nd, 1894.

George R. Fitch, Esq., G. E. A., N. P. R. R.,
319 Broadway, New York.

Dear Sir:—

We beg to own receipt of and thank you for your favor of the 27th ultimo, and advising the engagement of 40 tons of condensed milk and 225 tons of pig lead for our steamer Tacoma, sailing hence the 30th instant. Please keep us frequently advised of freight engagements, as we have applications now for more space for flour than our steamers will carry, and we are shutting out considerable of the latter every voyage.

Yours truly,

(Sig.) p. p. Dodwell, Carlill, & Co.
A. T. Pritchard.

12. At Tacoma the lead was delivered by the receivers to the Northern Pacific Steamship Company, and was loaded upon the Tacoma, the vessel of the steamship company which was to sail on October 30th; but about 4 o'clock in the afternoon of that day the deputy collector of the United States at that port refused to clear the vessel while the lead was on board, upon the ground that it was contraband of war, and telegraphed to the collector at Port Townsend for instructions. On the following day, which was the 31st of

[452] October, the deputy collector at Tacoma received a telegram *from the collector of the United States at Port Townsend, which was as follows:

"Department advises that, unless you have evidence tending to show that the pig lead at Tacoma, and referred to in your telegram of yesterday, is to be used in the war between China and Japan, no reason is perceived why shipment should not be permitted."

In the meantime, however, the master of the vessel unloaded the lead, which delayed the ship until 9 A. M. on the morning of October 31st, when he sailed without it.

The petitioner was not notified of the delay in the transshipment of the lead until November 5th, 1894.

The next vessel on the line was the Sikh, which did not belong to the steamship company, but was a chartered ship. Her captain declined to take the lead on the ground that it was contraband. The Northern Pacific Steamship Company cabled to the owners of the vessel in London, and they adhered to the position taken by the captain.

13. The lead went forward on the next vessel, the Victoria, on December 11, 1894, and did not arrive in Yokohama until on or about January 4, 1895, instead of on or about November 18, 1894, when it would have arrived had it gone forward on the 30th of October, 1894.

14. In the meantime hostilities between China and Japan had ceased, the price of lead had fallen very considerably, and the purchaser of the shipment refused to accept it, and declared the contract null and void in consequence of the failure to deliver it promptly in accordance with the terms of the contract.

15. The price of the lead under the contract would have been \$38,610.17. The lead was delivered to the trading company in Yokohama upon the surrender of the bill of lading, and, in consequence of the failure of its vendee to accept the lead, the trading company sold it for \$11,331.60, which was the best price obtainable therefor at the time of the sale. The sale was made as soon [453] as a purchaser could be found. *The value of the lead on January 4, 1895, in Japan, was \$11,906.16.

16. Upon the case arising on the foregoing facts, the American Trading Company has duly presented to the receivers, and to the Northern Pacific Railway Company, its claim, amounting to the sum of 26,704.02, with interest thereon from the 4th day of January, 1895, and has demanded payment thereof; but payment has been refused, and no part thereof has been paid.

195 U. S.

Mr. C. W. Bunn argued the cause and filed a brief for appellant:

The general doctrine as to transportation by connecting lines amounts to this: That each road, confining itself to its common-law liability, is only bound, in the absence of a special contract, safely to carry over its own route and safely to deliver to the next connecting carrier, but that any one of the companies may agree that over the whole route its liability shall extend. In the absence of a special agreement to that effect, such liability will not attach; and the agreement will not be inferred from doubtful expressions or loose language, but only from clear and satisfactory evidence.

Myrick v. Michigan C. R. Co. 107 U. S. 102, 27 L. ed. 325, 1 Sup. Ct. Rep. 325; *Taylor v. Maine C. R. Co.* 87 Me. 302, 32 Atl. 905; *Burroughs v. Norwich & W. R. Co.* 100 Mass. 26, 1 Am. Rep. 78; *Washburn & M. Mfg. Co. v. Providence & W. R. Co.* 113 Mass. 490.

The ordinary and usual business of the railroad company the receivers had the right to do; but contracting for transportation beyond its own line is an unusual and extraordinary service, not, according to American law, pertaining or belonging to the duties of a common carrier, but requiring a special and express contract. Therefore the making of such guaranties is no part of the necessary, or even the usual, business of operating a railroad, and does not come under the authority of receivers.

Chicago Deposit Vault Co. v. McNulta, 153 U. S. 554, 38 L. ed. 819, 14 Sup. Ct. Rep. 915; *International & G. N. R. Co. v. Wentworth*, 87 Tex. 311, 28 S. W. 277.

There can be no more ground for saying that the receivers could lawfully guarantee the performance of service by the ocean carrier between Tacoma and Yokohama, than for holding that the receivers themselves could buy or charter ships, and by their operation transport the freight themselves, or that they could guarantee the earnings of ships operated by others. And will it be contended for a moment that the receivers, under the ordinary power to operate this railroad, could have set up a steamship line across the Pacific Ocean, and subjected the trust fund in their charge to the risks and liabilities of such an enterprise, or that they could have guaranteed earnings to the steamship company?

See *Green Bay & M. R. Co. v. Union S. B. Co.* 107 U. S. 98, 27 L. ed. 413, 2 Sup. Ct. Rep. 221; *Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co.* 131 U. S. 371, 385, 33 L. ed. 157, 161, 9 Sup. Ct. Rep. 770; *Swift v. Pacific Mail S. S. Co.* 106 N. Y. 206, 12 N. E. 583.

The bill of lading expresses the only con-

tract covering the rights of the parties, and the plain agreement of the bill of lading, that the receivers should not be liable beyond their terminus at Tacoma, is a part of that contract.

Seitz v. Brewers' Refrigerator Co. 141 U. S. 510, 35 L. ed. 837, 12 Sup. Ct. Rep. 46; *De Witt v. Berry*, 134 U. S. 306, 33 L. ed. 896, 10 Sup. Ct. Rep. 536; *Shelton v. Merchants' Despatch Transp. Co.* 59 N. Y. 258; *Hill v. Syracuse, B. & N. Y. R. Co.* 73 N. Y. 351, 29 Am. Rep. 163; *Germania F. Ins. Co. v. Memphis & C. R. Co.* 72 N. Y. 90, 28 Am. Rep. 113; *Rubens v. Ludgate Hill S. S. Co.* 48 N. Y. S. R. 732, 20 N. Y. Supp. 481.

The collector's action in refusing the boat to carry the lead made the performance of the agreement not only impossible, but unlawful, and absolved the carriers from the agreement to carry by that boat.

Brewster v. Kitchell, 1 Salk. 198; *Baily v. De Crespigny*, L. R. 4 Q. B. 180; Leake, Contr. 710-713.

Probably the deputy collector erred. Contraband as the lead doubtless was, trade therein was lawful.

Kent Com. 14th ed. *142, 143 and notes (c) and 1; *The Santissima Trinidad*, 7 Wheat. 283, 340, 5 L. ed. 454, 468; *Richardson v. Maine F. & M. Ins. Co.* 6 Mass. 102, 4 Am. Dec. 92; 11 Ops. Atty. Gen. 408; *The Helen*, L. R. 1 Ad. & Eccl. 1.

But, rightly or wrongly, the United States officers charged with authority did withhold the clearance, and for the ship to sail without clearance would have been an offense against the laws of the United States.

It is indeed true that a party may bind himself to do an act in such a way that a subsequent arising impossibility is no defense; but that is not this case.

Chicago, M. & St. P. R. Co. v. Hoyt, 149 U. S. 1, 37 L. ed. 625, 13 Sup. Ct. Rep. 779.

That the performance of a contract to traffic with an enemy is excused by a declaration of war, and that an embargo excuses performance, are well settled.

Dermott v. Jones (Ingle v. Jones) 2 Wall. 1, 7, 17 L. ed. 762, 764; *Hanger v. Abbott*, 6 Wall. 532, 535, 536, 18 L. ed. 939, 941, 942; *Baylies v. Fettyplace*, 7 Mass. 325.

Parties will be presumed to have contracted with reference to the necessity of obeying the laws of their own country, and performance is for that reason excused, where obedience becomes illegal.

Leake, Contr. 4th ed. pp. 497, 501.

Appellee suggests that the captain should have sailed without a clearance. Not only would that have been a violation of the statute, but it would have involved the ship in other troubles.

Abbott, Shipping, 9th ed. 288, 289; Lushington, Naval Prize Law, 24-28, 29-34.

Mr. F. B. Jennings argued the cause, and, with *Mr. Howard van Sinderen*, filed a brief for appellee:

A common carrier has power to contract for transportation beyond the terminus of its line, even though such carriage extend into another state or country.

Elliott, Railroads, § 1434; *Redf. Railways*, §§ 189, 191; *Hutchinson, Carr.* §§ 151, 152; *Ogdensburg & L. C. R. Co. v. Pratt*, 22 Wall. 123, 22 L. ed. 827; *Ohio & M. R. Co. v. McCarthy*, 96 U. S. 258, 24 L. ed. 693.

With respect to such contracts and transportation the receivers were liable to third parties, in all respects, to the same extent as the railroad company would have been liable by law.

Beers v. Wabash, St. L. & P. R. Co. 34 Fed. 247; *Elliott, Railroads*, § 567; *Hutchinson, Carr.* § 67a; *Beach, Receivers*, § 371; *Central Trust Co. v. New York City & N. R. Co.* 110 N. Y. 257, 1 L. R. A. 260, 18 N. E. 92; *Little v. Dusenberry*, 46 N. J. L. 614, 50 Am. Rep. 445; *Wall v. Platt*, 169 Mass. 400, 48 N. E. 270; *Kansas P. R. Co. v. Bayles*, 19 Colo. 348, 35 Pac. 744.

The real authority of an agent is equal to his apparent authority, and he can make any contract relative to the business under his management, which could be made by his principal.

Union Mut. L. Ins. Co. v. Wilkinson, 13 Wall. 222, 235, 20 L. ed. 617, 623; *Goldwater v. Liverpool & L. & G. Ins. Co.* 39 Hun, 178, 109 N. Y. 618, 15 N. E. 895; *Pechner v. Phoenix Ins. Co.* 65 N. Y. 195; *Lowenstein v. Lombard*, 164 N. Y. 324, 58 N. E. 44; *Isaacson v. New York C. & H. R. R. Co.* 94 N. Y. 278, 46 Am. Rep. 142; *Talcott v. Wabash R. Co.* 159 N. Y. 461, 54 N. E. 1; *Porter, Bills of Lading*, § 159; *Hutchinson, Carr.* § 267.

A general freight agent has authority to contract for the carriage of goods beyond the limit of the carrier's line.

Ray, Negligence of Imposed Duties, p. 400; *White v. Missouri P. R. Co.* 19 Mo. App. 400; *Grover & B. Sewing Mach. Co. v. Missouri P. R. Co.* 70 Mo. 672, 35 Am. Rep. 444.

The agent of a railroad has power to stipulate for carriage within a specified time.

Strohn v. Detroit & M. R. Co. 23 Wis. 126, 99 Am. Dec. 114.

Fitch had authority to bind his principals to forward the goods per steamship "Tacoma," sailing October 30th.

Goddard v. Mallory, 52 Barb. 87; *Goodrich v. Thompson*, 44 N. Y. 324.

The consent of both parties was just as essential to the annulment or modification of the contract as to its inception.

Wheeler v. New Brunswick & C. R. Co.

115 U. S. 34, 29 L. ed. 343, 5 Sup. Ct. Rep. 1061, 1160.

Assent to the modification of a shipping contract under which goods have gone forward will never be implied from the subsequent receipt of a bill of lading without stated objection to its terms.

Bostwick v. Baltimore & O. R. Co. 45 N. Y. 712; *Missouri P. R. Co. v. Beeson*, 30 Kan. 298, 2 Pac. 496; *Michigan C. R. Co. v. Mineral Springs Mfg. Co.* 16 Wall. 319, 21 L. ed. 297; *Swift v. Pacific Mail S. S. Co.* 106 N. Y. 206, 12 N. E. 583; *Mobile & M. R. Co. v. Jurey*, 111 U. S. 584, 28 L. ed. 527, 4 Sup. Ct. Rep. 566; *Park v. Preston*, 108 N. Y. 434, 15 N. E. 705; *Guillaume v. General Transp. Co.* 100 N. Y. 491, 3 N. E. 489; *Strohn v. Detroit & M. R. Co.* 21 Wis. 555, 94 Am. Dec. 564; *King v. Woodbridge*, 34 Vt. 565; *Hutchinson*, Carr. §§ 246, 247; *McAbsher v. Richmond & D. R. Co.* 108 N. C. 344, 12 S. E. 892; *Hamilton v. Western N. C. R. Co.* 96 N. C. 398, 3 S. E. 164; *Central R. Co. v. Dwight Mfg. Co.* 75 Ga. 609; *Baker v. Michigan S. & N. I. R. Co.* 42 Ill. 73; *Merchants' Despatch Transp. Co. v. Furthmann*, 149 Ill. 66, 41 Am. St. Rep. 265, 36 N. E. 624; *Michigan C. R. Co. v. Mineral Springs Mfg. Co.* 16 Wall. 318, 329, 21 L. ed. 297; *Pollard v. Vinton*, 105 U. S. 8, 26 L. ed. 999.

The trading company's dealings with the bank could not affect the carrier's obligation to the trading company.

Gaines v. Union Transp. & Ins. Co. 28 Ohio St. 418.

The deputy collector's act in refusing clearance is conceded to have been unlawful, and, clearly, it was so.

Treasury Decisions, August, 1865-1883; *Hendricks v. Gonzales*, 14 C. C. A. 659, 35 U. S. App. 127, 67 Fed. 351.

There can be no such thing as illegality subsequently arising which could take the case out of the operation of the rule as laid down in respect to impossibility of performance subsequently arising.

Davis v. Wallace, 3 Cliff. 123, Fed. Cas. No. 3,657.

The performance of this contract did not become illegal in consequence of the unlawful interference by the collector; and even under the English law it is well settled that under such circumstances the carrier would not be excused, but would be liable to the shipper, and would then have its action for damages against the official who unlawfully and improperly interfered.

Gosling v. Higgins, 1 Campb. 481; *Evans v. Hutton*, 12 L. J. C. P. N. S. 17.

Where the collector, unlawfully and in violation of his duty as prescribed by this section, refused to grant a clearance, the vessel would be justified in sailing without

it, subject of course to the payment of the fine fixed by the act, which it could then recover from the collector.

Hendricks v. Gonzales, 14 C. C. A. 659, 35 U. S. App. 127, 67 Fed. 357; *Schell v. Cochran*, 107 U. S. 625, 27 L. ed. 543, 2 Sup. Ct. Rep. 827; *Cruikshank v. Bidwell*, 176 U. S. 73-81, 44 L. ed. 377-381, 20 Sup. Ct. Rep. 280; *United States v. Sherman*, 98 U. S. 565, 25 L. ed. 235.

Even if the receivers were prevented from a literal compliance with the terms of the contract, they were still bound to perform it in substance.

Williams v. Vanderbilt, 28 N. Y. 217, 84 Am. Dec. 333.

Impossibility of performance arising subsequently to the making of a contract constitutes no defense.

Jacksonville, M. P. R. & Nav. Co. v. Hooper, 160 U. S. 514, 527, 40 L. ed. 515, 524, 16 Sup. Ct. Rep. 379; *Hutchinson*, Carr. § 317; *Jones v. United States*, 96 U. S. 24, 29, 24 L. ed. 644, 646; *Robson v. Mississippi River Logging Co.* 61 Fed. 900, 16 C. C. A. 400, 32 U. S. App. 520, 69 Fed. 777; *The Harriman (The Harriman v. Emerick)* 9 Wall. 161, 19 L. ed. 631; *Beebe v. Johnson*, 19 Wend. 500, 32 Am. Dec. 518; *Blight v. Page*, 3 Bos. & P. 295 note; *Barker v. Hodgson*, 3 Maule & S. 271; *Medeiros v. Hill*, 8 Bing. 235; *Ashmore v. Cox* [1899] 1 Q. B. 436; 1 Parsons, Contr.* p. 566; Addison, Contr. *pp. 1195, 1198; *Atkinson v. Ritchie*, 10 East, 530; *Harmony v. Bingham*, 12 N. Y. 99, 62 Am. Dec. 142; *Hale v. Rawson*, 4 C. B. N. S. 85; *Higginson v. Weld*, 14 Gray, 165; *Splidt v. Heath*, 2 Campb. 57 note; *Spence v. Chadwick*, 10 Q. B. 517; *Hayward v. Scougall*, 2 Campb. 56; Story, Contr. § 1334.

The damages which have been suffered by the appellee were those clearly due to the negligent omission of the carriers to exercise that degree of diligence in the interest of shippers which the law requires.

Hutchinson, Carr. §§ 186, 188, 208, 209; *Robinson v. Memphis & C. R. Co.* 16 Fed. 57.

Even if the negligence were that of the steamship company, the receivers, having contracted for through transportation, would still be liable.

Ohio & M. R. Co. v. McCarthy, 96 U. S. 258, 24 L. ed. 693; *Ogdensburg & L. C. R. Co. v. Pratt*, 22 Wall. 123, 22 L. ed. 827.

Mr. Justice **Peckham**, after making the foregoing statement of facts, delivered the opinion of the court:

The objections to the recovery, herein made on the argument, were—

(1) That no contract was shown, on the part of the receivers, to assume any responsibility for the transportation of the lead

beyond the line of the railway in their charge.

[458] * (2) That there was no proof that the court had authorized the receivers to assume any such responsibility, and they could not do so without any such authority.

(3) That if Fitch, the agent, made such agreement, it was not within his authority, real or apparent.

(4) That the bill of lading is the controlling contract, and by its terms the receivers were not liable beyond their own line.

(5) That the damages were caused solely by the act of the collector, representing the authority of the United States; and the receivers are not liable for damages so caused.

In regard to the first objection, we think the facts agreed upon clearly show a special agreement for the transportation of the lead to Yokohama by the steamship of the Northern Pacific Steamship Company, which was to leave Tacoma on the 30th of October, 1894. The opening of the negotiation was made by the American Trading Company, which applied to Fitch for a rate upon the proposed shipment from New York to Yokohama, Japan. The trading company knew nothing of his steamship agency, and he was informed that it was of vital importance that the lead should be transported promptly, and go forward by the earliest possible steamer without delay, in order to enable the trading company to fulfil a proposed agreement which it was about to make for the sale of the lead in Japan, and which would require its delivery there at a fixed date. Fitch thereupon named a rate, and undertook to forward the lead from New York to Yokohama, on or before September 29, *via* the Northern Pacific steamer sailing from Tacoma October 30, 1894. The trading company thereupon made its proposed agreement through its agents at Yokohama. Although Fitch, the agent, was not thereafter specially informed of the fact that the proposed agreement had been made, yet he was informed that the company intended to make it if a rate could be agreed upon for the transportation of the lead. It is clear that his furnishing of the rate was with reference to the

[459] proposed agreement, *and that he understood that, if his terms were accepted, he was entering into an agreement to transport to Japan the lead in question over the Northern Pacific railroad to Tacoma, and by the steamship which would leave Tacoma on the 30th of October, 1894. His letter of September 19, 1894, to the trading company, confirming the rate, is a plain agreement, not alone to deliver the lead in time for the sailing of the steamer, October 30, but an agreement that the lead should be forwarded from Tacoma, Washington, *via* the Northern Pacific steamer sailing on that day. Fitch in

that letter asking the trading company to forward their acceptance of this proposed agreement as early as possible. On the next day, September 20, the trading company, by letter, did accept the rate "for a shipment of pig lead, to consist of not less than 400,000 pounds, to be forwarded from New York to Tacoma, and from Tacoma *via* the Northern Pacific steamer sailing from that port October 30." There is no doubtful expression in these letters. They form a clear and specific contract. It is entirely different from *Myrick v. Michigan C. R. Co.* 107 U. S. 102, 27 L. ed. 325, 1 Sup. Ct. Rep. 425. The receipt in that case was plainly not one which established a contract for transportation on the part of the railroad company (defendant) beyond its own line. This court held that while a company might, by a contract to that effect, be held liable for the transportation and delivery of freight beyond its own line, yet the contract to do so must be clear; and that the mere stating of a through fare on the receipt of the freight does not establish such contract or liability.

In the case at bar we hold that a special agreement is set forth in the statement of facts, to forward to Yokohama by the steamer leaving Tacoma on October 30, 1894. If it had been made by the proper officer of a railroad company in the general course of business we have no doubt, under the authorities, of the validity of the contract. *Ogdensburg & L. & C. R. Co. v. Pratt*, 22 Wall. 123, 22 L. ed. 827; *Ohio & M. R. Co. v. McCarthy*, 96 U. S. 258, 24 L. ed. 693; *Myrick v. Michigan C. R. Co.* 107 U. S. *102, 27 L. ed. 325, [460] 1 Sup. Ct. Rep. 425. Whether the fact that it was made by an agent of the receivers of a railroad company makes any difference will be discussed later.

Appellant urges, however, that, as Fitch was also agent for the steamship company, his contract, if there was one, to forward by the steamship sailing October 30, was in behalf of the steamship company. Fitch had never received any direct or independent appointment or authority from the Northern Pacific Steamship Company to act as its agent. His only authority as agent of that company was created by the contract made between the two companies. By that agreement the railroad company was to have the exclusive right (with certain exceptions) to appoint agents in the United States, etc.; and the steamship company thereby authorized the railroad company and its appointed agents to act as agents for the steamship company, and to issue bills of lading and passenger tickets, and to make and name rates on all traffic for Asiatic points, etc. The trading company did not know what company operated the steamships between Tacoma and Yokohama, or that the steamship

company was a separate and independent company, or that there was any contract between the receivers and the steamship company. When the trading company, therefore, applied to Fitch for a rate, they applied to him as the agent of the receivers of the railroad company. The letter of Fitch of the 19th of September, confirming the rate already given orally that day, is written on the paper used by the receivers of the railroad company, which paper is headed by the names of the receivers under the words "Northern Pacific Railroad Co.;" and in it Fitch describes himself as "general eastern agent," and his department as the "Traffic Department in New York city," and he signs his name, and adds the words "G. E. Agent." In his letter of September 29, 1894, to the steamship agent at Tacoma, Washington, he writes on the same kind of paper, with the same heading, and describes himself as "general eastern agent;" and in the letter he says: "As I have previously advised you, I

[461] have made contract *guaranteeing delivery of this shipment at Yokohama by our S. S. Tacoma, sailing October 30. Will you kindly see that this connection is made, without fail." He signs his name, and adds the letters G. E. A., meaning, of course, thereby "general eastern agent." It is contended that, by the statement of facts, it appears that Fitch was acting for two principals, and that the plaintiff must establish that Fitch made the alleged guaranty on behalf of the receivers. We do not think he was acting in behalf of two principals. From all the facts, we think it plain that he was acting for the receivers of the railroad company. He was their general eastern agent; he was applied to, and he made his rates, as such, and as such he signed the letter confirming those rates, and containing the agreement to forward the lead on the steamship as already stated. Subsequently, and on the 29th of September, while acting and signing himself as the general eastern agent of the receivers, he writes to the steamship agents at Tacoma the letter in which he says he has guaranteed delivery at Yokohama, by "our steamer" sailing October 30. All this shows the fact that he was acting as agent for the receivers.

We have no difficulty in determining the capacity in which Fitch acted, nor that he made the special agreement, as contended by the trading company.

(2) Neither do we doubt that the court had authorized the receivers to make such a contract.

Under the modern methods of foreclosing railroad mortgages, it has been the custom to appoint receivers to take charge and conduct the business of the railroad mortgagor during the pendency of the suit. The possession of such receivers frequently lasts for years.

195 U. S.

It would be in the highest degree disadvantageous to all interested in the railroad company, as well as to the public having occasion to do business with it, if the same power which the company possessed to make special contracts for transportation should not be given to and exercised by the receivers of the company in continuing to run the road in substance as a going concern, so far as these *kinds of contracts are concerned. Such con-[462] tracts are not of the character spoken of by Mr. Justice Jackson in *Chicago Deposit Vault Co. v. McNulta*, 153 U. S. 554, 38 L. ed. 819, 14 Sup. Ct. Rep. 915, as so extraordinary or unusual as not to be included in the authority to carry on the business of the company. On the contrary, this contract is one of that class which we regard as so included.

(3) We are also of opinion that Fitch had the right to make the agreement in question, and, if there could be any doubt on that point, nevertheless the agreement was in fact thereafter ratified by the officers representing the receivers, who had power so to do. *Goodrich v. Thompson*, 44 N. Y. 324.

A railroad company has the power, as we have seen, to make such a contract of carriage beyond its lines. A general agent would be presumed to have such power. If the company have the power, some individual must exercise it. It would not be supposed that the board of directors would be consulted, and authority given by it every time such a contract was to be made. Who is a more proper or fit person to make the contract than the general agent of the company? He must necessarily have large powers in order to conduct the business of his office, and, prima facie, such power is within the scope of such agency. When the railroad company passes into the hands of a receiver, appointed by the court in a foreclosure suit, and the receiver is directed to conduct and continue the business of the company, the power to appoint general agents necessarily goes with the order to conduct the business of the company; and when the general agent is appointed by a receiver, he will be presumed to have the general powers of such an officer when acting for the railroad itself. The words "general eastern agent" for a western railroad company only limit the exercise of the agency to the place so described.

(4) It is urged that the bill of lading constitutes the sole contract. But there was a plain, valid contract existing between the parties before the lead was shipped, and before any bill of lading was issued. That special contract was to forward *the lead by [463] the steamship leaving Tacoma on the 30th of October. The next day after the lead was shipped at Newark, a bill of lading was delivered to one of the clerks of the trading

company, and that bill of lading contains the absolutely inconsistent statement that the carrier is not to be liable for any loss not occurring on its own road, and that the contract, as executed, is accomplished, and all liability thereunder terminates, upon the delivery of the property to the steamship.

It is said that the trading company, by receiving this bill of lading and obtaining money on it as the representative of the property therein described, has acquiesced in the total abolition of the special contract the company made with Fitch, and has agreed that the railroad company shall be under no liability after the delivery of the lead to the steamship.

We regard it as entirely clear that no such effacement of the original contract was meant by the receipt of the bill of lading. The railroad company had no power alone to alter that contract, and it could not alter it by simply issuing a bill of lading, unless the other party assented to its conditions, and thereby made a new and different contract.

At the time when the bill of lading was issued the lead had been shipped at Newark, and had departed for its destination. It was impossible for the trading company to recall it. The particular conditions in the bill are set out in subdivision 3 and subdivision 12 of the conditions printed in small type, and they form part of numerous other printed conditions in regard to the freight received.

Where the acceptance of the bill of lading, under these circumstances, is sought to be made an equivalent to an assent to the change of contract, it is proper to look at these facts in order to determine what weight should be given to such acceptance. At the time it was received the lead was out of the possession of the trading company, on its way West. That company needed the bill of lading as evidence of title to the property described in it, upon the security of which [464] it *desired to raise money, which it could not do without the possession of the bill. Under these circumstances, we refuse to hold that the trading company, in accepting the bill of lading, thereby consented to the complete alteration of its original contract, and without any consideration whatever, agreed to release the railroad company from all liability on that contract, and to take in its stead the reduced liability provided for in the bill of lading.

Of course the company expected a bill of lading, for such an instrument is the usual accompaniment in shipping merchandise. The bill showed the amount of the lead, the marks and numbers, etc., and so identified the goods as to enable the shippers to show their amount and general value, and to en-

able them to negotiate the bill and obtain money on its security.

It is agreed in the statement of facts that this bill of lading was received by a clerk of the trading company without stated objection to its terms, but was not read or examined by him, or by any officer of the company, and was immediately hypothecated with a bank as collateral security for the money borrowed thereon by the trading company. We do not state the fact that the bill of lading was not examined, for the purpose of insisting that an examination of such an instrument must always be shown before a contract can be predicated thereon. But where there is a valid contract already in existence, and it is urged that such contract has been abrogated or changed by the receipt of a bill of lading, after goods have passed from the control of the shipper, we think it is important, upon the question of whether such original contract has, in fact, been abrogated, to show that the bill was never read in fact; that the conditions abrogating the original contract were among a number of other conditions printed in the bill in smaller type than the rest of the bill, and that the alleged acquiescence of the trading company in the change of the contract, by virtue of these conditions, is based upon the mere reception of the bill of lading by a clerk without any knowledge of the existence of these conditions, and without evidence *of [465] any authority in him to consent to a modification of the contract already made by his employer. The fact, that, in such ignorance, that company hypothecated the bill of lading, adds nothing to the alleged acquiescence. What the contract meant as between the railroad company and the bank or other assignee of the bill of lading is not important here; but, upon these facts, we are unable to see that the receipt and holding of the bill of lading changed the original contract as claimed by the railroad company. See *Bostwick v. Baltimore & O. R. Co.* 45 N. Y. 712, where it was held, under the circumstances of that case, the mere acceptance of a bill of lading did not alter a previously made oral contract in relation to the shipment.

(5) Even if the receivers of the railroad company contracted to forward the lead by the steamer sailing from Tacoma October 30, it is still insisted that the action of the deputy collector, at Tacoma, in refusing to grant a clearance to the steamship while the lead was on board, made the performance of the agreement not only impossible, but unlawful; and, for that reason, the receivers were absolved from their agreement to forward by that vessel. The contract was not unlawful when made. It may be assumed that the lead was contraband of war; but

that fact did not render the contract of transportation illegal, nor absolve the carrier from fulfilling it. It is legal to export articles which are contraband of war; but the articles, and the ship which carries them, are subject to the risk of capture and forfeiture. *The Santissima Trinidad*, 7 Wheat. 283, 340, 5 L. ed. 454, 468. Neither any law of the United States, nor any provision of international law, was violated by the making of this contract, nor by an attempt to export the lead pursuant to its provisions. The case does not come within the principle of *Brewster v. Kitchell*, 1 Salk. 198, where it was said that, if one covenants to do a thing which is lawful, and an act of Parliament comes in and hinders him from doing it, the covenant is repealed.

No act of Congress was passed, subsequently [466] to the making* of the contract, which made it unlawful, and it was lawful when made. It is true that the sailing of the vessel without a clearance would have been unlawful, and the deputy collector refused to grant that necessary document while the lead was on board the steamship. But that did not render unlawful the contract to transport. He had the power to refuse to grant the clearance, and he did refuse unless the lead were taken off. In so doing he undoubtedly violated his duty. He was not justified in exacting any such condition for granting the clearance.

Upon the facts in this case, we are of opinion that this refusal of the deputy collector constituted no defense to the action on the contract. It is not within the exception referred to by Mr. Justice Jackson, in delivering the opinion of the court in *Chicago, M. & St. P. R. Co. v. Hoyt*, 149 U. S. 1, 37 L. ed. 625, 13 Sup. Ct. Rep. 779. This contract, in view of all the facts, we think was made in contemplation of trouble arising from the character of the lead as contraband of war.

The statement of facts shows that the question of whether the lead might not be excluded from transportation as contraband in view of the war then existing between China and Japan was fully understood before the contract was made, and after it was made, and the steamship refused to carry the lead, the trading company, upon being so informed by Fitch, notified him that they would hold the receivers responsible for failure to fulfil the contract; and thereafter, with the attention of all the parties directed to the subject, it was finally agreed that the lead should be received and transported, and the refusal was then withdrawn.

It is true that the special and particular difficulty was first made by the steamship
195 U. S.

company which refused to transport the lead, yet, still, the attention of all the parties was, from the very first, directed to the peculiar character of the freight as contraband of war, and whether the contract should on that account be made, or, having been made, whether the shipment should not be refused. The receivers, therefore, knew *that there might be difficulty in relation to [467] the transportation, and yet, after full knowledge on the subject, they agreed to, and did, withdraw their refusal; and they thereupon took the lead for transportation under the contract.

Under these circumstances, it ought not to be held that the mistaken action of the deputy collector in refusing to give the clearance should operate as an excuse for the nonperformance of the contract, which was not thereby rendered illegal. It cannot be affirmed that such possible refusal was not within the contemplation of the contracting parties when the contract was made. Many causes, it was known, might operate to obstruct the transportation of articles contraband of war: This particular form of impediment may not have been actually within the minds of the parties to the contract, but there was, as the agreed facts show, present to their minds the fact that there might be trouble in procuring the transportation of the lead because of its character as contraband of war, and in the light of those facts the contract was made, and, in substance, ratified after it was made. The railroad receivers took the risk of this, as of other obstructions, in making the contract, and they ought to be held to it.

As the act of the deputy collector was an erroneous one, and a clearance should have been given while the lead was on board the steamship, we think his refusal should not be at the expense of the shippers, who had obtained this contract for transportation while all parties actually knew the difficulties that might concern the exportation of the lead from Tacoma. The state had not intervened to prevent the performance of the contract, as was the case in *Touteng v. Hubbard*, 3 Bos. & P. 291, where Lord Alvanley held that in such circumstances the party will be excused. In that case there was an embargo laid by the British government, after the contract was made, on all Swedish vessels.

Here there was no intervention of the government of the United States. The exportation of lead was never prohibited by the Treasury Department during the war between China *and Japan. There was no [468] change in the law or the policy of this government subsequently to the making of the

contract, by which its performance was excused. The exportation of the lead was legal when the contract was made, and continued to be so after the execution of such contract, although the deputy collector mistakenly refused to grant the clearance unless the lead was taken off the vessel. Such mistaken decision did not render the original loading of the lead on the ship unlawful, nor would it have been unlawful for the ship to proceed with the lead on board provided the clearance had been had. It was not an act of the state, therefore, which prevented the sailing of the vessel, within the true meaning of such a term, but a mistaken act of a subordinate official, not justified by law, and not sufficient as an excuse for the nonperformance of the contract in question under the circumstances already detailed. If the bill of lading were regarded as applicable for this purpose, the refusal of the clearance did not constitute a "restraint of princes, rulers, or people," within that clause of the bill.

It was one of the contingencies of which the receivers undertook by their special contract of transportation to take the risk. It was not a contract that they should violate the law, but they took the risk of its misapplication, believing of course, that such contingency was most remote, and that, if the steamship company would receive the lead for transportation, the chief obstacle to the fulfilment of the contract would be thereby removed.

[469] After the lead had been unshipped, and within half an hour after the sailing of the vessel, the telegram which the deputy collector had sent to the collector in regard to the matter was answered by the latter in such terms that, undoubtedly, if the ship had been still in port, the lead would have been placed thereon and transported to Japan. The master, however, as soon as the determination of the deputy collector was given, immediately, and without appealing to the collector, unshipped the lead, and sailed for his destination at once. *The result of the failure thus to carry the lead on that vessel was that it did not arrive in Yokohama until on or about January 4, 1895, instead of on or about November 18, 1894, which it would have done had it gone forward as contracted for. In the meantime, the war between China and Japan ceased, the value of the lead fell, and the trading company was damaged as stated in the finding of facts.

We think the objections made to this recovery are untenable, and *the decree of the court below is, therefore, affirmed.*

UNITED STATES and the Kiowa Indians,
Appts.,
v.

JUAN B. MARTINEZ, Administrator of
Julio Martinez, Deceased.

(See S. C. Reporter's ed. 469-480.)

Pleading—amendment in Indian depredation cases—limitation.

A petition in an action under the Indian depredation act of March 3, 1891 (26 Stat. at L. 851, chap. 538, U. S. Comp. Stat. 1901, p. 758), in which the wrong was alleged to have been committed by a particular Indian tribe, cannot be amended after the three years' limitation prescribed by that act has expired, by stating another and different tribe as the wrongdoer, since it is manifestly intended by the statute, taken as a whole, that the tribe by whom the depredation was committed shall be joined in the petition where it can be identified, though it does not in terms provide for service of process upon such tribe.

[No. 15.]

Argued October 21, 24, 1904. Decided December 5, 1904.

APPEAL from the Court of Claims to review an award of damages in an action under the Indian depredation act. *Reversed*, with directions to dismiss the petition.

Statement by Mr. Justice **Day**:

This action was brought in the court of claims on October 24, 1891, to recover damages against the United States and the Ute tribe of Indians, in the sum of \$1,400, the value of certain sheep alleged to have been taken and destroyed or used in June, 1873, by the said Indians. The petition was filed under the provisions of the act of March 3, 1891, entitled "An act to Provide for the Adjudication and Payment of Claims Arising from Indian Depredations." 26 Stat. at L. 851, chap. 538, U. S. Comp. Stat. 1901, p. 758. On February 5, 1902, the Assistant Attorney General of the United States answered the allegations of the petition *by a [470] general denial. On November 4, 1902, the claimant filed a motion for leave to file an amended petition, charging the depredation to have been committed by the Kiowa Indians, which motion was allowed, and upon the same day the amended petition was filed. On November 5, 1902, the Assistant Attorney General, appearing on behalf of the United States and the Kiowa Indians, filed a plea to the amended petition, setting up that no action had been commenced against the Kiowa Indians within three years after the passage of the act of March 3, 1891. On November 11, 1902, this plea in bar was overruled, and,

upon the general issue being pleaded and trial had, the court found as a matter of fact: At the time of the depredation the claimant's decedent was a citizen of the United States. In June, 1873, in Mora county, New Mexico, Indians belonging to the Kiowa tribe took and drove away property of the kind and character described in the petition, the property of claimant's decedent, which was reasonably worth the sum of \$690. At the time of said depredation defendant Indians were in amity with the United States.

As a conclusion of law, the majority of the court decided that the claimant recover a judgment against the United States and the Kiowa Indians, in the sum of \$690.

The defendants appealed to this court.

Mr. Lincoln B. Smith, by special leave, argued the cause, and, with *Assistant Attorney General Thompson*, filed a brief for appellants:

It is not permissible to bring in a new party defendant by an amendment after the statute of limitations has run in his favor.

Miller v. M'Intyre, 6 Pet. 61, 8 L. ed. 320; *Sicard v. Davis*, 6 Pet. 124, 8 L. ed. 342; *Crowl v. Nagle*, 86 Ill. 437; *Dunphy v. Riddle*, 86 Ill. 22; *Clark v. Manning*, 95 Ill. 580.

Supposed hardships do not affect limitation.

Jones v. Lemon, 26 W. Va. 629; *Kendall v. United States*, 107 U. S. 123, 27 L. ed. 437, 2 Sup. Ct. Rep. 277; *Amy v. Watertown*, 130 U. S. 320, 32 L. ed. 953, 9 Sup. Ct. Rep. 537.

The statutory provision which applies in this case is not identical with the ordinary statutes of limitation, but in this respect is stronger than such statutes, inasmuch as its prescription does not merely apply to the right of action on the claim, but declares the demand barred, so that the court will interpose the statute in bar of a suit, whether or not it is pleaded by counsel for the defendants.

Kendall v. United States, 14 Ct. Cl. 122.

Mr. William H. Robeson argued the cause and filed a brief for appellee:

The tribe is not a necessary party to the suit.

Kemp v. United States, No. 4,777 Ct. Cl. *Duran v. United States*, 31 Ct. Cl. 357, 29 Ct. Cl. 97; *United States v. Gorham*, 165 U. S. 316, 41 L. ed. 729, 17 Sup. Ct. Rep. 382; *Graham v. United States*, 30 Ct. Cl. 318; *Woolverton v. United States*, 29 Ct. Cl. 107.

Where suits must be brought within a fixed jurisdictional period, the court will not allow a meritorious cause of action to fail because of a mistake of parties or attorneys, if it can be saved by amendment.

195 U. S.

Cowan Infants' Case, 5 Ct. Cl. 107; *Thomas's Motion*, 15 Ct. Cl. 335, 360.

A suit brought in the name of one partner as the sole owner may be amended, after the expiration of the statutory period, by the bringing in of the other partners so that they may participate in the judgment.

Garcia v. United States, 37 Ct. Cl. 243.

Mr. Justice **Day** delivered the opinion of the court:

This claim arises under the Indian depredation act of March 3, 1891 (26 Stat. at L. 851, chap. 538, U. S. Comp. Stat. 1901, p. 758), and presents the question whether, after the expiration of three years from the filing of the petition in the court of claims, a tribe of Indians not originally named in the petition can be brought into the action by amended petition, with a view to proceeding against such tribe to judgment. The record discloses that the original petition was filed on October 24, 1891; the amended petition on November 4, 1902. The Attorney General filed a plea setting up the bar of the statute, which plea was overruled, and thereafter, upon issue joined and testimony taken, judgment was rendered against the tribe of Indians so brought in by the amended petition.

The act in question was before this court in *United States v. Gorham*, 165 U. S. 316, 41 L. ed. 729, 17 Sup. Ct. Rep. 382, and in that case it was held that, where the Indian tribe cannot be identified, a judgment for the amount of the claim can be rendered against the United States. In the opinion of the court in that case, the act was analyzed and its various sections construed; and it only remains to consider so much of the act and its purposes as will lead to a solution of the question now under consideration.

The provisions of the 1st section of the act are positive,—that all claims existing at the time of the taking effect of the act shall be presented to the court by petition, as therein *provided, within three years after the passage of the act, or be forever barred. This section, by itself considered, would seem to conclude the right of the petitioner to bring in a new party to the proceeding after the expiration of three years, in such wise as to preclude the right to rely upon the bar of the statute. For obvious reasons, a party brought into court by an amendment, and who has, for the first time, an opportunity to make defense to the action, has a right to treat the proceeding, as to him, as commenced by the process which brings him into court. *Miller v. M'Intyre*, 6 Pet. 61, 8 L. ed. 320. Conceding this proposition as applied to ordinary actions, it is urged that this proceeding is

so peculiar in character as to take it out of the general rule. Section 3 of the act provides:

"That all claims shall be presented to the court by petition, setting forth in ordinary and concise language, without unnecessary repetition, the facts upon which such claims are based, the persons, classes of persons, tribe or tribes or band of Indians by whom the alleged illegal acts were committed, as near as may be, the property lost or destroyed and the value thereof, and any other facts connected with the transactions, and material to the proper adjudication of the case involved."

The 5th section of the statute provides:

"That the court shall determine, in each case, the value of the property taken or destroyed at the time and place of the loss or destruction, and, if possible, the tribe of Indians or other persons by whom the wrong was committed, and shall render judgment in favor of the claimant or claimants against the United States, and against the tribe of Indians committing the wrong, when such can be identified."

Section 4 provides for service upon the Attorney General, whose duty it is to appear and defend for both the interests of the government and the Indians, and giving to any Indian or Indians interested in the proceedings the right to appear and defend by an attorney employed with the approval of the Commissioner of Indian Affairs. By [474] the 6th section the *amount of the judgment is charged against the tribe by which or the members of which the depredation was committed; and if no annuity, fund, or appropriation is available as provided, the judgment is to be paid from the treasury of the United States, to remain a charge against the tribe, and to be deducted from any annuity, fund, or appropriation thereafter due from the United States to such tribe. It is contended that, inasmuch as the Indian tribes are not necessary parties to the proceeding, and are not required to be served with process except so far as the notice to the Attorney General is such service, and are only to be described "as near as may be," they may be brought in at any time before judgment, whenever such tribe "can be identified," as set forth in the 5th section of the act. The reasons for this conclusion are fully set forth in the opinion of the court of claims in *Duran v. United States*, 31 Ct. Cl. 353. But we are unable to concur in the conclusions therein reached. In our view, the act provides for a recovery of depredation claims in two classes of cases: the one where the persons, classes of persons, tribe or tribes or band of Indians cannot be identified, in which event the United States may be held liable, upon proof com-

plying with other terms of the act, though failing to identify the particular depredators; the other, where the persons or tribe described in the act can be identified, in which event they must be named in the petition, and the judgment will go against the United States and the tribe committing the wrong, to be satisfied primarily out of the funds of the Indians. As was said in the *Gorham Case*, 165 U. S. 321, 41 L. ed. 731, 17 Sup. Ct. Rep. 384: "It may be fairly claimed that, reading all the provisions together, the act makes it necessary, when known, to join with the United States the Indians or tribe of Indians by whom the illegal acts are alleged or are supposed to have been committed."

Whichever form the action takes, it must be brought within three years after the passage of the act, as provided by the 1st section. In requiring the band or tribe of Indians to be described as near as may be, it is the purpose of the act to *require such [475] tribe, primarily liable for the injury, to be brought before the court, when they can be identified, for the purpose of the judgment authorized in the 5th section. All the sections are to be read together to effectuate the purpose of the law; and when the tribe "can be identified," it must be described as near as may be; that is, with reasonable accuracy, sufficiently identifying the party for the purposes of the action and judgment, resorting to the liability of the United States alone only in cases where the offending parties cannot be identified. The claimant, under the statute, has three years for the purpose of investigating his cause of action, and, in cases where it can be done, identifying the tribe sufficiently for the purposes of pleading and judgment against both the United States and the Indian tribe, or, in the alternative, proceeding against the United States alone. It is true that the act does not, in terms, provide for service upon the Indian tribes, their agents or attorneys, and the Attorney General is required to appear for them as well as for the United States. Of this provision, Mr. Justice Peckham, speaking for the court in the *Gorham Case*, 165 U. S. 321, 41 L. ed. 731, 17 Sup. Ct. Rep. 384, said: "Although the 4th section provides for the defense of the claim by the law officer of the government, under any circumstances, yet, as the interest of the Indians is embraced in the inquiry before the court because of their liability to a judgment against them if identified, and to a payment of that judgment out of the annuities or otherwise, as provided for in the 6th section, it is proper to allow them to appear, and defend also by their own attorney." When brought into court they may give, by special counsel,

more careful attention to their particular defense than could be given by the law officer of the government charged with the defense of thousands of similar claims. But it is said that the Attorney General, by failing to promptly raise, by plea, the defense of misjoinder, is quite as much in fault as the petitioner, in permitting more than three years to elapse before the new party is brought in; and it is said that, at the common law, this objection could only be raised

[476] by such plea seasonably *interposed. At common law, where it was sought to bring in another party jointly liable, a plea by the defendant, setting forth the nonjoinder, and giving the name of such party, was the proper method of procedure. 3 Chitty, Pl. [901] and notes. But such is not the present case. The original petition charged positively that the depredation was committed by the Ute Indians. It was sufficient for the Attorney General to plead the general issue to put the plaintiff upon proof of his allegations. It is said that eleven thousand of these cases have been begun; and it is not to be presumed that the Attorney General would know the facts of each case, and be in possession of information to fulfil the requisite of a good plea, and furnish the name of the party to be impleaded. It was for the plaintiff to make such investigation as would warrant the beginning of the action against the proper tribe, or against the United States alone, averring that the particular tribe could not be identified.

It is further insisted that it is the purpose of the act, as provided for in the 5th section, to require the judgment to be rendered against the Indian tribe, if it can be identified, at any time before judgment, and that this construction is required to protect the interests of the United States. But we think this section should be read in connection with the other sections of the act, and the manifest purpose is to join in the petition, when it can be identified, the tribe by whom the depredation was committed, and to limit the presentation of the claim to three years from the passage of the act. If this be not so, the Indians may be made parties to the proceeding and judgment without being brought into court in any manner until years after the alleged wrong was committed, and when it may be impossible, by reason of the lapse of time, or the death or disappearance of witnesses, to make adequate defense. The construction herein put upon the statute will give to the three years' limitation the effect of other statutes of limitation, and will, in our judgment, best effectuate the purpose of the act. This act

[477] is extremely liberal in permitting *presentation of claims for Indian depredations. All limitations are swept away except the re-
195 U. S.

quirement as to the time of filing the petition. In the present case the depredation is alleged to have been committed eighteen years before the action was commenced. Under these liberal provisions we think it was the purpose of the law to require parties to be duly prosecuted within the three years allowed for the filing of petitions; and the liberality of the act should not be extended by construction. As the case was prosecuted against the wrong tribe until after the three years had expired, it cannot be maintained against the Indians sought to be brought in by the amendment, nor can it be sustained against the United States, which is liable by itself only in cases where the depredating Indians or other persons are unknown.

It follows that *the judgment of the Court of Claims must be reversed* and the petition directed to be dismissed, and it is so ordered.

Mr. Justice **White**, with whom concurs Mr. Justice **McKenna**, dissenting:

Under the Indian depredation act of March 3, 1891, the United States was sued by one Gorman, in the court of claims, and it was averred in the petition that the damage complained of had been inflicted by the Comanche and Kiowa tribes of Indians, who were in amity with the United States. After hearing, the court of claims, finding it to be established by the proof that the loss complained of had been occasioned by Indians in amity with the United States, but that the proof did not show that the Comanche and Kiowa tribes were the wrongdoers, nevertheless, without any amendment of the petition, rendered a judgment solely against the United States. The action of the court of claims was sustained by this court in *United States v. Gorham*, 165 U. S. 316, 41 L. ed. 729, 17 Sup. Ct. Rep. 382.

In considering the power conferred by the statute it was said (p. 320, L. ed. p. 731, Sup. Ct. Rep. p. 384):

*"In conferring jurisdiction in this class [478] of cases upon the court of claims, it will be seen that Congress conferred it in regard to all claims for property of citizens of the United States, taken or destroyed by Indians belonging to any band, tribe, or nation in amity with the United States, without just cause or provocation on the part of the owner or agent in charge. So long as the depredations were committed upon the property of citizens of the United States, and by Indians in amity with the government, without just cause, etc., jurisdiction and authority to inquire into and finally adjudicate upon such claims was granted to the court. This broad ground of jurisdiction would, unless circumscribed by the sub-

sequent provision of the act, permit an adjudication against the United States alone. There is nothing in any other portion of the act which provides, in terms, for joining, as codefendants with the United States, the tribes or bands of Indians by whom the alleged illegal acts were committed. The 3d section of the act merely provides for the contents of the petition; and by such section it is made the duty of the petitioner to state in his petition 'the persons, classes of persons, tribe or tribes or band of Indians by whom the alleged illegal acts were committed, as near as may be,' etc. This is for the obvious purpose of giving some notice to the government of the alleged facts upon which the claim is based, so that the proper defense, if any exist, may be made to the claim."

Again, after pointing out that the statute made it "the duty of the court to determine in each case, if possible, the tribe of Indians or other persons by whom the wrong was committed, and to render judgment in favor of the claimant or claimants against the United States, and against the tribe of Indians committing the wrong when such can be identified," it was observed (p. 321, L. ed. p. 731, Sup. Ct. Rep. p. 384):

"But the 5th section provides for judgment in favor of claimant, and against the United States, in any event where the property of a citizen has been destroyed under the circumstances provided in the statute, but [479] only against the tribe *of Indians committing the wrong 'when such can be identified;' and of course it follows that, if they cannot be identified, no judgment can go against them. The United States would then be left as alone responsible for the property destroyed, provided the proofs were of the character mentioned in the 1st section of the act; that is, the claimant would be bound to prove that he was a citizen of the United States at the time of the taking or destruction of his property; that it had been taken by Indians belonging to some band or tribe or nation in amity with the United States, without just cause or provocation on the part of the owner or agent in charge; and that it had not been returned or paid for."

To my mind this decision clearly establishes that, under the act of Congress, the Indian tribe by whom the depredation was committed was not an essential party to give the court jurisdiction over the claim. This conclusion, it seems to me, is inevitable from the ruling that, although it was alleged in the petition that a particular tribe was the wrongdoer, it was competent for the court to conform to the proof, and render a judgment against the United States, in a case

where the proof did not establish the truth of the averment as to the tribe committing the injury, if only it was shown that the wrong complained of must have been committed by some Indian tribe which was in amity with the United States. Now, the question on this record is simply whether a petitioner who has alleged that the wrong was committed by a particular tribe can, after the three years' limitation, amend by stating another and different tribe as the wrongdoer. It is decided that such amendment cannot be allowed, because to allow it would amount to a fatal departure; that is, the substitution of a new and wholly different cause of action.

Consistently with the ruling previously made, my mind cannot assent to this conclusion. To adopt it without specifically overruling the *Gorham Case*, it seems to me, is to declare, on the one hand, that it is not essential to prove the allegation that the wrong was committed by a particular tribe, and, on *the other hand, to say that [480] the allegation as to the tribe committing the wrong was essential to the cause of action. That is to declare that a particular allegation is, at the same time, both essential and nonessential,—essential to be alleged, but not essential to be proved.

As it is considered by me that the *Gorham Case* is conclusive of this, and as the opinion now announced does not purport to overrule that case, it is not necessary for me to enter into a statement of my reasons for believing that, even if that case did not exist, the construction now given to the statute is not only repugnant to its text, but conflicts both with the rights of individual claimants and those of the United States, as shown by the purpose and spirit of the act.

I therefore dissent.

JOHN A. HUMBIRD and Frederick Weyerhaeuser
v.

WALDO A. AVERY *et al.*

(See S: C. Reporter's ed. 480-510.)

Public lands—railroad land grants—conflicting claims—vested rights—court's interference with Land Department.

1. Sales or contracts made by the Northern Pacific Railway Company after its acceptance of the act of July 1, 1898 (30 Stat. at L. 597, 620, chap. 546), cannot defeat the operation of the provisions of that act, enacted

NOTE.—As to land grants to railroads—see note to *Kansas P. R. Co. v. Atchison, T. & S. F. R. Co.* 28 L. ed. U. S. 794.

to settle disputes arising out of conflicting rulings in the Land Department with reference to the eastern terminus of the railroad as affecting the Northern Pacific land grant, by permitting any purchaser or settler claiming, in good faith, under any law of the United States or ruling of the Land Department, any land so situated that a right thereto in the railroad grantee or its successor in interest attached by reason of definite location or selection, to elect whether to retain or transfer his claim, and requiring the Secretary of the Interior to furnish the company with a list of the lands so retained, and allowing the company to select other lands in lieu thereof upon executing a proper relinquishment, although the statute contains a provision that the railroad grantee or its successor in interest shall not be bound to relinquish lands sold or contracted by it.

2. A waiver of the objection that vested rights of the railroad company under the Northern Pacific land grant are interfered with by the provisions of the act of July 1, 1898, enacted to settle disputes arising out of conflicting rulings in the Land Department with reference to the eastern terminus of the railroad as affecting its land grant, results from the acceptance of that act by the successor in interest of the railway grantee.

3. A court of equity will not undertake to determine, in advance of the final action of the Land Department, the respective rights of grantees from the Northern Pacific Railway Company of land claimed to be within the indemnity limits of the land grant of July 2, 1864 (13 Stat. at L. 365, chap. 217), and settlers and purchasers from the United States or their grantees, whether holding patents or not, who claim the protection of the act of July 1, 1898, enacted to settle disputes arising out of conflicting rulings in the Land Department with reference to the eastern terminus of the railroad as affecting the Northern Pacific land grant, by permitting any purchaser or settler claiming, in good faith, under any law of the United States or ruling of the Land Department, any land so situated that a right thereto in the railroad grantee or its successor in interest attached by reason of definite location or selection, to elect whether to retain or transfer his claim, and requiring the Secretary of the Interior to furnish the company with a list of the lands so retained, and allowing the company to select other lands in lieu thereof upon executing a proper relinquishment.

[No. 7.]

Argued October 23, 26, 1903. Decided December 12, 1904.

ON A CERTIFICATE from, and an order to, the United States Circuit Court of Appeals for the Eighth Circuit bringing up a case pending in that Court on an appeal from a decree of the Circuit Court for the District of Minnesota dismissing without prejudice, except as to lands for which patents have been issued, a bill in a suit involving the title to certain tracts of land

195 U. S.

situated on the line of the Northern Pacific Railway. Modified by adjudging that the dismissal must be without prejudice to any suit that may be rightfully instituted by a claimant after the jurisdiction of the Land Department in respect to any particular lands has ceased, and, as so modified, affirmed.

The facts are stated in the opinion.

Messrs. William W. Billson and C. W. Bunn argued the cause, and, with Messrs. Chester A. Congdon, H. Oldenburg, and James B. Kerr, filed a brief for Humbird et al.:

The act of 1898 is inapplicable to land patented before its passage.

28 Land Dec. 103; *Re Northern P. R. Co.'s Grant*, 28 Land Dec. 470; *Wasmund v. Northern P. R. Co.* 29 Land Dec. 244.

The only titles over which the Interior Department has generally, or normally, jurisdiction, are those of which the fee is in the United States. Its jurisdiction is wholly incident to the determination by the government of the disposition properly to be made of its legal title to public lands. When that title is transferred by patent, the jurisdiction of the Department is extinct.

Moore v. Robbins, 96 U. S. 530, 533, 24 L. ed. 848, 850; *United States v. Schurz*, 102 U. S. 378, 402, 26 L. ed. 167, 173.

The fact that for a portion of these lands the patents have not issued does not withdraw such lands from the jurisdiction of the court, under the peculiar circumstances of this case:

(a) Because none of these controversies are *in fieri* in the Department.

Cornelius v. Kessel, 128 U. S. 456, 32 L. ed. 482, 9 Sup. Ct. Rep. 122; *Witherspoon v. Duncan*, 4 Wall. 210, 18 L. ed. 339; *Polk County v. Hunter*, 42 Minn. 312, 44 N. W. 201; *Berthold v. McDonald*, 22 How. 334, 16 L. ed. 318; *Moore v. Robbins*, 96 U. S. 530, 24 L. ed. 848; *Orchard v. Alexander*, 157 U. S. 372, 39 L. ed. 737, 15 Sup. Ct. Rep. 635; *Bockfinger v. Foster*, 190 U. S. 116, 47 L. ed. 975, 23 Sup. Ct. Rep. 836; *Cosmos Exploration Co. v. Gray Eagle Oil Co.* 190 U. S. 301, 47 L. ed. 1064, 23 Sup. Ct. Rep. 692.

(b) Because complainants are at least entitled to an injunction against trespass.

La Chapelle v. Bubb, 69 Fed. 481; *Thompson v. Lyman*, 1 Del. Ch. 64; *Camp v. Bates*, 11 Conn. 51, 27 Am. Dec. 707; *Webb v. Boyle*, 63 N. C. 271; *McLure v. Sherman*, 70 Fed. 190.

The imminence of the act sought to be restrained may, in appropriate cases, be as readily inferred upon the score of intrinsic probability as upon the strength of overt acts or threats.

Johnson v. Peterson, 59 N. C. (6 Jones

Eq.) 12; *Maclean v. Fitzsimons*, 80 Mich. 336, 45 N. W. 145; *Lloyd v. Gurdon*, 2 Swanst. 189; *Smith v. Haytwell*, 1 Ambl. 66; *Patrick v. Harrison*, 3 Bro. Ch. 477; *Zeigler v. Beasley*, 44 Ga. 56; *Mocckly v. Gorton*, 78 Iowa, 202, 42 N. W. 648; *Belohradsky v. Kuhn*, 69 Ill. 547; *Thurman v. Burt*, 53 Ill. 129; *Ferguson v. Fisk*, 28 Conn. 501; *Wilhelmson v. Bentley*, 25 Neb. 473, 41 N. W. 387; *Merritt v. Thompson*, 3 E. D. Smith, 283.

The indemnity selections of the railroad company were made under the direction of the Secretary of the Interior, and were not defeated in favor of subsequent entrymen by failure of the Secretary of the Interior to approve them.

Groock v. Southern P. R. Co. 42 C. C. A. 144, 102 Fed. 32.

A capricious or arbitrary failure of the Secretary to approve is unimportant.

McHenry v. Nygaard, 72 Minn. 2, 74 N. W. 1106; *Southern P. R. Co. v. Wiggs*, 43 Fed. 333.

Neither is it important that the Secretary has failed to approve, by mere neglect.

Duluth & I. Range R. Co. v. Roy, 173 U. S. 587, 591, 43 L. ed. 820, 822, 19 Sup. Ct. Rep. 549; *Wright v. Roseberry*, 121 U. S. 498, 30 L. ed. 1041, 7 Sup. Ct. Rep. 985.

So, if the Secretary's failure to approve is due to error of law.

St. Paul & S. C. R. Co. v. Winona & St. P. R. Co. 112 U. S. 720, 732, 733, 28 L. ed. 872, 876, 877, 5 Sup. Ct. Rep. 334; *Sage v. Swenson*, 64 Minn. 517, 67 N. W. 544.

If the Department is induced by legal error to pursue a course which has made it impracticable for the person having prior claim upon a tract of public land to perform the acts legally necessary to the perfection of his right and to the earning of the title, he can enforce his right to the land without showing the performance of such acts.

Bisson v. Curry, 35 Iowa, 72; *Cunningham v. Ashley*, 14 How. 377, 14 L. ed. 462; *Lytle v. Arkansas*, 9 How. 328, 13 L. ed. 158; *Duluth & I. Range R. Co. v. Roy*, 173 U. S. 587, 43 L. ed. 820, 19 Sup. Ct. Rep. 549; *Ard v. Brandon*, 156 U. S. 537, 39 L. ed. 524, 15 Sup. Ct. Rep. 406; *Wright v. Roseberry*, 121 U. S. 498, 30 L. ed. 1041, 7 Sup. Ct. Rep. 985.

Mr. **Benton Hanchett** argued the cause, and, with Mr. **H. H. Hoyt**, filed a brief for Avery et al.:

The action cannot be maintained by the claimants to remove a cloud upon the title to these lands, when they are not in possession and no patents have yet been issued; the legal title to the lands being still in the government, and the title to these lands still in fieri.

Marquez v. Frisbie, 101 U. S. 473, 25 L.

ed. 800; *Johnson v. Towsley*, 13 Wall. 72, 20 L. ed. 485; *Bockfinger v. Foster*, 190 U. S. 116, 47 L. ed. 975, 23 Sup. Ct. Rep. 836.

Before a court of equity by its decree would declare that a party holds the legal title to a tract of land in trust for another, the party setting up such claim must make it appear that he is entitled to the land, and that the government should have recognized his right.

Bohall v. Dilla, 114 U. S. 47, 29 L. ed. 61, 5 Sup. Ct. Rep. 782; *St. Louis Smelting & Ref. Co. v. Kemp*, 104 U. S. 636-646, 26 L. ed. 875-879; *Sparks v. Pierce*, 115 U. S. 408, 29 L. ed. 428, 6 Sup. Ct. Rep. 81; *Lee v. Johnson*, 116 U. S. 48, 29 L. ed. 570; *Boggs v. Merced Min. Co.* 14 Cal. 279.

It seems of some concern to the defendants whether they are to be harassed and annoyed with an expensive litigation, prematurely brought, over the title to lands in which, at the time of bringing the action, the complainants had not such an interest as would entitle them to a decree that the defendants hold said lands for them in trust.

Ankeny v. Clark, 148 U. S. 345, 37 L. ed. 475, 13 Sup. Ct. Rep. 617; *Kansas P. R. Co. v. Prescott*, 16 Wall. 603, 21 L. ed. 373; *Union P. R. Co. v. McShane*, 23 Wall. 444, 22 L. ed. 747.

The jurisdiction to determine the facts which determine the rights of the parties under the act of July 1, 1898, in respect to the dates and character of their claims, as well as the rights of the railway company to the selection of the lands under the land grant, is vested in the Secretary of the Interior.

United States v. Northern P. R. Co. 37 C. C. A. 290, 95 Fed. 864; *James v. Germania Iron Co.* 46 C. C. A. 476, 107 Fed. 597; *Marquez v. Frisbie*, 101 U. S. 473, 475, 476, 25 L. ed. 800, 801; *Steel v. St. Louis Smelting & Ref. Co.* 106 U. S. 447, 450, 451, 27 L. ed. 226, 227, 228, 1 Sup. Ct. Rep. 389; *Quinby v. Conlan*, 104 U. S. 420, 425, 26 L. ed. 800, 802; *Barden v. Northern P. R. Co.* 154 U. S. 288, 326-331, 38 L. ed. 992, 1001-1003, 14 Sup. Ct. Rep. 1030; *Knight v. United Land Asso.* 142 U. S. 161, 176, 178, 181, 35 L. ed. 974, 979-981, 12 Sup. Ct. Rep. 258; *St. Louis Smelting & Ref. Co. v. Kemp*, 104 U. S. 636, 640, 641, 26 L. ed. 875, 876; *Heath v. Wallace*, 138 U. S. 573, 585, 34 L. ed. 1063, 1068, 11 Sup. Ct. Rep. 380; *Wisconsin C. R. Co. v. Price County*, 133 U. S. 496, 511, 33 L. ed. 687, 694, 10 Sup. Ct. Rep. 341; *United States v. Missouri K. & T. R. Co.* 141 U. S. 358, 375, 35 L. ed. 766, 771, 12 Sup. Ct. Rep. 13; *Catholic Bishop v. Gibbon*, 158 U. S. 155, 166, 39 L. ed. 931, 936, 15 Sup. Ct. Rep. 779; *United States v. California & O. Land Co.* 148 U. S. 31, 43, 37 L.

ed. 354, 360, 13 Sup. Ct. Rep. 458; *Moore v. Robbins*, 96 U. S. 530, 535, 24 L. ed. 848, 850; *Michigan Land & Lumber Co. v. Rust*, 168 U. S. 589, 592, 42 L. ed. 591, 592, 18 Sup. Ct. Rep. 208; *Brown v. Hitchcock*, 173 U. S. 473, 477, 43 L. ed. 772, 774, 19 Sup. Ct. Rep. 485; *Clark v. Herington*, 186 U. S. 206, 210, 46 L. ed. 1128, 1131, 22 Sup. Ct. Rep. 872; *Cosmos Exploration Co. v. Gray Eagle Oil Co.* 61 L. R. A. 230, 50 C. C. A. 79, 112 Fed. 4; *Savage v. Worsham*, 104 Fed. 18; *King v. McAndrews*, 50 C. C. A. 29, 111 Fed. 860; *Bockfinger v. Foster*, 190 U. S. 116, 47 L. ed. 975, 23 Sup. Ct. Rep. 836; *Kirwan v. Murphy*, 189 U. S. 35, 47 L. ed. 698, 23 Sup. Ct. Rep. 599; *Germania Iron Co. v. United States*, 165 U. S. 379, 382, 41 L. ed. 754, 755, 17 Sup. Ct. Rep. 337.

Title to lands within either the first or second indemnity limits of the grant is not acquired by the railroad company unless and until the selections made by the railroad company are approved by the Secretary of the Interior.

Ryan v. Central P. R. Co. 99 U. S. 382, 386, 25 L. ed. 305; *Kansas P. R. Co. v. Atchison, T. & S. F. R. Co.* 112 U. S. 414, 419, 28 L. ed. 794, 796, 5 Sup. Ct. Rep. 208; *Wisconsin C. R. Co. v. Price County*, 133 U. S. 496, 512, 33 L. ed. 687, 695, 10 Sup. Ct. Rep. 341; *Sioux City & St. P. R. Co. v. Chicago, M. & St. P. R. Co.* 117 U. S. 406, 407, 29 L. ed. 928, 6 Sup. Ct. Rep. 790; *United States v. Missouri, K. & T. R. Co.* 141 U. S. 358, 367, 374-376, 35 L. ed. 766, 768, 771, 12 Sup. Ct. Rep. 13; *Southern P. R. Co. v. Bell*, 183 U. S. 675, 46 L. ed. 383, 22 Sup. Ct. Rep. 232; *Groecck v. Southern P. R. Co.* 183 U. S. 690, 46 L. ed. 390, 22 Sup. Ct. Rep. 268; *Oregon & C. R. Co. v. United States*, 189 U. S. 103, 47 L. ed. 726, 23 Sup. Ct. Rep. 615; *Clark v. Herington*, 186 U. S. 206, 209, 46 L. ed. 1128, 1130, 22 Sup. Ct. Rep. 872; *Re Northern P. R. Co.* 2 Land Dec. 820; *Northern P. R. Co. v. Miller*, 7 Land Dec. 100; *Northern P. R. Co. v. Walters*, 13 Land Dec. 230; *Northern P. R. Co. v. Blain*, 27 Land Dec. 361; *Meister v. St. Paul, M. & M. R. Co.* 14 Land Dec. 624; *Walker v. Southern P. R. Co.* 24 Land Dec. 172; *Re Oregon & C. R. Co.* 28 Land Dec. 363; *Re Southern P. R. Co.* 28 Land Dec. 281; *Oregon & C. R. Co. v. Bales*, 28 Land Dec. 231; *Grandin v. La Bar*, 3 N. D. 446, 57 N. W. 241; *Southern P. R. Co. v. Wood*, 124 Cal. 475, 57 Pac. 388; *Resser v. Carney*, 52 Minn. 397, 54 N. W. 89; *Northern P. R. Co. v. Fly*, 27 Land Dec. 464; *Dunnigan v. Northern P. R. Co.* 27 Land Dec. 467; *Musser v. McRae*, 38 Minn. 409, 38 N. W. 103, 44 Minn. 343, 46 N. W. 673; *Elling v. Theaton*, 7 Mont. 330, 16 Pac. 931; **195 U. S.** U. S., Book 49.

Jackson v. La Moure County, 1 N. D. 238, 46 N. W. 449.

Until there has been an adjustment of the grant within the place limits, the extent to which the indemnity lands may be required to supply the deficit cannot properly or legally be determined.

Oregon & C. R. Co. v. United States, 189 U. S. 103, 47 L. ed. 726, 23 Sup. Ct. Rep. 615.

Assistant Attorney General **Campbell** and Mr. **A. C. Campbell** argued the cause, and, with Mr. **F. W. Clements**, filed a brief for the United States, intervener:

Until the legal title passes from the government, inquiry as to all equitable rights comes within the cognizance of the Land Department.

Brown v. Hitchcock, 173 U. S. 473, 476, 43 L. ed. 772, 19 Sup. Ct. Rep. 485.

Until the title has passed to an individual the equities subject to which he holds it cannot be enforced in the courts.

Marquez v. Frisbie, 101 U. S. 473, 475, 25 L. ed. 800, 801.

Until the legal title to public land passes from the government the Land Department has jurisdiction to determine the question whether or not the equitable title has passed.

Michigan Land & Lumber Co. v. Rust, 168 U. S. 589, 593, 42 L. ed. 591, 592, 18 Sup. Ct. Rep. 208; *Hawley v. Diller*, 178 U. S. 476, 488-490, 44 L. ed. 1157, 1162, 20 Sup. Ct. Rep. 986.

But pending the determination of this question by the Land Department, the courts will not pass upon the same in controversies between individuals, but will leave it to be determined by the Land Department.

Litchfield v. Register & Receiver (Litchfield v. Richards) 9 Wall. 575, 578, 19 L. ed. 681, 682; *United States v. Schurz*, 102 U. S. 378, 396, 26 L. ed. 167, 171; *New Orleans v. Paine*, 147 U. S. 261, 264, 37 L. ed. 162, 163, 13 Sup. Ct. Rep. 303; *Brown v. Hitchcock*, 173 U. S. 473, 477, 43 L. ed. 772, 19 Sup. Ct. Rep. 485; *Cosmos Exploration Co. v. Gray Eagle Oil Co.* 190 U. S. 301, 308, 47 L. ed. 1064, 1070, 23 Sup. Ct. Rep. 692.

After the Land Department has passed upon all disputed questions of fact, and has finally determined that the equitable title to public lands has passed from the government, but not before, the courts may inquire into and determine controversies between individuals in respect to the validity of such equitable title, together with individual rights claimed thereunder; and the courts will accept the findings of the Land Department as conclusive upon all questions of fact.

Moore v. Robbins, 96 U. S. 530, 534, 24 L. **19** **289**

ed. 847, 850; *Marquez v. Frisbie*, 101 U. S. 473, 476, 25 L. ed. 800, 801; *Johnson v. Drew*, 171 U. S. 93, 99, 43 L. ed. 88, 90, 18 Sup. Ct. Rep. 800; *Clark v. Herington*, 186 U. S. 206, 210, 211, 46 L. ed. 1128, 1131, 22 Sup. Ct. Rep. 872.

While it is true that, when the right to a patent once becomes vested, it is equivalent, so far as the government is concerned, to a patent actually issued (*Barney v. Dolph*, 97 U. S. 652, 656, 24 L. ed. 1063, 1064; *Stark v. Starr*, 6 Wall. 402, 418, 18 L. ed. 925, 929; *Simmmons v. Wagner*, 101 U. S. 260, 261, 25 L. ed. 910, 911), it is equally true that the right to a patent to public land does not become vested, as against the United States, until all the prerequisites for the acquisition of the title have been complied with (*Shepley v. Cowan*, 91 U. S. 330, 338, 23 L. ed. 424, 427); nor until conflicting claims, if any, to the lands, have been finally determined by the Land Department (*Cosmos Exploration Co. v. Gray Eagle Oil Co.* 190 U. S. 301, 311, 312, 47 L. ed. 1064, 1071, 1072, 23 Sup. Ct. Rep. 692; *Hawley v. Diller*, 178 U. S. 476, 488, 490, 491, 44 L. ed. 1157, 1161-1163, 20 Sup. Ct. Rep. 986; *Brown v. Hitchcock*, 173 U. S. 473, 478, 43 L. ed. 772, 774, 19 Sup. Ct. Rep. 485; *Michigan Land & Lumber Co. v. Rust*, 168 U. S. 589, 593, 594, 42 L. ed. 591-593, 18 Sup. Ct. Rep. 208; *Knight v. United Land Asso.* 142 U. S. 161, 176-178, 35 L. ed. 974, 979, 980, 12 Sup. Ct. Rep. 258).

It is settled law that the Land Department retains jurisdiction in respect to public lands until patent has issued, and that the Secretary of the Interior, at any time before the issuance of patent, "may review, reverse, amend, annul, or affirm" any proceeding in the Land Department looking to the acquisition of public lands.

See *United States v. Schurz*, 102 U. S. 396, 401; 402, 26 L. ed. 171, 173, 174; *Knight v. United Land Asso.* 142 U. S. 161, 35 L. ed. 974, 12 Sup. Ct. Rep. 258.

Whether the erroneous decision of the Secretary of the Interior with respect to the eastern terminus of the Northern Pacific land grant involved merely a question of law, a mixed question of law and fact, or only of fact, the entries in question made because of such erroneous decision are, nevertheless, subject to inquiry by the Land Department, and may be and should be canceled by it if found to be illegal.

Marquez v. Frisbie, 101 U. S. 473, 475, 476, 25 L. ed. 800, 801; *United States v. Schurz*, 102 U. S. 401, 402, 26 L. ed. 173, 174; *Knight v. United Land Asso.* 142 U. S. 161, 177, 178, 182, 35 L. ed. 974, 979, 980, 12 Sup. Ct. Rep. 258; *New Orleans v. Paine*, 147 U. S. 261, 266, 267, 37 L. ed. 162, 13 Sup. Ct. Rep. 303; *Michigan Land & Lum-*

ber Co. v. Rust, 168 U. S. 589, 592-595, 42 L. ed. 591-593, 18 Sup. Ct. Rep. 208; *Beley v. Naphtaly*, 169 U. S. 353, 364, 42 L. ed. 775, 779, 18 Sup. Ct. Rep. 354; *Hawley v. Diller*, 178 U. S. 476, 488, 44 L. ed. 1157, 1161, 20 Sup. Ct. Rep. 986; *Brown v. Hitchcock*, 173 U. S. 478, 476-478, 43 L. ed. 772-774, 19 Sup. Ct. Rep. 485.

It is established law that the issuance of a patent terminates the jurisdiction of the Land Department over public lands, and exhausts its power to examine and decide conflicting claims thereto.

United States v. Schurz, 102 U. S. 378, 401-403, 26 L. ed. 167, 173, 174; *Germania Iron Co. v. United States*, 165 U. S. 379, 383, 41 L. ed. 754, 756, 17 Sup. Ct. Rep. 337.

The Land Department, therefore, has lost jurisdiction to pass upon and determine the validity of the selections to the extent that they embrace patented lands. It does not follow, however, that the judiciary has power to pass upon and determine the validity of said railroad indemnity selections, or to determine conflicting claims to such patented lands. Where conflicting claims depend upon questions of fact, the determination of which has been committed to the Land Department, it, and not a court of equity, is the tribunal intrusted by the law with jurisdiction over such matters; and the latter may not inquire what ought to have been the determination of the former, but whether it has been wrongfully deprived of the power to make such determination.

Germania Iron Co. v. United States, 165 U. S. 379, 41 L. ed. 754, 17 Sup. Ct. Rep. 337.

The determination of these facts has been committed by Congress to the Land Department. It has not determined them.

Hewitt v. Schultz, 180 U. S. 139, 157, 158, 45 L. ed. 463, 472, 21 Sup. Ct. Rep. 309; *Re Northern P. R. Co.* 25 Land Dec. 511; *Northern P. R. Co. v. Streib*, 26 Land Dec. 589.

In respect to the patented lands it has been deprived of the power to do so. It is not the function of the court to pass upon these facts, but it can restore to the Land Department the power to do so.

Germania Iron Co. v. United States, 165 U. S. 379, 41 L. ed. 754, 17 Sup. Ct. Rep. 337.

It is settled law that, where jurisdiction of the Land Department over public lands has been lost through mistake in the issuance of a patent, and it appears that the government is under an obligation to any party in respect to the land so patented, the courts will restore such lost jurisdiction.

Germania Iron Co. v. United States, 165 U. S. 379, 41 L. ed. 754, 17 Sup. Ct. Rep. 337; *San Pedro & C. D. A. Co. v. United*

States, 146 U. S. 120, 132, 133, 36 L. ed. 912, 915, 13 Sup. Ct. Rep. 94.

Mr. M. H. Stanford filed a brief for the Lesure Lumber Company.

Mr. Luther C. Harris filed a brief for the Olean Land Company and Alger, Smith, & Company.

Mr. Justice **Harlan** delivered the opinion of the court:

This case was brought before us upon questions certified by the circuit court of appeals. Subsequently, the United States was allowed to intervene upon the general ground that the case involved important questions affecting the administration of the public land laws, including the grant to the Northern Pacific Railroad Company then in process of adjustment. And on motion of the government, the plaintiffs and defendants concurring, the whole record was ordered to be sent up for our consideration.

The case involves the title to numerous tracts of land situated on the line of the Northern Pacific Railway between Duluth and Ashland. The lands are described in an exhibit attached to the bill.

The plaintiffs, Humbird and Weyerhaeuser, sue as grantees of the Northern Pacific Railway Company, a Wisconsin corporation, which, it is claimed, succeeded, in respect of the lands in dispute, to all the rights, interests, and ownership of the Northern Pacific Railroad Company, created by the act of Congress of July 2d, 1864 (13 Stat. at L. 365, chap. 217). They allege that the claims of the defendants constitute clouds upon their title.

[482] *The defendants assert title under the land laws as settlers and purchasers from the United States, or grantees of such settlers and purchasers. But the bill alleges that the lands here in dispute are part of the grant to the Northern Pacific Railroad Company, and that the Land Department wrongfully and unlawfully permitted the entries under which the defendants severally claim. The circuit court dismissed the bill, but without prejudice, except as to all lands here involved for which patents had been issued. 110 Fed. 465.

It seems both appropriate and necessary that the facts be fully stated. That statement we now proceed to make, premising that the present controversy had its origin, as will be presently shown, in conflicting orders or rulings in the Land Department as to what was the eastern terminus of the Northern Pacific Railroad.

By the above act of July 2d, 1864, chap. 217, Congress made a grant of lands to the Northern Pacific Railroad Company in aid of the construction of a railroad and tele-

graph line from some point on Lake Superior, in Minnesota or Wisconsin, to some point on Puget sound, with a branch, *via* Columbia river, to a point at or near Portland. The act established indemnity limits not more than 10 miles beyond the limits of the alternate sections granted. 13 Stat. at L. 365.

By a joint resolution approved May 31st, 1870, second indemnity limits were established within 10 miles on each side of the road, beyond the limits prescribed in the company's charter. 16 Stat. at L. 378, Resolution 67. The effect of this resolution was to allow the company, under the direction of the Secretary of the Interior, to go into second indemnity limits in order to supply any deficiency in lands on its main line or branch.

On the 3d day of July, 1882, the company transmitted to the Secretary of the Interior a map of definite location covering the proposed line from Thompson Junction, on the St. Paul & Duluth Railroad, near Duluth, Minnesota, to Ashland, in Wisconsin. That map was duly approved by the *Secretary of [483] the Interior, and the lands embraced by it were withdrawn from sale or entry.

By resolution of the board of directors of the company, adopted August 28th, 1884, Ashland was declared to be the eastern terminus of the road; and that resolution was accepted by the Secretary on December 3d, 1884, as establishing such terminus.

The part of the road delineated on the map of definite location was constructed and was duly accepted; and in conformity with the directions of the Secretary the company, the circuit court states, filed lists of selections of lands, some in the first and others in the second indemnity limits, in lieu of lands lost to it in its place limits,—such lists *including all the lands in controversy in this suit*. But the bill avers that no final action has ever been taken by the Land Department upon such lists; and they have not yet been approved by the Department.

Subsequently, on August 12th, 1896, the Secretary of the Interior ruled that Duluth, not Ashland, was the eastern terminus of the railroad, and therefore that the land grant of 1864 did not embrace any lands between Duluth and Ashland. The company's lists of selections were thereupon canceled by order of the Secretary, and the lands covered by them were thereafter treated by the Department as unappropriated public lands, and were opened for sale and entry.

This appears from an official communication addressed by the Commissioner of the General Land Office, with the approval of the Secretary of the Interior, to the register and receiver at Duluth. In that com-

munication the Commissioner said: "On August 27th, 1896, the Secretary of the Interior rendered a decision wherein he held that the initial point on Lake Superior, or the eastern terminus of the grant to the Northern Pacific Railroad Company, was at Duluth, Minnesota, and on December 24th, 1896, he approved a diagram prepared by this office showing the eastern terminal of the grant. On January 23d, 1897, a copy
[484] of so much of said *diagram as related to or affected lands within your district was transmitted to you for the use and guidance of your office. The decision of the Secretary aforesaid had the effect of restoring to the public domain all lands lying east of said terminal, which had theretofore been withdrawn on account of the grant to said railroad company. Therefore to the end that all persons interested may have an opportunity to present any claims they may have to any of these lands, you will cause to be published for the period of thirty days, in some newspaper of general circulation in their vicinity, a notice referring to said Secretary's decision, which in effect declared that all lands previously withdrawn on account of the grant to the Northern Pacific Railroad Company, and lying east of the terminal established at Duluth, are restored to the public domain and are subject to disposal at your office."

Under the above ruling of the Secretary as to the eastern terminus, the defendants were allowed to make entries and purchases on the line of the railroad between Duluth and Ashland, despite the company's map of definite location and the lists of selections filed by it with the Secretary. In reference to the action of the Interior Department, the circuit court said: "By reason of the erroneous ruling of the Secretary of the Interior as to the location of the eastern terminus of said railroad, and his revocation of his prior approval of lawful selections by the railroad company of indemnity lands, and permitting sales and entries of such selected lands, as unappropriated, he had introduced confusion and conflict in respect to the right to such lands, which was beginning to be litigated in the courts. . . . The fact that patents had issued in a few instances would not end such disputes as to the lands so patented, as courts would adjudge the patentee in any case to hold the title in trust for the other party, wherever the other party had clearly the right to the land." 110 Fed. 465, 469.

Such was the situation when Congress incorporated into the body of the sundry civil appropriation act of July 1st, 1898
[485] * (30 Stat. at L. 597, 620, chap. 546), subdivision, *Surveying the Public Lands*, certain provisions relating to the Northern Pacific

land grant. As these provisions disclose a scheme or plan for the settlement of the disputes arising out of the conflicting rulings in the Land Department in reference to the eastern terminus of the railroad, and its action in reference to the public lands between Duluth and Ashland, they should all be examined in order to ascertain the intention of Congress. They are therefore here given in full.

By that act—dividing it, for convenience, into paragraphs—it was provided:

"That where, prior to January first, eighteen hundred and ninety-eight, the whole or any part of an odd-numbered section, in either the granted or the indemnity limits of the land grant to the Northern Pacific Railroad Company, to which the right of the grantee or its lawful successor is claimed to have attached by definite location or selection, has been purchased directly from the United States, or settled upon or claimed in good faith by any qualified settler under color of title or claim of right under any law of the United States or any ruling of the Interior Department, and where purchaser, settler, or claimant refuses to transfer his entry as hereinafter provided, the railroad grantee or its successor in interest, upon a proper relinquishment thereof, shall be entitled to select in lieu of the land relinquished an equal quantity of public lands, surveyed or unsurveyed, not mineral or reserved, and not valuable for stone, iron, or coal, and free from valid adverse claim, or not occupied by settlers at the time of such selection, situated within any state or territory into which such railroad grant extends, and patents shall issue for the land so selected as though it had been originally granted; but all selections of unsurveyed lands shall be of odd-numbered sections, to be identified by the survey when made, and patent therefor shall issue to and in the name of the corporation surrendering the lands before mentioned, and such patents shall not issue until after the survey:

*2. "Provided, however, That the Secretary of the Interior shall from time to time ascertain, and, as soon as conveniently may be done, cause to be prepared and delivered to the said railroad grantee or its successor in interest a list or lists of the several tracts which have been purchased or settled upon or occupied as aforesaid, and are now claimed by said purchasers or occupants, their heirs or assigns, according to the smallest government subdivisions. And all right, title, and interest of the said railroad grantee or its successor in interest, in and to any of such tracts, which the said railroad grantee or its successor in interest may relinquish hereunder, shall revert

to the United States, and such tracts shall be treated, under the laws thereof, in the same manner as if no rights thereto had ever vested in the said railroad grantee, and all qualified persons who have occupied and may be on said lands as herein provided, or who have purchased said lands in good faith as aforesaid, their heirs and assigns, shall be permitted to prove their titles to said lands according to law, as if said grant had never been made; and upon such relinquishment said Northern Pacific Railroad Company or its lawful successor in interest may proceed to select, in the manner hereinbefore provided, lands in lieu of those relinquished, and patents shall issue therefor:

3. "*Provided, further*, That the railroad grantee or its successor in interest shall accept the said list or lists so to be made by the Secretary of the Interior as conclusive with respect to the particular lands to be relinquished by it, but it shall not be bound to relinquish lands sold or contracted by it, or lands which it uses or needs for railroad purposes, or lands valuable for stone, iron, or coal:

4. "*And provided, further*, That whenever any qualified settler shall in good faith make settlement in pursuance of existing law upon any odd-numbered sections of unsurveyed public lands within the said railroad grant to which the right of such railroad grantee or its successor in interest has attached, then, upon proof thereof satisfactory to the Secretary of the Interior,
[487] *and a due relinquishment of the prior railroad right, other lands may be selected in lieu thereof by said railroad grantee or its successor in interest, as hereinbefore provided, and patents shall issue therefor:

5. "*And provided, further*, That nothing herein contained shall be construed as intended or having the effect to recognize the Northern Pacific Railway Company as the lawful successor of the Northern Pacific Railroad Company in the ownership of the lands granted by the United States to the Northern Pacific Railroad Company, under and by virtue of foreclosure proceedings against said Northern Pacific Railroad Company in the courts of the United States, but the legal question whether the said Northern Pacific Railway Company is such lawful successor of the said Northern Pacific Railroad Company, should the question be raised, shall be determined wholly without reference to the provisions of this act, and nothing in this act shall be construed as enlarging the quantity of land which the said Northern Pacific Railroad Company is entitled to under laws heretofore enacted:

6. "*And provided, further*, That all qualified settlers, their heirs or assigns, who,
195 U. S.

prior to January first, eighteen hundred and ninety-eight, purchased, or settled upon or claimed in good faith, under color of title or claim of right under any law of the United States or any ruling of the Interior Department, any part of an odd-numbered section in either the granted or indemnity limits of the land grant to the Northern Pacific Railroad Company, to which the right of such grantee or its lawful successor is claimed to have attached by definite location or selection, may in lieu thereof transfer their claims to an equal quantity of public lands, surveyed or unsurveyed, not mineral or reserved, and not valuable for stone, iron, or coal, and free from valid adverse claim, or not occupied by a settler at the time of such entry, situated in any state or territory into which such railroad grant extends, and make proof therefor as in other cases provided; and in making such proof, credit shall be given for the period of their bona fide residence and *amount of [488] their improvements upon their respective claims in the said granted or indemnity limits of the land grant to the said Northern Pacific Railroad Company, the same as if made upon the tract to which the transfer is made; and before the Secretary of the Interior shall cause to be prepared and delivered to said railroad grantee or its successor in interest any list or lists of the several tracts which have been purchased or settled upon or occupied as hereinbefore provided, he shall notify the purchaser, settler, or claimant, his heirs or assigns, claiming against said railroad company, of his right to transfer his entry or claim, as herein provided, and shall give him or them option to take lieu lands for those claimed by him or them, or hold his claim and allow the said railroad company to do so under the terms of this act." 30 Stat. at L. 597, 620.

The provisions of that act were formally accepted in writing by the Northern Pacific Railway Company on the 13th of July, 1898, in writing, and such written acceptance was promptly transmitted by the company to the Secretary of the Interior.

In a case in the supreme court of Wisconsin, determined shortly before the act of 1898, it was held, contrary to the ruling of the Interior Department in 1896, that Ashland, and not Duluth, was the eastern terminus of the Northern Pacific Railway. *Northern P. R. Co. v. Doherty*, 100 Wis. 39, 75 N. W. 1079. Upon writ of error to this court that judgment was affirmed. *Doherty v. Northern P. R. Co.* 177 U. S. 421, 44 L. ed. 830, 20 Sup. Ct. Rep. 677, and *United States v. Northern P. R. Co.* 177 U. S. 435, 44 L. ed. 836, 20 Sup. Ct. Rep. 706.

After the above decisions by this court—

which were rendered April 16th, 1900—the Secretary of the Interior revoked the order canceling the company's above lists of selections, and reinstated them. Shortly before those cases were argued here, namely, on January 19th, 1900,—and apparently to meet the contingency of a reversal by this court of the judgment of the supreme court of Wisconsin,—the Northern Pacific Railway Company made conveyances with warranty to the *plaintiffs, Humbird and Weyerhaeuser, of all the lands aggregating more than 10,000 acres, the title to which is here in dispute. As appears from the record, these conveyances were made after the Land Department had issued regulations to facilitate the adjustment of claims under the act of July 1st, 1898. It should be recalled here that the lands covered by those conveyances were placed on the above list of selections filed by the railroad company, but those lists had not then, nor have they since, received the approval of the Secretary.

It is contended by the plaintiffs that the result of the above decisions in this court, adjudging the eastern terminus of the Northern Pacific Railroad to be at Ashland, Wisconsin, and not at Duluth, Minnesota, was that the odd-numbered alternate sections between Duluth and Ashland, on either side of the railroad, as definitely located, to the extent and within the limits prescribed, and not excluded from the grant of July 2d, 1864, were to be deemed public lands from which that grant could be supplied, and to which neither the defendants nor their grantors *after* the definite location of the road as shown by the company's accepted map of location could have acquired any valid title by entry or settlement, or by purchase, except from the railroad grantee, and that the defense cannot be maintained without violating the rights that were *vested* in the company in *virtue* of such definite location.

The defendants, of course, combat this view of the rights of the parties, and insist that they are fully protected in their claims by the act of 1898, all the provisions of which, as we have seen, were accepted by the railroad company.

In the statement accompanying the certified questions it is set forth that prior to the passage of the act of July 1st, 1898, the Secretary of the Interior had, pursuant to his original ruling as to the eastern terminus of the railroad, caused patents to be delivered to defendant settlers or their grantors for about 3,400 acres of the lands involved in this suit; that at the time of the passage of that act about 2,800 acres of the lands in question had been entered [490] by defendant settlers or their *grantors pri-

or to January 1st, 1898, but no patents therefor had been issued; that after January 1st, 1898, the settlers or their grantors were permitted to enter about 5,000 acres of the lands here in controversy. The situation is thus described in the statement sent up by the circuit court of appeals: Of the lands claimed by the plaintiffs as successors in interest of the Northern Pacific Railroad Company about 3,400 acres thereof were held by the appellees under patents issued by the government prior to July 1st, 1898; for the residue of the lands the settlers held final receipts and final certificates, such final receipts and final certificates, as respects about 5,000 acres, being for tracts entered subsequent to January 1st, 1898. In reference to the lands for which final receipts and certificates have been issued nothing, so far as appears, remains to be done by the Land Department except the issuing of patents.

The relief sought is a decree declaring, among other things, that the lands described in the exhibit attached to the bill, and all the timber standing or lying thereon, belong to the plaintiffs; that the entries, locations, final certificates, Land Office receipts, and patents, under which the several defendants claim, be adjudged to be void and removed as clouds from the titles of the plaintiffs, and the defendants severally enjoined from asserting any title by virtue thereof; and that such of the defendants as hold patents may be declared to hold as trustees for the plaintiffs in respect of any title conveyed by such patents, or any timber, cut or uncut, on such lands.

The questions propounded to this court by the circuit court of appeals are these:

"Is the act of July 1st, 1898, applicable to the determination of the rights of the parties to the 3,400 acres of land which were patented to the appellees or their predecessors in interest prior to the adoption of the act of July 1st, 1898?"

"Has the circuit court of the United States for the district of Minnesota, or any court, jurisdiction as respects the lands in controversy entered subsequent to January 1st, 1898, and for which the settlers hold final receipts or certificates, *to adjudicate [491] the rights of the parties to this action in respect to said lands in advance of the issuance of patents therefor by the executive branch of the government, or should the courts decline jurisdiction until the government has divested itself of the legal title to the lands by the issuance and delivery of patents?"

It is appropriate at the outset to refer to certain allegations of the bill, which bring the determination of the case within a very

narrow compass, and make it unnecessary to consider some matters referred to by counsel. After setting out in detail the various steps taken by the railroad company to acquire a right to the lands in dispute, the bill alleges that "but for the vested rights" of the Northern Pacific Railroad Company and its grantees the several tracts of land in question would have been unappropriated public lands open to the several kinds of entries or location made with respect to them, severally; also, that "the several applications and proceedings with respect to the said several entries were in due form, and regularly conducted, as required by law, and, *in the absence of the vested rights of the said Northern Pacific Railroad Company and its grantees in the said premises*, would have been operative and effectual to invest the several entrymen of said lands with complete equitable title thereto, each of such entries and locations having been finally receipted for, allowed, and approved by the proper land officers of the United

[499] States; the only act *remaining for the United States or its officers to perform with respect to such entries being the issuance of the patent in cases where the patent has not already issued;" and that all of the said entries and locations of lands referred to in the exhibit filed with the bill were allowed, and the final certificates (and, so far as issued, the patents) issued therefor, "under a mistake of law founded upon a certain erroneous ruling by the Secretary of the Interior, to the effect that the said Northern Pacific Railroad Company, and their successors in interest, were not entitled to any lands by virtue of said act of Congress approved July 2d, 1864, and said joint resolution, approved May 31st, 1870, granting lands to said Northern Pacific Railroad Company, east of that point on the line of said Northern Pacific Railroad where the same crosses the line of the St. Paul & Duluth Railroad, known as Thompson Junction."

Obviously, the first inquiry should be as to the object and scope of the act of 1898. Upon that point we do not think any doubt can be entertained, if the words of the act be interpreted in the light of the situation as it actually was at the date of its passage. Here were vast bodies of land, the right and title to which was in dispute between a railroad company holding a grant of public lands, and occupants and purchasers,—both sides claiming under the United States. The disputes had arisen out of conflicting orders or rulings of the Land Department, and it became the duty of the government to remove the difficulties which had come upon the parties in consequence

of such orders. The settlement of those disputes was therefore, as the circuit court said, a matter of public concern. If the disputes were not accommodated, the litigation in relation to the lands would become vexatious, extending over many years and causing great embarrassment. In the light of that situation Congress passed the act of 1898, which opened up a way for an adjustment upon principles that it deemed just and consistent with the rights of all concerned,—the government, the railroad grantee, and individual claimants. The railroad company evinced its approval of this *action of the legislative department by [500] a prompt acceptance of the act in its entirety. By such unqualified acceptance the railroad company agreed that, so far as it had any claim to the lands in dispute, whatever the act of Congress required to be done might be done.

Promptly after the passage of that act the Land Department set about to administer its provisions, and to that end, as we have said, issued regulations for the guidance of all concerned.

During the progress of this work of administration, the railroad company, by conveyances to the present plaintiffs, assumed to pass such interest as it had in the lands here in question, with the effect—it is now claimed by the plaintiffs—to withdraw or exempt all the lands so sold from the operation of the act. The plaintiffs rest this claim upon that part of the act providing that the railroad grantee or its successor in interest "shall not be bound to relinquish lands sold or contracted by it, or lands which it uses or needs for railroad purposes, or lands valuable for stone, iron, or coal." See above, par. 3.

We have seen that the act (par. 1 above) made it the duty of the Secretary of the Interior to ascertain from time to time, and cause to be prepared and delivered to the railroad grantee or its successor in interest, a list or lists of the several tracts purchased, settled upon, or occupied, and claimed, at the date of the act, by such settlers, purchasers, or occupants, their heirs and assigns, according to the smallest government subdivisions. And the act provided that the railroad grantee or its successor should accept said list or lists "as conclusive, with respect to the particular lands to be relinquished by it." The contention of the plaintiffs, stated more fully, is, in effect, that it was competent for the company, notwithstanding its acceptance of the act, to take out of its operation any lands embraced by its terms, by simply selling or contracting to sell them before the delivery to it, or to its successor in interest, of the lists above mentioned. In other

[501]*words,—for the contention comes to that,—the railroad company, so far as the act of 1898 was concerned, could, notwithstanding the acceptance of its provisions, and on the day after such acceptance, have sold or contracted to sell its right, title, and interest in and to all the lands embraced by those provisions. This would have left no lands whatever to which the act could apply. Such a result would have left unsettled all the disputes relating to any lands which the company chose, in its own interest, to sell while the Land Department was proceeding under the statute. We do not believe that Congress intended that it should be in the power of the railroad company in any such mode to defeat the operation of the act. Congress, manifestly, had reference to the situation as it was when the act of 1898 was passed.

If any rights had become vested in the Northern Pacific Railroad Company which could not, against or without its consent, be affected by an enactment like that of 1898, then the objection to legislation on the ground that it interfered with vested rights, was waived by the acceptance of the act by its successor in interest; for it was entirely competent for the latter company, if it succeeded to all the rights of the railroad grantee, to agree to such a settlement as that devised by Congress. The rights acquired by the definite location of the road, and any selection of lands based thereon, became, upon the acceptance of the act, and so far as that company was concerned, subject to such settlement as the Land Department might legally make under that act. It could not, by any sale or contract made after the acceptance of the act, interfere with the full execution of its provisions. And the plaintiffs, who claim to have purchased from the successor in interest of the railroad grantee, can occupy no better position than the company from which they purchased. They were in a sense purchasers *pendente lite*; for the Secretary of the Interior was, at the time, as he is now, engaged in administering the act of Congress. By him or under his direction must be as-

[502]inquiry whether *the lands in question are within the indemnity limits of the land grant to the railroad company, and so situated that a right to them attached by reason of the definite location of the road. He must also inquire whether such lands were purchased, by the respective defendants, directly from the United States, or were settled upon or claimed in good faith by qualified settlers under color of title or claim of right under a law of the United States or ruling of the Interior Department, and whether the purchaser, settler, or

claimant refuses to transfer his entry. Upon these facts also depends the right of the railroad grantee or its successor in interest (its rights being relinquished as provided in the act) to select, in lieu of the lands relinquished, an equal quantity of surveyed or unsurveyed public lands, not mineral or reserved, and not valuable for stone, iron, or coal, and free from any adverse claim, or not occupied by settlers at the time of such selection, situated within any state or territory into which the railroad grant extends.

Now it is sought, in advance of final action by the Land Department in execution of the act, to have it adjudged, *as between the parties to this suit*, that the lands in dispute, claimed by the defendants, cannot properly be placed on the lists which the Secretary may deliver to the railroad grantee or its successor in interest. But that is a question the solution of which depends, in part at least, on facts within the province, primarily, of the Secretary of the Interior to find. In short, he, and he alone, must ascertain the facts which enter into the question as to what lands are to go on the lists to be delivered to the railroad grantee or its successor in interest. The court should not, by any decree, as between parties who have no contract relations with each other, attempt indirectly to control the authority and discretion of that officer to determine what lands shall and what lands shall not be included in the lists to be prepared under his direction. The plaintiffs cannot invoke the aid of the court to have these questions concluded, even as between them and the defendants, by an admission, made in their bill for the purposes of this case, that the final *certificates and final[503] receipts held by the respective defendants will entitle them to the lands they claim but for the "vested" rights acquired by the railroad company in virtue of the definite location of its road. The court should not assume that they are embraced by the act, in order simply that it may have an opportunity, as between the present parties, to decide a question of law which cannot appropriately arise until at least all the facts are ascertained by the Land Department, and final action is taken under the statute of 1898. Although it may be true, as alleged in the bill, that the defendants, not holding patents, have received and hold final certificates or final receipts, and that, so far as they are concerned, nothing more remains to be done in the Department except to issue patents, yet it is in the power of the Department, even after decree here, in this suit, to reopen the case as to each defendant of that class, and, sufficient grounds existing therefor, recall or cancel

such certificates or receipts. The whole matter, in respect of the lands in dispute, is yet in the hands of the Department, undisposed of finally under the act of 1898. Congress intended that the Department should, within the limit and according to the rules prescribed by the act of 1898, settle the disputes that had arisen between the railroad grantee and settlers, although, after the matter has passed beyond the jurisdiction of the Department, such settlements may become the subject of judicial inquiry for the protection of the rights of parties against any error of law committed by the Department.

Those views are in entire accord with the former decisions of this court. In *Johnson v. Towsley*, 13 Wall. 72, 87, 20 L. ed. 485, 488, it was said: "This court has at all times been careful to guard itself against an invasion of the functions confided by law to other departments of the government; and in reference to the proceedings before the officers intrusted with the charge of selling the public lands it has frequently and firmly refused to interfere with them in the discharge of their duties, either by mandamus or injunction, so long as the title remained in the *United States and the matter was rightfully before those officers for decision. On the other hand, it has constantly asserted the right of the proper courts to inquire, *after the title had passed from the government*, and the question became one of private right, whether, according to the established rules of equity and the acts of Congress concerning the public lands, the party holding that title should hold absolutely as his own, or as trustee for another." So, in *Marquez v. Frisbie*, 101 U. S. 473, 475, 25 L. ed. 800, 801: "We have repeatedly held that the courts will not interfere with the officers of the government while in the discharge of their duties in disposing of the public lands, either by injunction or mandamus. . . . After the United States has parted with its title and the individual has become vested with it, the equities subject to which he holds it may be enforced, but not before. . . . We did not deny the right of the courts to deal with the possession of the land prior to the issue of the patent, or to enforce contracts between the parties concerning the land. But it is impossible thus to transfer a title which is yet in the United States." What was said in the case just cited, as to the power of the court to interfere, in certain cases, in advance of the issuing of the patent, was no doubt in the mind of the circuit court when, in its opinion in this case, it said: "It is unnecessary to decide whether a case may not arise, when, even while the disputed question as to the rights

[504]

195 U. S.

of contesting parties to a tract of public land is pending or cognizable before the Land Department, a court of equity may properly interfere by injunction, at the suit of one of the claimants, to prevent the other claimant from despoiling the land by waste, and appropriating its substantial value, by denuding it of all its merchantable timber, before any final decision upon the disputed claims by the Land Department, which is only rendered by issuing the patent."

So, again, in *United States v. Schurz*, 102 U. S. 378, 395, 26 L. ed. 167, 171: "The Constitution of the United States declares that Congress shall have power to dispose of and make all needful rules *and regula-[505] tions respecting the territory and other property belonging to the United States. Under this provision the sale of the public lands was placed by statute under the control of the Secretary of the Interior. To aid him in the performance of this duty a bureau was created, at the head of which is the Commissioner of the General Land Office, with many subordinates. To them, as a special tribunal, Congress confided the execution of the laws which regulate the surveying, the selling, and the general care of these lands. Congress has also enacted a system of laws, by which rights to these lands may be acquired and the title of the government conveyed to the citizen. This court has with a strong hand upheld the doctrine that so long as the legal title to these lands remained in the United States, and the proceedings for acquiring it were as yet *in fieri*, the courts would not interfere to control the exercise of the power thus vested in that tribunal. To that doctrine we still adhere." As late as *Bockfinger v. Foster*, 190 U. S. 116, 126, 47 L. ed. 975, 979, 23 Sup. Ct. Rep. 836, 840, we reaffirmed the principle "that the courts will not interfere with the Land Department in its control and disposal of the public lands, under the legislation of Congress, so long as the title in any essential sense remains in the United States."

These principles are applicable to the particular scheme devised by the act of 1898 in reference to the lands in dispute. When the Land Department shall have done all that it can do in execution of the act of Congress, as to any particular lands in dispute, it will be time enough for interested private parties claiming an interest in them to invoke the aid of the courts for the determination of such questions of law as may arise out of the action of the Department. It is true that no order is asked here that will, directly or in terms, operate upon the Land Department. But a decree is asked, as between the parties now before the court, which must necessarily control

or affect the action of the Department in respect of matters committed to it by Congress. Such interference by the court, although between private claimants only, [506] would be inappropriate,—*especially as to lands covered by the act of 1898.

What has been said is peculiarly applicable to the unpatented lands in dispute. It is equally applicable to lands patented both before and after the passage of the act, if such lands are *in dispute* and *belong to either of the classes described in the act of 1898*. We agree with the circuit court that the act "gives the option to keep or relinquish the disputed land, to the individual claimant in every instance. If he elects to retain that land, it is to be listed by the Secretary in lists to be furnished to the railroad claimant, who must relinquish, and whose consent to this was given by its acceptance of the act." In case of such relinquishment by the railroad company, it acquires a right to select other lands in place of those retained by the individual claimant. If the individual claimant, having a patent, elects to surrender his right, then he must reconvey to the United States, and will then be entitled to select other lands in lieu of those surrendered. So that the statute embraces both patented and unpatented lands, in respect of which the railroad company or its successor in interest claims that a right thereto attached by the definite location of its road or by selection, provided they are also such lands as were originally "purchased directly from the United States, or settled upon or claimed in good faith by any qualified settler under color of title or claim of right under any law of the United States or any ruling of the Interior Department." The duty of a court of equity not to interfere with parties in the prosecution of their rights under the act, whereby the execution of its provisions in advance of final action by the Department would be embarrassed by judicial decision, is quite as imperative in cases of the patented lands in dispute as in the cases of unpatented lands. This view is not at all in conflict with those cases in which it has been held that after a patent issued for public lands the only remedy for one who claims the land as against the patentee is to bring a suit against the person holding the patent, and obtain a decree declaring [507] *the patentee a trustee for the party suing. This general principle does not apply to cases embraced by the act of 1898. That act is peculiar in its provisions, and contemplates that the individual claimant of one of the classes described in it may hold the land patented to him, if he elects to retain it, and that the railroad grantee or its successor in interest can be made whole by

taking lieu lands in place of those claimed in virtue of definite location or selection.

For the reasons stated; neither the claim of vested rights in behalf of the railroad grantee, nor the contention that the lands in dispute, having been sold to the plaintiffs, were not for that reason embraced by the act of 1898, furnishes any ground for interference by a court of equity, or for the granting of the relief asked.

This conclusion is fortified, if not absolutely demanded, by another consideration, namely, that no title to indemnity lands is vested until a selection be made by which they are definitely ascertained, and the selection made *approved by the Secretary of the Interior*. This principle is firmly established. A full statement of it is found in *Wisconsin C. R. Co. v. Price County*, 133 U. S. 496, 511, 33 L. ed. 687, 694, 10 Sup. Ct. Rep. 341, 347. The court there said: "He [the Secretary] was required to determine, in the first place, whether there were any deficiencies in the land granted to the company, which were to be supplied from indemnity lands; and, in the second place, whether the particular indemnity lands selected could be properly taken for those deficiencies. In order to reach a proper conclusion on these two questions he had also to inquire and determine whether any lands in the place limits had been previously disposed of by the government, or whether any pre-emption or homestead rights had attached before the line of the road was definitely fixed. . . . *Until the selections were approved* there were no selections in fact, only preliminary proceedings taken for that purpose; and the indemnity lands remained unaffected in their title. Until then the lands which might be taken as indemnity were incapable of identification; the proposed selections remained the *property of the United States. The [508] government was, indeed, under a promise to give the company indemnity lands in lieu of what might be lost by the causes mentioned. But such promise passed no title, and, until it was executed, created no legal interest which could be enforced in the courts." In *New Orleans P. R. Co. v. Parker*, 143 U. S. 42, 57, 36 L. ed. 66, 70, 12 Sup. Ct. Rep. 364, 369, it was said: "As to lands within the indemnity limits, it has always been held that no title is acquired until the specific parcels have been selected by the grantee and approved by the Secretary of the Interior." And in *Michigan Land & Lumber Co. v. Rust*, 168 U. S. 589, 592, 593, 42 L. ed. 591-593, 18 Sup. Ct. Rep. 208, 209, the court said: "Generally speaking, while the legal title remains in the United States, the grant is in process of administration and the land is subject to

the jurisdiction of the Land Department of the government." To the same effect are *Sioux City & St. P. R. Co. v. Chicago, M. & St. P. R. Co.* 117 U. S. 406, 408, 29 L. ed. 928, 929, 6 Sup. Ct. Rep. 790; *United States v. Missouri, K. & T. R. Co.* 141 U. S. 358, 374, 35 L. ed. 766, 771, 12 Sup. Ct. Rep. 13; *Brown v. Hitchcock*, 173 U. S. 473, 479, 43 L. ed. 772, 775, 19 Sup. Ct. Rep. 485; *Kansas P. R. Co. v. Atchison, T. & S. F. R. Co.* 112 U. S. 414, 421, 28 L. ed. 794, 797, 5 Sup. Ct. Rep. 208; *Barney v. Winona & St. P. R. Co.* 117 U. S. 228, 232, 29 L. ed. 858, 860, 6 Sup. Ct. Rep. 654; *Grinnell v. Chicago, R. I. & P. R. Co.* 103 U. S. 739, 26 L. ed. 456; *St. Paul & S. C. R. Co. v. Winona & St. P. R. Co.* 112 U. S. 720, 731, 28 L. ed. 872, 876, 5 Sup. Ct. Rep. 334; *Cedar Rapids & M. River R. Co. v. Herring*, 110 U. S. 27, 28 L. ed. 56, 3 Sup. Ct. Rep. 485.

Now, the lands here in dispute and claimed by the plaintiffs as grantees of the Northern Pacific Railway Company (the alleged successor in interest of the Northern Pacific Railroad Company) are lands admittedly within indemnity, as distinguished from granted or place, limits. The mere filing of lists of selections, after the acceptance of the map of definite location of the railroad line between Duluth and Ashland, gave the company no such title as could be enforced by the courts in a suit between private parties. It is true the government was under a promise to give the railroad company lands in the indemnity limits to supply losses in place limits. But, as adjudged in the above cases, that promise passed no title. The promise will [509] no doubt be fulfilled by the government *in due time and in its own way. The selections not having been approved by the Secretary, the title remains in the government. So that the plaintiffs, having no greater rights than those of the railroad grantee or its successor, have no such interest in the particular lands specified in the railroad company's lists of unapproved selection as entitles it, while the title remains in the United States, and while these lands are being administered by the Land Department, to ask a court of equity to decide, as between them and the defendants, that the latter could not by any entry or purchase acquire an interest after the acceptance by the Secretary of the railroad's map of definite location.

But it is suggested that the final action of the Department may be indefinitely postponed, to the great injury of the railroad grantee and those claiming under it. Delay in such matters was a contingency which the alleged successor in interest of the railroad grantee must have taken into

account when accepting the act and assenting to the plan of settlement embodied in it. The Land Department was not required to complete its administration of the statute within any designated time. The act, upon its face, directs that the required lists be prepared and delivered to the railroad company "as soon as conveniently may be done." It cannot be assumed upon this record that the Department has not progressed with the work of administration as rapidly as all the circumstances and its convenience permitted. Even if the fact be otherwise, it is not for a court of equity by its decree to decide, in the first instance, that the selections made by the railroad company of lieu lands shall be approved by the Secretary, or to decide what lands should be on the lists required to be furnished to the railroad, granted under the act of 1898, or to control directly or indirectly the work which Congress, with the assent of the railroad grantee, has committed to one of the Departments of the government, or by an order interfere with the prosecution by the defendants of their claims under the act of 1898.

*We are of opinion that the bill should [510] have been dismissed upon the ground that a court of equity should not, in advance of the final action by the Secretary of the Interior in respect of lands embraced by the act of 1898, interfere with the regular and orderly administration of its provisions by means of a decree directed against claimants under that act. And without now expressing any opinion as to what questions may be raised by a claimant after such final action by the Land Department under that act, we adjudge that such dismissal must be without prejudice to any suit that may, according to established principles, be rightfully instituted by a claimant after the jurisdiction of the Department in respect of any particular lands has ceased. *Thus modified, the decree of the Circuit Court must be affirmed.*

It is so ordered.

Mr. Justice **Brewer** took no part in the decision of this case.

CITY OF SAN JUAN, *Plff. in Err.*,
v.

ST. JOHN'S GAS COMPANY, Limited.

(See S. C. Reporter's ed. 510-523.)

Contracts—medium of payment—accord and satisfaction—refusal of requested instructions—harmless error—effect of general charge.

1. References in a contract for street light-

NOTE.—On accord and satisfaction by pay-

ing to the sums due thereunder as to be paid in currency, without any qualification, cannot be permitted to counterbalance the showing which the prior negotiations and the context of the contract itself otherwise makes, that current foreign money was to be the medium of payment.

2. Error in instructing the jury that the time of making the contract for lighting the street lamps in San Juan, Porto Rico, was alone to be considered in determining the current foreign money which the contract provided was to be the medium of payment, is not prejudicial, where it is conceded that, if current foreign money was required by the contract, money of the United States current at the time the contract was made was within the contemplation of the parties, and that such money was also current in the island at the time when performance was due.
3. An accord and satisfaction results from the receipt, under protest, in discharge of a particular payment, of a different money medium from that which was required by a contract.
4. An agreement that payment in United States currency should extinguish a larger amount due under a street-lighting contract estimated in Porto Rican currency is binding where there was a bona fide dispute between the parties as to the medium of payment, the municipality insisting that it was Porto Rican money, and the lighting company that it was current foreign money.
5. Error in refusing to instruct the jury that parties who differed as to the medium of payment under a contract would be bound by a stipulation, by way of compromise, to extinguish, by a payment in United States currency, a larger amount due under the contract, estimated in Porto Rican currency, is not cured by instructing the jury, in the general charge, that the compromise evidenced by the agreement must be treated as inefficacious as to the particular items to which it related unless it was found that the minds of the parties had met on an entirely new and independent contract.

[No. 41.]

*Argued and submitted November 3, 1904.
Decided December 12, 1904.*

IN ERROR to the District Court of the United States for the District of Porto Rico, to review a judgment in favor of plaintiff in a suit to recover for services in lighting the street lamps in the city of San Juan, in that island. *Reversed.*

Statement by Mr. Justice **White**:

The gas company, defendant in error, an English corporation, sued the city of San Juan, the plaintiff in error, to recover \$14,600.60, alleged to be due for services in lighting 485 street lamps from November, 1899, to September 16, 1900. Annexed to the petition was an account showing the

items from which the balance resulted. The city generally denied, and pleaded that, under the contract for lighting, it had at various times imposed fines upon the company for neglect of its contract duty, which fines were a set-off, and extinguished the sum sued for. A statement of account was also filed by the city, showing the alleged set-off. Both the accounts credited the gas company for lighting with \$15,125.70. In the account of the gas company, that company credited itself with several small items for labor and materials supplied to, and materials appropriated by, the city, aggregating \$246.42, and for interest calculated at 12 per cent up to September 16, 1901, the items in question and the interest amounting to \$2,215.96, making the total credited to the company \$17,588.08. These sums were not in the account of the city. Whilst the credit items in both accounts, therefore, agreed except as above stated, there was this further difference: The account of the gas company stated that the sums to its credit were payable in gold or United States money; whilst the account of the city stated such items as payable in Porto Rican currency, declared to be worth 40 per cent less than United States gold or currency. The gas company debited itself with various payments made to it by the city on account of the services rendered and for the sum of a certain ground rent, all amounting to \$2,987.42, leaving in its favor the balance sued for. The city's account, whilst debiting the company with payments in United States gold to the amount stated in the gas company's account, treated the debt as being due in Porto Rican currency, and figured the payments in gold as extinguishing a larger amount by 40 per cent than the face value* of [512] the gold. In addition the gas company was debited with certain fines imposed and other charges, and was moreover debited in Porto Rican money with two sums aggregating \$8,836.88, amounting, if paid in gold, to \$5,332.13. These two debits, it was recited in the account, were the sums in Porto Rican money or its equivalent in gold, which the city was bound to pay to the firm of Mullenhoff & Korber, to which firm the gas company, with the consent of the city, had transferred a portion of its claims against the city in Porto Rican money, to be paid in its equivalent in gold. By the result of the debits against the gas company the items credited to it were extinguished and the account balanced. Thus, the substantial difference between the two accounts arose from the fact that one stated the debt to be payable in gold or United States money, the

ment of less sum for greater—see notes to *Fulcr v. Kemp*, 20 L. R. A. 785; *Cglesby v. Attrill*, 300

26 L. ed. U. S. 1186; and *Jaffray v. Davis*, 11 L. R. A. 710.

other treated it as payable in Porto Rican currency.

Subsequently, the city pleaded that it had paid to Mullenhoff & Korber the sum of \$5,196.80 in United States gold, and was entitled to due credit therefor, and it was thereafter agreed between counsel that this amount had been paid under the transfer in question. As will hereafter appear, \$4,337.32 of the sum was paid as the equivalent of \$7,228.20 in Porto Rican currency, the amount due for street lighting up to June 1, 1900, if estimated in Porto Rico, while the balance of \$859.48 was paid as satisfying the charge made for street lighting in the month of June, 1900, also consisting of a larger sum in Porto Rican money.

At the trial the undisputed proof showed that in 1875 the city made a contract, to last for twenty-five years, with one Steinacher for the lighting of the city, which contract, about 1878, was assigned to the gas company; that shortly after there was a difference between the parties as to whether the sums due under the contract were payable in Porto Rican money or in current foreign money. As a result, all the payments up to and exclusive of the items embraced in the suit were received by the gas company, under protest, in Porto Rican currency. So far as any payments made on account of the *items embraced in the suit and stated in both accounts, it was undisputedly shown that they were made in United States gold. There was proof tending to show that the city, in making them, insisted that the gold should extinguish its equivalent amount in Porto Rican currency, whilst the company claimed that the payments should only extinguish a sum equal to the face value of the United States gold.

Concerning the transfer to the firm of Mullenhoff & Korber, and the payment made by the city to that firm, it was indisputably shown as follows: That the gas company, being in want of funds, had agreed to transfer to the firm a given portion of its claim, and applied to the city to recognize the assignment, and to pay to the transferees the sum assigned, and that action was taken on this request by the city, and was accepted in writing by Scott, representing the gas company, as follows:

I, Ramon Negron Flores, secretary of the city council of the city of San Juan, hereby certify, that at the meeting held by the city council of San Juan, on the eighteenth day of this month, the following resolution was passed:

20.—The president of the city council declared that Mr. Scott, the contractor of the public lighting for the city, and Mr. Korber, 195 U. S.

a member of the firm of Mullenhoff and Korber of this city, had called on his office and stated that the amount of seven thousand two hundred and twenty-eight pesos and eighty-seven cents, Porto Rican currency, total amount of the credit due to Mr. Scott, on account of his services as contractor from November of the year one thousand eight hundred ninety-nine, to last May, being deducted the amounts already collected by the said contractor, should be delivered to the above said firm, to the credit of which Mr. Scott wishes this amount to be passed.

The city council agreed with the declarations of the president, and passed the resolution considering the said balance of seven thousand two hundred and twenty-eight pesos with eighty cents equivalent of four thousand three hundred and *thirty-seven[514] dollars and thirty-two cents in favor of the firm Mullenhoff & Korber, being therefore the municipal corporation relieved from any compromise with Mr. Scott concerning the said amount, without any prejudice to the resolutions to be passed some time in the future, about the claims previously filed by the said contractor.

And to begin the respective proceedings, I write and sign this declaration in San Juan of Puerto Rico this twenty-second day of June of the year one thousand nine hundred.

(Signed) R. Negron.

On twenty-second June, being present Mr. Scott and Mr. Korber, the latter acting as representative of the firm, of which he is a partner, I notified them the above resolution, and they affixed their signature as a proof of their acquiescence to the same, declaring at the same time, that the amount of the account of the month of June of this year should be recognized as due to the same firm, to which the said amount must be paid. I certify it.

(Signed) R. Negron.

(Signed) Mullenhoff & Korber.

(Signed) L. A. Scott.

San Juan, June 19th, 1900.

Let it be done. The Mayor, Egozcue.

There was testimony, admitted without objection, tending to show that at the time the city accepted this transfer it was understood that the reservation made in the written agreement related only to fines which it was contended the city had unjustly imposed on the company. The court rejected the offer of the city to prove that the parties, by their conduct prior to the period covered by the items sued for, had interpreted the contract as meaning that the payments were to be made in Porto Rican money, and not otherwise. The court also refused to instruct, at the request of the city, that the

contract was payable in Porto Rican money, and charged that *it provided for payment in foreign money, exclusive of Spanish gold, which was current in the island at the time the contract was made. The court further instructed that the payments made by the city to Mullenhoff & Korber in gold should be debited to the city at the face value of those payments, unless the jury found that the minds of the parties had met on a new contract to substitute Porto Rican currency for the foreign current money stipulated by the contract. The court, moreover, refused the request of the city to charge that if, at the time of the transfer to Mullenhoff & Korber, there was a compromise entered into between the parties by which the payment to the firm of a given amount in United States currency should extinguish a larger amount of the debt due the company in Porto Rican money, that the parties were bound thereby, as to such payment. Besides, the jury were instructed that, as there was no proof concerning the fines imposed by the city upon the company, as stated in the account of the city, such items must be disregarded, and that interest, as calculated in the account of the city, not being exigible under the local law, must also be disregarded.

There was a verdict and judgment thereon against the city for \$8,761.35, and this writ of error was prosecuted.

Mr. N. B. K. Pettingill submitted the cause for plaintiff in error:

If a contract is made payable in terms of currency or current money, oral evidence is always admissible as to the meaning of those terms as between the parties.

Thorington v. Smith, 8 Wall. 1, 19 L. ed. 361.

In the absence of such evidence, where the performance of the contract extends through many years, the actual construction put upon the contract by the parties, and the medium in which partial payments have been made, is conclusive as to their intention.

Chicago v. Sheldon, 9 Wall. 50, 19 L. ed. 594; *Cook v. Lillo*, 103 U. S. 792, 26 L. ed. 460; *District of Columbia v. Gallaher*, 124 U. S. 505, 510, 31 L. ed. 526, 527, 8 Sup. Ct. Rep. 585; *The Confederate Note Case* (*Atlantic, T. & O. R. Co. v. Carolina Nat. Bank*) 19 Wall. 548, 22 L. ed. 196; *Bissell v. Heyward*, 96 U. S. 580, 24 L. ed. 678. See also *Dearing v. Parker*, 4 Dall. Appx. xxiii., 1 L. ed. 925; *Topliff v. Topliff*, 122 U. S. 121, 131, 30 L. ed. 1110, 1114, 7 Sup. Ct. Rep. 1057.

A party is bound by his conduct in accepting and acting upon the proposals and conduct of the other party, irrespective of

any express consent or acquiescence; and the rights of the parties are determined upon principles of estoppel, rather than of the meeting of the minds in a new contract.

22 Am. & Eng. Enc. Law, p. 539; *Savage v. United States*, 92 U. S. 382, 23 L. ed. 660; *United States v. Justice*, 14 Wall. 535, 20 L. ed. 753; *Mason v. United States*, 17 Wall. 67, 21 L. ed. 564; *Baird v. United States*, 96 U. S. 430, 24 L. ed. 703; *Washington v. Opie*, 145 U. S. 214, 36 L. ed. 580, 12 Sup. Ct. Rep. 822; *Chicago, M. & St. P. R. Co. v. Clark*, 178 U. S. 353, 44 L. ed. 1099, 20 Sup. Ct. Rep. 924.

It is no doubt true that the payment by a debtor of a part of his liquidated debt is not a satisfaction of the whole, unless made and accepted upon some new consideration; but it is equally true that where the debt is unliquidated and the amount is uncertain this rule does not apply. In such cases the question is whether the payment was in fact made and accepted in satisfaction.

Baird v. United States, 96 U. S. 430, 24 L. ed. 703.

Mr. Frederic D. McKenney argued the cause, and, with *Messrs. Francis H. Dexter* and *John Spalding Flannery*, filed a brief for defendant in error:

Payments must, under the French Civil Code, have as a basis the nominal value of the medium of payment on the day when effected or paid, though the legal value of the coin may have changed during the interval which has elapsed between the day on which the obligation was contracted and that on which the payment was made.

4 Aubry et Rau, Cours de Droit Civil Français, pp. 158, 159; 2 Mourlon, Répétitions écrites sur le Code Civil, p. 749; 8 Hue, Commentaire Théorique et Pratique du Code Civil, p. 62; 2 Baudry-Lecantinerie, Précis de Droit Civil, p. 748.

The opinions and sentences of Spanish jurists are to like effect, as plainly appears from the various references thereto under article 57 of the Code of Commerce in force in Porto Rico, page 24 of the War Department translation (Government printing office, 1899).

And so also is the prevailing law of the United States as settled by this court.

Butler v. Horwitz, 7 Wall. 258, 19 L. ed. 149; *Willard v. Tayloe*, 8 Wall. 557, 574, 19 L. ed. 501, 506; *Trebilcock v. Wilson*, 12 Wall. 687, 20 L. ed. 460.

And it is well settled that a contract made abroad to pay in "dollars," where performance is contemplated in an American port, is payable in currency of the United States.

Trecartin v. The Rochambeau, 2 Cliff. 465, Fed. Cas. No. 14,163; *The Quintero*, 1 Low. Dec. 38, Fed. Cas. No. 11,517.

And so, a bond given in 1859, payable in

"dollars," was held to be payable in gold and silver only.

Williamson v. Richardson, Fed. Cas. No. 17,754.

The same rule has been upheld, in the absence of statutory provisions, by most, if not all, of the states of the United States.

39 American Digest, Century ed. title *Payment*, p. 54.

Mr. Justice **White**, after making the foregoing statement, delivered the opinion of the court:

In order to come to the principal controversy covered by the assignments of error we dispose of certain contentions which we deem of minor importance. We think the court was right in instructing the jury that [516] it must disregard the *items as to fines charged by the city against the gas company, because no proof was offered on the subject. Whilst it is true, as asserted in the argument, that some reference was made to such fines in the testimony of one or more of the witnesses, such reference in no sense tended to establish that the fines had been legally imposed. As to the assignment of error relating to the refusal of the court to allow testimony for the purpose of showing that even if, under the contract, payment in foreign current money was required, the contract was tacitly modified, we deem it unnecessary to express an opinion, for the following reasons: The record shows that, subsequent to the ruling complained of, without objection, testimony was admitted establishing that, although all the payments made up to the first of the items embraced in the claim in suit, were made by the city to the gas company in Porto Rican money, nevertheless that such payments were only received by the gas company under protest, asserting its right to be paid in foreign current money. However conclusive on the gas company may have been the receipt by it of payment in a different medium from that which it asserted the contract required, the fact of the protest operated to prevent the inference that the medium actually received was admitted to be the one in which future payments should be made.

With the questions just referred to out of the way, it is apparent from the statement which we have made of the case that the record requires us to decide only two questions: First, in what money were the sums due under the contract payable? and, second, the effect of the agreement concerning payment made by the city to Mullenhorf & Korber.

1st. *In what currency were the sums due under the contract payable?*

The contract, of which only a translation is in the record, was passed before a notary, 195 U. S.

and is voluminous, containing in minute detail a recital of all the occurrences which took place from the date of the first steps taken to make a contract, and its consummation.

*Excluding irrelevant details, it appears [517] as follows:

Some time in 1874 the city advertised for bids for a contract for lighting. Proposals were received from a Mr. Steinacher and Mr. Olney. Steinacher, whilst proposing to bind himself to light lamps for \$3 monthly for each lamp, suggested that the city modify its request for proposals in several particulars, one of which was that there should be included in the contract the purchase by the contractor of gas works then owned by the city. This suggestion was accepted, and preparatory to making a call for bids, after obtaining the authority of the provincial deputation of Porto Rico, the city directed that the gas works be appraised by certain city officials. This appraisement was made as follows:

Recapitulation:	Pesetas.
Value of the buildings.....	19,176.25
Fixed and loose materials in the gas works	48,908.85
Fixed materials in the city.....	10,624.00

Total amount 78,709.10

The present appraisement amounting to 78,709.10 pesetas, or \$31,741.82 of the currency in commerce.

Porto Rico, 26th of May, 1875.

The municipal architect.

(Signed) Domingo Sesmero.

The city thereupon called for new proposals. Among the many conditions exacted were, first, that the bidder should agree to light street lamps at \$3 monthly for each lamp, and that payment for the same "will be made in the circulating foreign money in commerce for the value that it is received, without any premium that will equalize it to the Spanish official current money;" that he should buy the gas works, appraised, as we have above stated, at \$78,709.10, Porto Rico money, at its equivalent in foreign currency,—\$31,741.82; that the bidder should furnish a guarantee of \$6,000 in cash or a bond for \$9,000, to be secured by first mort-[518]gage on a house in the city, satisfactory to the municipality. Many details were provided in the conditions; as to the manner in which the contractor should perform his duties; as to fines to be imposed by the city for neglect in the quality and character of the light furnished, and for various other delinquencies, and it was also provided "the penalties for faults in the service and sup-

ply of gas to the public will be imposed by the alcalde without appeal."

Steinacher was the only bidder in answer to this call for proposals. He offered "to take charge of the city service for the amount of \$3 currency for each lamp," and to buy the buildings and apparatus, etc., for the sum of \$22,000 in currency, instead of \$31,741.82, as required by the requests for bids made by the city. In his proposition, moreover, Steinacher tendered two houses, stating the fact to be that one of them was encumbered by a prior mortgage in favor of the municipality, which he, Steinacher, had given to guarantee a prior contract existing between himself and the municipality. In addition, his bid suggested various modifications in the administrative provisions enumerated by the city in its conditions. The bid, not being in accord with the proposition submitted by the city, was rejected. Negotiations then ensued, the result of which was that the city yielded as to the administrative provisions, and Steinacher yielded as to the price to be paid for the gas works, it being recited in the proceedings of the city on the subject that, in order to terminate the difficulties, "Mr. Steinacher expresses himself disposed to the acquisition of the said buildings, etc., as published in the Official Gazette of the 8th of June last, for the amount of \$31,741.82 in currency, and to take under his charge the public light at \$3 monthly for each lamp, at same currency, according to the price published." The houses tendered to secure the bond were accepted by the city, and, in order to give the city a first mortgage, a liquidation [519] was had between Steinacher *and the city under the prior contract, and by this liquidation it was established that Steinacher owed the city \$203 in "foreign currency," which he paid. To ascertain whether the value of the houses was equal to the requirements of the city, they were appraised by the city officials in Porto Rican money, and this sum was reduced to foreign currency, and, as the amount in foreign currency equaled the \$9,000 required by the conditions of the city, the houses were accepted and a new mortgage for that amount was given. Under these proposals and acceptance the contract was executed, conforming in all respects to the proposals and bids as modified by the proceedings which we have narrated.

The contention that the \$3 per month for lighting street lamps was payable in Porto Rican money is based on the fact that sometimes in the contract the sum to be paid is referred to as in currency, without any qualification. The arguments would have cogency if the passages in the contract relied upon stood alone; but its unsound-

ness becomes apparent by a consideration of the context of the contract. The estimate of the property to be sold in Porto Rican money and its liquidation in foreign currency; the terms of the bid; the proposition of Steinacher, which was accepted, to pay for the gas works at the sum of the foreign current money to which the Porto Rican money was reduced, and to do the lighting at \$3 per lamp *in the same currency*; the action of the city concerning the liquidation of the prior account, and the mortgage upon the house,—all demonstrate that both the proposals of the city, the acceptance by Steinacher, and the contract fixed current foreign money, exclusive of Spanish gold, as the medium in which the service for lighting the street lamps was to be paid. The court, therefore, was right in its instruction as to the medium of payment required by the contract. We find, however, nothing in the contract to support the construction that it required the payment to be made in foreign current money circulating in the island at the time the contract was made, instead of money of that character circulating at the time *the payments [520] were to be made. The general rule, under both the common and the civil law, is that, in the absence of a stipulation to the contrary, the character of money which is current at the time fixed for performance of a contract is the medium in which payments may be made. *Butler v. Horwitz*, 7 Wall. 258, 19 L. ed. 149; *Willard v. Tayloe*, 8 Wall. 557, 19 L. ed. 501; *Trebilcock v. Wilson*, 12 Wall. 687, 20 L. ed. 460; Commercial Code of Porto Rico, art. 312; Spanish Civil Code of Porto Rico, arts. 1091, 1157, 1170; Code Napoleon, art. 1246; *Aubrey & Rau*, vol. 4, p. 158; *Mourlon*, vol. 2, p. 749.

There was, therefore, error in instructing that the time of making the contract was to be alone considered in determining the foreign current money for which the contract provided. We think, however, such error was in no sense prejudicial. This follows, because it was conceded that, if foreign current money was required by the contract, money of the United States current at the time the contract was made was within the contemplation of the parties, and that such money was also current in the island at the time when performance was due. From this it results that the rights of the parties were in no way affected by the erroneous ruling.

2d. *The effect of the agreement concerning the payment made by the city to Mullenhoff & Korber.*

On the face of the written agreement between the city and the gas company it undoubtedly appears that a stated sum of

money, to be paid in United States currency, was to extinguish a larger sum in Porto Rican money.

As we have seen, there was testimony tending to show, and none tending otherwise, that the reservation in the written document concerning "claims previously filed by the said contractor," and which were to be "passed some time in the future," solely related to claims for fines which the city had assessed against the gas company, and the justice of which the company disputed. The city asked the court to instruct that if it was found that at the time of the agreement it was stipulated by way of com-
[521]promise that the larger sum owing *at the time should be extinguished by the payment of the lesser amount, the parties were bound. This request was refused and excepted to. The court, in its general charge, in the fullest manner instructed the jury that, as the medium of payment required by the contract was foreign current money, payment in that money extinguished simply the amount paid in foreign money, unless it was found that the minds of the parties had met on an agreement engendering an entirely new contract, substituting Porto Rican money for foreign currency.

It is urged by the city that error to its prejudice resulted from refusing to give the requested instruction. To sustain this proposition the doctrine is invoked that where one receives in payment a different thing or medium from that called for in the contract, such receipt is binding. Undoubtedly the general rule obtains, and is based on the premise that the discharge of a contract in a different thing from that for which the contract provides, necessarily is an accord and satisfaction as to the particular payment concerning which the different thing is received. *Sheehy v. Mandeville*, 6 Cranch, 263, 3 L. ed. 218; *Very v. Levy*, 13 How. 357, 14 L. ed. 179; *Bull v. Bull*, 43 Conn. 455; *Neal v. Handley*, 116 Ill. 418, 56 Am. Rep. 784, 6 N. E. 45; *Dimmick v. Sexton*, 125 Pa. 334, 17 Atl. 345.

True also is it that it has been settled by this court (*Savage v. United States*, 92 U. S. 382, 23 L. ed. 660) that this doctrine is applicable to the receipt under protest, in discharge of a particular payment, of a different money medium from that which was required by the contract. Whilst we have not been referred to any Spanish authority showing that these principles obtained under the law in force in Porto Rico, as the doctrine rests upon principles known to the Roman law (L. 17, C. De Solut.) enforced under the Code Napoleon (*Journal de Palais Répertoire*, v. 10, verbo *paiement*, p. 10, No. 117; *Toulier*, t. 12, p. 355; *Duranton*, t. 12, Nos. 79 and 80), we
195 U. S. U. S., Book 49.

cannot hesitate to conclude that the doctrine in question prevailed also in the Spanish civil law in force in Porto Rico. Whether it is applicable to the facts of this case is, then, the question.

*Now, whilst it may be at once conceded[522] that the doctrine in question is applicable to the payments made in Porto Rican money before the date of the first item sued for, it is equally clear that it cannot be applied to the payments thereafter made, including those to Mullenhoff & Korber, since they were made in United States currency. The contention that these payments in such money extinguished a larger sum than the par value of the money paid reduces itself to this: that a larger sum was satisfied by the payment of a lesser sum, because there was an agreement to that effect. The gas company in effect insists that this cannot be sustained, because of the well-established rule "that where a liquidated sum is due, the payment of a less sum in satisfaction thereof, though accepted as satisfaction, is not binding as such, for want of consideration." *Chicago, M. & St. P. R. Co. v. Clark*, 178 U. S. 364, 44 L. ed. 1105, 20 Sup. Ct. Rep. 928, and authorities there cited.

Conceding, without so deciding, that such rule was controlling in Porto Rico, we think it is not applicable to the case in hand. As pointed out by this court in the case just previously cited, the rule in question is subject, among others, to the well-established exception that it does not apply where, at the time of the agreement, there was a dispute between the parties, the subject-matter of which dispute is embraced in the agreement to extinguish a greater by a less amount. True it is, as pointed out in *Fire Ins. Asso. v. Wickham*, 141 U. S. 564, 35 L. ed. 860, 12 Sup. Ct. Rep. 84, it must appear that the alleged dispute really existed, and did not arise merely from an arbitrary denial by one party of an obligation which was obviously due. Despite the construction which we have given the contract, we think it is quite clear that the proof established that there was a bona fide dispute in this case. As we have seen, from the very inception of the contract the parties differed as to the medium of payment,—the one, the city, insisting that it was Porto Rican money; the other, the gas company, that it was foreign current money. During a period of fully twenty years this controversy continued, and in every instance the gas *company, although protesting, ac-
[523]cepted the city's view of the contract, and, by taking a different medium, bound itself as to those payments despite its protest. When the period arrived when the company was no longer willing to so act, and stood

upon its rights as it understood them, naturally the city stood upon its asserted rights, and thus the parties were at arm's length, disputing their respective rights. If there had been no agreement, the solution would have required judicial action. When, in view of this dispute, an agreement was reached that the payment should be made in United States currency, and that the payment should extinguish a larger amount estimated in Porto Rican currency, there was necessarily a compromise and settlement as to that payment which put the transaction so settled exactly in the position which had resulted from the action of the parties concerning the payments made during the preceding period of more than twenty years.

It follows from the foregoing that the court below erred to the prejudice of the city in refusing the instruction asked by it as to the result of the compromise, and that this error was not cured by the general charge, which instructed the jury that the compromise evidenced by the agreement must be treated as inefficacious as to the particular items to which it related unless it was found that the minds of the parties had met on an entirely new and independent contract.

The judgment of the court below is reversed, and the cause is remanded with directions to set aside the judgment, and grant a new trial.

Reversed.

[524]

*UNITED STATES, *Appt.*,

v.

CHICAGO, MILWAUKEE, & ST. PAUL
RAILWAY COMPANY *et al.*

(See S. C. Reporter's ed. 524-539.)

*Railway land grants—erroneous certification
by Secretary of Interior—bona fide purchaser.*

1. A certification to the state of Minnesota, made by the Secretary of the Interior, for the benefit of a railway company, of land within the indemnity limits of the railway land grant act of July 4, 1866 (14 Stat. at L. 87, chap. 168), even if erroneous, is not absolutely void because of a previous application to enter the land as a homestead after a prior homestead entry had been canceled for abandonment, which application was refused because the land in question had then been withdrawn from market by the Land Department, where this refusal was acquiesced in and an entry was then made under an amended application, which did not cover the land in question, although the entryman

thereunder made use of such land in connection with his own, but without laying claim to it as land which he had attempted to enter, and which had been improperly or wrongfully refused him.

2. A purchaser of land certified by the Secretary of the Interior to the state of Minnesota in aid of railway construction, and conveyed by that state to a railway company, occupies the position of a purchaser in good faith, protected as such by the act of March 3, 1887 (24 Stat. at L. 556, chap. 376, U. S. Comp. Stat. 1901, p. 1595), § 4, although the certification was erroneous, and might have been avoided and the land recovered back by the government while in the hands of the railway company, where such purchaser had no notice, actual or constructive, of the claim of the government.

[No. 54.]

Submitted November 4, 1904. Decided December 12, 1904.

APPEAL from the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment which affirmed a decree of the Circuit Court for the District of Minnesota, dismissing a bill to set aside a certification under a congressional land grant, made by the Secretary of the Interior to the state of Minnesota, for the benefit of a railway company, and to set aside the conveyance of such land by the state to the railway company, and by the company to one of the individual defendants. *Affirmed.*

See same case below, 54 C. C. A. 545, 116 Fed. 969.

Statement by Mr. Justice **Peckham**:

The United States, on the 6th day of March, 1893, filed this bill in the circuit court of the United States for the district of Minnesota, for the purpose of setting aside the certification, under the land grant of Congress (14 Stat. at L. 87, chap. 168), made by the Secretary of the Interior, of the land described in the bill, to the state of Minnesota, for the benefit of the railroad company, and also to set aside the conveyance thereof by the state to the railroad company, and by the company to one of the individual defendants. A supplemental bill was filed, by leave, March 4, 1901, bringing in by service of the subpœna other individual defendants.

The suit was brought under and pursuant to the act of Congress of March 3, 1887 (24 Stat. at L. 556, chap. 376, U. S. Comp. Stat. 1901, p. 1595), entitled "An Act to Provide for the Adjustment of Land Grants made by Congress *to Aid in the Construc-[525]tion of Railroads, and for the Forfeiture of Unearned Lands, and for Other Purposes."

Upon trial in the circuit court the bill was dismissed, and the decree of dismissal

195 U. S.

NOTE.—As to land grants to railroads—see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28 L. ed. U. S. 794.

was affirmed by the United States circuit court of appeals for the eighth circuit (54 C. C. A. 545, 116 Fed. 969), and from that decree of affirmance the government has appealed here.

The facts upon which the controversy arose are, in substance, as follows: On the 4th day of July, 1866, Congress passed an act making an additional grant of lands to the state of Minnesota (14 Stat. at L. 87, chap. 168), to aid in the construction of railroads in that state. The Southern Minnesota Railroad Company was, at the time of the passage of the act of Congress, a corporation organized under the laws of Minnesota, with the power to construct a line of railroad, as mentioned in that act. The legislature of Minnesota, on the 25th day of February, 1867, transferred the land granted to it by the act of Congress to the railroad company, subject to the provisions of that act and also of the state statute.

Among the lands thus transferred was a lot 80 acres in extent, in Faribault county, Minnesota, being the property in dispute in this suit. The land was within the indemnity limits of the grant by Congress to the state, as determined by the map of definite location of the railroad, which became effective February 25, 1867. The deficiency in what are termed the "place" lands was largely in excess of 80 acres. On the 29th day of November, 1870, the Southern Minnesota Railroad Company selected this tract, in section 35, in lieu of part of the land lost in the granted limits; and the land was certified to the state of Minnesota by the Secretary of the Interior, March 25, 1871, for the benefit of the railroad company; and on the 8th day of August, 1871, the state of Minnesota conveyed it by deed to the railroad company. In March, 1868, the company had mortgaged all of its property, including the land granted under the act of Congress and all subsequently ac-
[526]quired property, to secure *the payment of its bonds. This mortgage was foreclosed, and the property sold and conveyed to a new corporation by the name of the Southern Minnesota Railway Company, and the land was conveyed to that company. On the 5th day of January, 1885, the railway company, by contract in writing, agreed to sell the land in dispute to one A. Boyeson, for the sum named in that contract. Boyeson assigned his interest in the contract, on the 6th of January, to Fredericksen, who, on the 1st day of April, 1885, assigned it to the defendant, Thomas S. Thompson, and, in turn, on the 3d day of February, 1888, the latter assigned it to Ericksrud, who paid the balance due upon the contract, and received the warranty deed for
195 U. S.

the land from the railway company on the 20th day of March, 1888.

Ericksrud died intestate on March 27, 1888, and on November 6, 1888, the land was decreed by the probate court to be the property of the widow and heirs at law of Ericksrud, and they remained in possession, and, on the 24th of May, 1899, these heirs at law, still being in possession, conveyed the same to the defendant Woodwick for the sum of \$2,000 cash. This is the title of record coming from the United States to the state, thence to the railroad company, and, by mesne conveyances, to the defendant Woodwick; and there was nothing of record showing that any other person was entitled to the land at the time when Woodwick paid the \$2,000 to the heirs of Ericksrud, and took the deed therefor. The defendant Donovan, however, lays claim to the land in question pursuant to the facts now to be stated.

Prior to the passage of the granting act of Congress, above referred to, one Luman Barclay had, on the 21st day of June, 1866, entered this land in controversy, and also the 80 acres in section 26, adjoining, as a homestead. In the following year (1867) Barclay abandoned the land and went to Canada. Some time after his departure, and in the same year (1867), Donovan, the defendant, sought to acquire a homestead on government land. He examined the land for *which Barclay had made his entry, and [527] decided to enter it as a homestead. He went to the United States local land office for the purpose, and was informed by the register of the land office that he could not make the entry until Barclay's entry was canceled. He was also informed that, if he wished to make a claim that Barclay had abandoned his interest, he should publish notice of the time and place where he would make proof upon that matter. He published a notice accordingly, for three weeks, and paid \$9 as the cost thereof, and, in the fore part of August, 1867, made proof that Barclay had abandoned his homestead claim. Donovan insists that he was given to understand that he could enter the land as a homestead as soon as the local land office received notice from the General Land Office, at Washington, that Barclay's entry was canceled. He thereupon made one application to enter both tracts of land,—the 80 acres in section 26, and the 80-acre tract in question in section 35, but left the date of application blank, because he could make no entry for the lot in section 35 until Barclay's entry had been canceled. He did this, as he or his witness Bullis said, to head off any other applicant for the land, and he left the application with the local land office. He then went into possession of sec-

tion 26, and commenced the erection of a house thereon; and he says he commenced the cultivation of a small part of the tract in section 35. This was in the fall of 1867. The Barclay entry was duly canceled at Washington on the 14th of January, 1868, and notice thereafter given to the local land office, and Donovan was notified of the fact. On the 6th day of June, 1868, Donovan went to the local land office, and applied to enter the two tracts of land. He was there informed that the odd-numbered sections within 20 miles of the road had been withdrawn from market; and that such withdrawal included the section in question; and that he could not, therefore, enter the 80 acres in section 35 as a part of his homestead.

[528] Donovan acquiesced in this determination of the local land *office, and made his entry for the 80 acres in section 26. The old application for the two lots was destroyed, and a new one made out for the lot in section 26. He thereafter used the land in section 35, in connection with his own in section 26, and cut grass upon and ploughed some of it; but it does not appear that he laid any claim to it as land which he had attempted to enter, and which had been improperly or wrongfully refused him. His house and other permanent improvements were on section 26. At the time he made proof (in 1875) for the 80 acres in section 26, Donovan says he offered to make proof also as to the land in section 35, but his offer was rejected because, among other reasons, he had not entered the land in that section. He has obtained his patent for the 80 acres in section 26.

On the 26th day of June, 1883, Donovan applied at the local land office to enter this tract of land in section 35 as an additional homestead, under the act of March 3, 1879 (20 Stat. at L. 472, chap. 191, U. S. Comp. Stat. 1901, p. 1401); and the register certified that the application was for surveyed lands of the class the applicant was legally entitled to enter under the homestead act of 1862 [12 Stat. at L. 392, chap. 75]; in other words, unappropriated public lands of the United States. The application was rejected upon the ground that the land so applied for had been certified to the state of Minnesota, for the benefit of the railroad company. Donovan appealed from this rejection to the Commissioner of the General Land Office, where, it is stated, the matter is still pending and undetermined.

In 1885 the defendant Thompson, an assignee of the contract made by the railway company with Boyeson, went into possession of the 80 acres in section 35, and ordered Donovan off the same, and Donovan left the land accordingly. After Thompson took possession of the land,—April 1, 1885,—

Donovan, in the same year, commenced a suit in the district court of Faribault county to obtain possession of the land; and, on or about the 24th of March, 1887, the state court decided that Donovan had no title to the land, or *right to the posses-[529] sion of the same, and that Thompson had the right to the possession thereof under the contract already mentioned. This judgment against him in the state court was never appealed from by Donovan, nor has it ever been vacated, modified, or reversed. In 1888 Donovan applied to the Land Department at Washington for relief, by reason of the act of Congress of March 3, 1887, heretofore referred to. In relation to that application the Commissioner of the General Land Office, on February 14, 1889, addressed a letter to the Secretary of the Interior, and therein spoke of Donovan's application for the institution of proceedings under that act of Congress, and said that Donovan had no title to the land; but he sent all the papers to the Secretary, for review by him. On the 1st of April, 1889, the Secretary replied to the communication of the Commissioner of the General Land Office, and therein reversed his holding, and directed the latter to make a demand of the railway company for the reconveyance of the land, as provided for in the act. On the 12th of April, 1890, the Commissioner sent a communication to the Secretary, informing him that a demand for the reconveyance of the land had been made April 9, 1889, upon the railroad company, and that no answer had been made, although more than a year had elapsed since the demand. On the 16th of April, 1890, the Secretary of the Interior transmitted the letter to the Attorney General, with a request that suit might be instituted to have the certification of the land in question by the Land Department to the state of Minnesota set aside and canceled if, in the opinion of the Attorney General, the suit could be maintained. After waiting three years, and on the 6th of March, 1893, the United States filed its bill against the Chicago, Milwaukee, & St. Paul Railway Company as successor in interest of the former companies, and also against the Southern Minnesota Railway Company, Michael Donovan, Thomas S. Thompson, and C. C. Ericksrud. On August 11, 1894, the companies answered the bill. Donovan did not answer it until March 6, 1901, and then confessed the same, *and prayed that the relief[530] asked for might be granted. On March 4, 1901, the United States filed a supplemental bill, wherein it was stated that no service had ever been made upon Thompson or Ericksrud, and that, on May 24, 1899, the heirs of Ericksrud had joined in a deed conveying the land in question to Louis K.

Woodwick. Process was prayed against the defendants, the heirs of Ericksrud, and also against Woodwick, and subpoenas were served on them, and on May 2, 1901, they answered the supplemental bill. A special examiner was appointed to take testimony; and on the 13th of January, 1902, he submitted his report of the testimony taken in the suit, to the court.

Assistant Attorney General **Purdy** submitted the cause for appellant:

Where a tract of land in the place or granted limits is subject to a homestead or pre-emption claim at the date of the grant, it is thereby forever excepted from the grant.

Bardon v. Northern P. R. Co. 145 U. S. 535, 36 L. ed. 806, 12 Sup. Ct. Rep. 856.

Land along the indemnity limits of a railroad grant, if subject at the time of the grant to a homestead or pre-emption claim which is afterwards canceled, then becomes subject to selection by the railroad company or any other legal applicant.

Ryan v. Central P. R. Co. 99 U. S. 382, 25 L. ed. 305; *Wisconsin C. R. Co. v. Price County*, 133 U. S. 496, 511, 512, 33 L. ed. 687, 694, 695, 10 Sup. Ct. Rep. 341; *Hewitt v. Schultz*, 180 U. S. 139, 45 L. ed. 463, 21 Sup. Ct. Rep. 309.

Where Congress provides for withdrawal of lands from market, any withdrawal which is contrary to such provision is absolutely void.

Northern P. R. Co. v. Davis, 19 Land Dec. 87.

Where land is subject to a homestead or pre-emption claim at the date of the passage of a granting act, such land is excepted from an order withdrawing the lands from market.

St. Paul, M. & M. R. Co. v. Iverson, 14 Land Dec. 79.

Where a homestead or pre-emption claim is attached to land, such land is thereby segregated from the public domain, and for the time being is withdrawn from the jurisdiction of the Secretary of the Interior and the Land Department, and so continues until the entry is canceled.

Ryan v. Central P. R. Co. 99 U. S. 382, 25 L. ed. 305; *Southern P. R. Co. v. Bell*, 183 U. S. 675, 46 L. ed. 383, 22 Sup. Ct. Rep. 232.

Unless otherwise expressly declared by Congress, no right of the railroad company attaches or can attach to specific lands within indemnity limits until there is a selection under the direction or with the approval of the Secretary.

Oregon & C. R. Co. v. United States, 189 U. S. 103, 112, 116, 47 L. ed. 726, 730, 732, 23 Sup. Ct. Rep. 615.

195 U. S.

Where a party applies to enter, under the homestead or pre-emption laws of the United States, a tract of land which is subject to be so taken, and he is qualified to thus acquire the same, and his application is erroneously rejected by the government officials, his right thereto attaches as though his application had been allowed; and if he continues in possession and complies with the law so as to be entitled to a patent, he acquires a vested interest of which he cannot be deprived even by an act of Congress.

Shepley v. Cowan, 91 U. S. 330, 23 L. ed. 424; *Arđ v. Brandon*, 156 U. S. 537, 39 L. ed. 524, 15 Sup. Ct. Rep. 406; *Weeks v. Bridgman*, 159 U. S. 541, 40 L. ed. 253, 16 Sup. Ct. Rep. 72; *Goodale v. Olney*, 12 Land Dec. 324.

An application to enter or pre-empt land, which is erroneously rejected, secures to the applicant the same rights as if his application had been allowed.

Goodale v. Olney, 12 Land Dec. 324; *Duluth & I. Range R. Co. v. Roy*, 173 U. S. 587, 43 L. ed. 820, 19 Sup. Ct. Rep. 549; *Coder v. Lotridge*, 12 Land Dec. 643.

As Donovan had complied with all the requirements of the law, including payment for the land, to entitle him to a certificate and patent for the same, he thereby acquired a vested interest in the land, of which he could not be deprived by any act of Congress.

Gonzales v. French, 164 U. S. 338, 346, 41 L. ed. 458, 461, 17 Sup. Ct. Rep. 102; *Newkirk v. Marshall*, 35 Kan. 77, 10 Pac. 571; *Hawley v. Diller*, 178 U. S. 476, 44 L. ed. 1157, 20 Sup. Ct. Rep. 986.

Donovan's entry and occupation of the lands in controversy, and cultivation of the same up to 1871, with the purpose of entering the same as his homestead, had the legal effect of so withdrawing such lands from the control of the Land Department that the officers thereof had no authority to issue a certification to the state of Minnesota; and their acts in so doing were void with respect to this tract of land.

Doolan v. Carr, 125 U. S. 618, 624, 31 L. ed. 844, 846, 8 Sup. Ct. Rep. 1228; *Burr v. Greeley*, 3 C. C. A. 357, 10 U. S. App. 409, 52 Fed. 926; *Weeks v. Bridgman*, 159 U. S. 541, 40 L. ed. 253, 16 Sup. Ct. Rep. 72; *Gertgens v. O'Connor*, 191 U. S. 237, 48 L. ed. 163, 24 Sup. Ct. Rep. 94.

Messrs. **Burton Hanson** and **W. H. Norris** submitted the cause for the railway companies:

The withdrawal of the Southern Minnesota Railroad grant by the Secretary at his discretion, in advance of the definite location, was neither premature nor ineffectual.

Wolscy v. Chapman, 101 U. S. 768, 769, 25 L. ed. 919, 920; *Wood v. Beach*, 156 U. S. 548, 39 L. ed. 528, 15 Sup. Ct. Rep. 410.

Any withdrawal made before June 6, 1868, and then unrevoked, precluded Donovan's attempted entry, however completely he may then or afterwards have complied with all formal particulars of statutory requirement; and his attempt initiated no right in him.

Bullard v. Des Moines & Ft. D. R. Co. 122 U. S. 167, 30 L. ed. 1123, 7 Sup. Ct. Rep. 1149; *St. Paul & P. R. Co. v. Northern P. R. Co.* 139 U. S. 1, 18, 35 L. ed. 77, 83, 11 Sup. Ct. Rep. 389; *Wood v. Beach*, 156 U. S. 548, 551, 39 L. ed. 528, 529, 15 Sup. Ct. Rep. 410; *United States v. Holmes*, 105 Fed. 41.

It is a matter of common knowledge that many go upon the public domain, build cabins, and establish themselves, temporarily, at least, as occupants, but having in view simply prospecting for minerals, hunting, trapping, etc., and with no thought of acquiring title to land.

Tarpey v. Madsen, 178 U. S. 221, 44 L. ed. 1045, 20 Sup. Ct. Rep. 849.

Donovan never acquired as against the state, or its grantee or assigns, any approach to a vested right.

Norton v. Evans, 27 C. C. A. 168, 49 U. S. App. 669, 82 Fed. 804; *Wagstaff v. Collins*, 38 C. C. A. 19, 97 Fed. 3; *Kansas P. R. Co. v. Dunmeyer*, 113 U. S. 629, 28 L. ed. 1122, 5 Sup. Ct. Rep. 566; *Hastings & D. R. Co. v. Whitney*, 132 U. S. 364, 33 L. ed. 366, 10 Sup. Ct. Rep. 112; *Tarpey v. Madsen*, 178 U. S. 215, 44 L. ed. 1042, 20 Sup. Ct. Rep. 849; *United States v. Winona & St. P. R. Co.* 165 U. S. 463, 41 L. ed. 789, 17 Sup. Ct. Rep. 368.

The selection was justified.

United States v. Winona & St. P. R. Co. 15 C. C. A. 96, 32 U. S. App. 272, 67 Fed. 949; *Ryan v. Central P. R. Co.* 99 U. S. 382, 388, 25 L. ed. 395.

Neither the Land Department nor the courts should disturb an adjustment made in accordance with a uniform construction which prevailed at the time.

Hahn v. United States, 107 U. S. 402, 27 L. ed. 527, 2 Sup. Ct. Rep. 494; *Brown v. United States*, 113 U. S. 568, 28 L. ed. 1079, 5 Sup. Ct. Rep. 648; *United States v. Philbrick*, 120 U. S. 52, 30 L. ed. 559, 7 Sup. Ct. Rep. 413; *United States v. Burlington & M. River R. Co.* 98 U. S. 341, 25 L. ed. 200.

The certification was not absolutely void, and conveyed title.

United States v. Winona & St. P. R. Co. 15 C. C. A. 96, 32 U. S. App. 272, 67 Fed. 948; *Ard v. Brandon*, 156 U. S. 540, 39 L. ed. 525, 15 Sup. Ct. Rep. 406; *United States v. Winona & St. P. R. Co.* 165 U. S. 463, 41 L. ed. 789, 17 Sup. Ct. Rep. 368.

Mr. Andrew C. Dunn submitted the cause for appellees Erichsrud, Anderson, Remington, and Woodwick:

The order of withdrawal operated at once to prevent any initiation of a homestead entry on this land, and was effectual to prevent Donovan from acquiring any right in this land after that withdrawal, which was over a year prior to his claim of settlement, in 1867, and nearly two years prior to his claim of application to enter, in 1868.

Spencer v. McDougal, 159 U. S. 62, 40 L. ed. 76, 15 Sup. Ct. Rep. 1026; *Hamblin v. Western Land Co.* 147 U. S. 531, 37 L. ed. 267, 13 Sup. Ct. Rep. 353; *Wolcott v. Des Moines Nav. & R. Co.* 5 Wall. 681, 18 L. ed. 689; *Wood v. Beach*, 156 U. S. 548, 39 L. ed. 528, 15 Sup. Ct. Rep. 410.

The case of *United States v. Winona & St. P. R. Co.* 165 U. S. 480, 41 L. ed. 789, 17 Sup. Ct. Rep. 368, is apparently decisive as to the matter of good faith in these defendants.

Titles to public land cannot be acquired by merely squatting upon it. Some actual notice must be given to the world, through the legal channels of the Land Department, within the periods and in the mode and manner limited and provided by law.

Kansas P. R. Co. v. Dunmeyer, 113 U. S. 629, 28 L. ed. 1122, 5 Sup. Ct. Rep. 566.

Courts do not overturn decrees and land titles upon disputed, doubtful evidence.

Maxwell Land-Grant Case (United States v. Maxwell Land-Grant Co.) 121 U. S. 325, 30 L. ed. 949, 7 Sup. Ct. Rep. 1015; *United States v. San Jacinto Tin Co.* 125 U. S. 273, 31 L. ed. 747, 8 Sup. Ct. Rep. 850.

Mr. Justice Peckham, after making the foregoing statement of facts, delivered the opinion of the court:

The Attorney General contends that, before the passage of the act of Congress granting the land (July 4, 1866), Barclay had made legal entry upon the books of the local land office, of the land in question, under the homestead laws of Congress, and that such legal entry was in existence at the time of the passage of the act of Congress of July 4, 1866; that, by reason of such entry, the land was excepted from the grant under that act, and that when Barclay abandoned his homestead claim upon the land, it immediately became public land of the United States, and did not then pass under the grant to the state pursuant to the act of July 4, 1866, and it was *therefore not legally withdrawn from market by any act of the Land Department, nor could it be certified to the state; and that the attempt to do so was not only erroneous, but absolutely void; that, at the time when Donovan made application to enter the land, in June, 1868, it was part of the public lands of the United States, open to entry, and his application, although he had done

all that he could, was wrongfully denied by the local land office; that thereafter the filing of the map of definite location by the railway company, and its selection of the land in question, and the certification of the land by the Secretary of the Interior to the state, and the conveyance by the state to the railway company, and the contract and conveyances following thereon,—conveyed no interest in or title to the premises in question, but that they rightfully belonged to Donovan, and therefore the certification by the Land Department, etc., should be set aside, to the end that the land may be transferred to Donovan, as demanded in the bill.

On the other hand, it is insisted on the part of the defendant Woodwick, that the action of the Land Department officials in withdrawing the land in question from market was valid, and within the jurisdiction of that department; that the selection of the land by the railway company was proper, as being within the indemnity limits of the grant by Congress; and that its certification by the Secretary of the Interior to the state was within the power of that officer, and the act was not, therefore, beyond his jurisdiction; and that his certification and the action of the state conveyed a good title, or, at any rate, that the defendant Woodwick was a bona fide purchaser of the land, and as such his rights were preserved under the act of March 3, 1887. 24 Stat. at L. 556, chap. 376, U. S. Comp. Stat. 1901, p. 1595.

If Woodwick is protected under that act, as a purchaser in good faith, even against Donovan, it is unnecessary to pursue an inquiry as to the existence of any other defense. We are of opinion that Woodwick is protected under the 4th section of the [536]act. The plain intent of that section *is, as stated by Mr. Justice Brewer in delivering the opinion of the court, in *United States v. Winona & St. P. R. Co.* 165 U. S. 463, 41 L. ed. 789, 17 Sup. Ct. Rep. 368, to secure one who, in good faith and as an honest transaction, purchases the land, and to leave to the government a simple claim for money against the railroad. The justice said (pp. 480, 481, L. ed. p. 796, 797, Sup. Ct. Rep. p. 372):

"It will be observed that the technical term 'bona fide purchaser' is not found in this section, and while it is provided that a mortgage or pledge shall not be considered a sale so as to entitle the mortgagee or pledgee to the benefit of the act, it does secure to every one who, in good faith, has made an absolute purchase from a railroad company, protection to his title, irrespective of any errors or mistakes in the certification or patent.

195 U. S.

" . . . These being the provisions of the act of 1887, the act of 1896 (29 Stat. at L. 42, chap. 39, U. S. Comp. Stat. 1901, p. 1603),—confirming the right and title of a bona fide purchaser, and providing that the patents to his lands should not be vacated or annulled, must be held to include one who, if not in the fullest sense a 'bona fide purchaser,' has nevertheless purchased in good faith from the railroad company."

The counsel for the government, while strenuously denying that the legal title to this land passed to the state of Minnesota by virtue of the certification, in 1871, admits in his brief that, if Woodwick bought the land as a bona fide purchaser in 1899, and acquired the legal title to the same, then, at that present time, not only was the right of the United States to recover the land defeated, but Donovan was precluded from thereafter asserting his claim to the land, as against such bona fide purchaser. His denial that the legal title passed is based upon the contention that Donovan, before the year 1871, when the Secretary of the Interior certified this land to the state, had, as stated by counsel, initiated proceedings to obtain this land in section 35 as a homestead, and had done all he could to make entry thereof, and had been in possession for three years before this certification; and that *prior to 1871 an initiatory title [537] had passed from the United States to Donovan, by reason of his possession and offer to enter the land, and his payment of the fees and expenses to the local land officers, so as to prevent the passage of the legal title to the state, by virtue of the certification referred to, which, by reason of the acts of Donovan, was rendered wholly void. It is also asserted that, if the United States, in 1871, did retain title in itself, notwithstanding Donovan's occupation and cultivation of the land, yet such occupation and cultivation withdrew the land from the jurisdiction of the Land Department, so far as any right or power to issue a certification to the railroad company was concerned, just as effectually as though the land had been reserved or otherwise appropriated specifically by an act of Congress.

We think that, in 1871, when the certification was made, jurisdiction over this land remained in the Land Department, to be exercised by the Secretary of the Interior, notwithstanding the acts of Donovan as shown by this record. It is shown by the testimony of Donovan himself and of his witness Bullis, putting it all together, that there never was, in fact, any entry of this land at the local land office, in the name of Donovan, before the certification in 1871. The facts as to what took place in that office, in regard to the applications of Don-

ovan in 1867, before the Barclay entry was canceled, and in June, 1868, when the entry was made for the lot in section 26, are set forth in the statement of facts herein, and need not be repeated. The statement shows no such facts as put Donovan in the place of one who, having done all he could to enter the land, had been refused such entry, but had nevertheless not acquiesced in such decision, and had taken possession of it as a homestead. On the contrary, Donovan did acquiesce in that decision, and amended his application.

[538] There was no entry made on the books of the local land office for this land, under the amended application, and the power of the Secretary of the Interior to make the certification, even if we assume that it was erroneously exercised, *was not an act which was beyond the jurisdiction of the Secretary. The legal title was thus transferred by the government to the state, and, at the most, it was an erroneous certification within the meaning of the act of 1887. Although under such circumstances, if the certification were erroneous and might have been avoided, and the land recovered back by the government while in the hands of the railroad company, yet, Woodwick, if a purchaser in good faith of the lands, was entitled to them under the provisions of the act. He had no notice, actual or constructive, of the claim of the government in regard to this land. The record title was plain. No suit had been commenced when Ericksrud took his title from the government, and went into possession thereunder. He died within a week thereafter, and his heirs thereupon took possession. They were in possession when the government commenced this suit, in 1893, but were never served with process therein until 1901; which was two years after Woodwick had purchased the property from them, and had in good faith paid them the sum of \$2,000 in cash for the land.

Counsel for the government admits that it is futile to maintain that Woodwick had constructive notice of the defects in his title by reason of the pendency of this suit, which had been commenced by the government in 1893, but in which the railroad companies alone had been served with process.

Whatever equities Donovan may have had as against the government, by virtue of his so-called attempt to make entry for the 80 acres in section 35, they do not override the plain provisions of the statute of 1887, and also that of 1896 (29 Stat. at L. 42, chap. 39, U. S. Comp. Stat. 1901, p. 1603), which save the rights of one who purchased from the railroad in good faith.

As was observed by Mr. Justice Brewer, in the case already referred to (*United States v. Winona & St. P. R. Co.* 165 U. S. 312

480, 41 L. ed. 796, 17 Sup. Ct. Rep. 372): "It matters not what constructive notice may be chargeable to such a purchaser, if, in actual ignorance of any defect in the railroad company's title, and in reliance upon *the action of the government in the [539] apparent transfer of title by certification or patent, he has made an honest purchase of the lands."

Donovan is not brought within the case of *Winona & St. P. R. Co. v. United States*, immediately following the above-cited case, at page 483 (L. ed. p. 798, Sup. Ct. Rep. p. 381), because, among other facts, it appears herein that there was no record of any entry in Donovan's case for this land, on the books of the local land office, and it is conceded that he had been out of any possession of the land since 1885. The above-cited case is not, therefore, in point. The same may be said of *Duluth & I. Range R. Co. v. Roy*, 173 U. S. 587, 43 L. ed. 820, 19 Sup. Ct. Rep. 549, and *Oregon & C. R. Co. v. United States*, 189 U. S. 103-116, 47 L. ed. 726-732, 23 Sup. Ct. Rep. 615.

Donovan cannot be regarded as having by his action secured a vested interest in this land, so as to make the certification to the state a wholly void act, as an act beyond the jurisdiction of the Secretary. Assuming that it may have been erroneous and voidable, it was not void. We do not decide it was erroneous. In 1871 the legal title, still remaining in the government, was transferred to the state by the certification of the Secretary, and, as we have said, Woodwick occupied the position of a purchaser in good faith under the acts of Congress.

The judgment is affirmed.

*WESTERN UNION TELEGRAPH COM-[540]
PANY, Appt. and Petitioner,
v.

PENNSYLVANIA RAILROAD COMPANY
and United New Jersey Railroad & Canal
Company.

(See S. C. Reporter's ed. 540-594.)

Eminent domain—rights of telegraph companies on railway rights of way.

1. Telegraph companies were not granted the right of eminent domain, or any right to enter upon and occupy the rights of way of railway companies without the latter's consent, by the act of July 24, 1866 (14 Stat. at L. 221, chap. 230; Rev. Stat. §§ 5263 *et seq.* U. S. Comp. Stat. 1901, p. 3579), giving telegraph companies the right to construct, maintain, and operate telegraph lines through and

NOTE.—On the rights of telegraph companies on railway rights of way—see note to *American Teleph. & Teleg. Co. v. Smith*, 7 L. R. A. 200.

over the public domain, and "over and along any of the military or post roads of the United States," since such statute must be deemed but an exercise by Congress of its power to withdraw from state interference interstate commerce by telegraph.

2. Railway rights of way are not made public property by charter provisions declaring the railways "public highways," so as to subject such rights of way to occupation by telegraph companies without the consent of the railway company, under the act of July 24, 1866, giving telegraph companies the right to construct, maintain, and operate telegraph lines through and over the public domain, and "over and along any of the military or post roads of the United States."

[Nos. 89, 199.]

Argued October 19, 20, 1904. Decided December 12, 1904.

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Third Circuit to review a case pending in that court on an appeal from a final decree of the Circuit Court for the District of New Jersey dismissing a bill to enjoin any interference with the use by the Western Union Telegraph Company of railway rights of way for telegraph purposes. *Affirmed.* Also—

APPEAL from the United States Circuit Court of Appeals for the Third Circuit to review a decree which reversed an order of the Circuit Court for the District of New Jersey granting a preliminary injunction in the same suit. *Affirmed.*

See same case below on appeal from order granting preliminary injunction, 59 C. C. A. 113, 123 Fed. 33.

Statement by Mr. Justice **McKenna**:

This is a bill in equity filed in the circuit court of the District of New Jersey by the appellant against the appellee, the Pennsylvania Railroad Company, to prevent the latter from removing from various railroad companies' rights of way the telegraph lines of the appellant. The bill was filed in aid of a petition on the law side of the court, praying the court to issue its process or take [541] such modes of procedure as might be agreeable to the principles and usages of law, to determine the amount of compensation to be paid by appellant to appellee for the use of the right of way of the appellee, and its branches and connecting lines, to construct, maintain, and operate a line of telegraph over and along such railways, subject to the conditions and provisions named in the act of Congress of July 24, 1866. 14 Stat. at L. 221, chap. 230, Rev. Stat. §§ 5263 *et seq.* U. S. Comp. Stat. 1901, p. 3579.

The construction of this act of Congress is the main question in the case.

The appellant, which we shall designate the telegraph company, contends that under certain acts of Congress the roads of the railroad company and all other railroads in the United States are made post roads, and that by the act of July 24, 1866, the telegraph company has the right to construct, maintain, and operate lines of telegraph along said roads upon the payment of compensation to the railroad company. In other words, the contention is that by the act of 1866 the telegraph company is given the power of eminent domain to acquire the right to occupy with its telegraph lines the rights of way of the railroad company.

A summary of the bill is as follows: The telegraph company is a New York corporation; the railroad company is a Pennsylvania corporation. The New Jersey Railroad & Canal Company was incorporated under the laws of New Jersey, and is the owner of a railroad extending from Jersey City, in the state of New Jersey, to the Delaware river at the city of Trenton, in said state, with certain branches, which the bill describes. The railroad company is the owner of a line of railroad extending from the city of Philadelphia to the city of Pittsburgh, in the state of Pennsylvania, and in possession and control of the railroads of the New Jersey Railroad & Canal Company in New Jersey, under a lease or leases for a period of 999 years from the 1st of July, 1871. By the laws of New Jersey the said railroads were created and made and are now public highways, and hence are subject to occupation and use of telegraph companies *under the provisions and conditions [542] of the act of Congress of July 24, 1866.

The telegraph company was organized in 1851, and began then to construct and has constructed and acquired a continuous system of telegraph lines, which extends through all of the states and territories of the United States, and connects with telegraph lines in the Dominion of Canada, and with lines also in the Republic of Mexico and South American Republics, and with and by submarine cables with the systems of all telegraph lines of foreign countries.

The system operated directly by the telegraph company consists of over 192,000 miles of poles and cables, and over 900,000 miles of wire; and an important part of the system and connected with its main office in New York city, and with other lines leading to the important cities of the West, is the lines of telegraph over and along the lines of railway operated by the railroad company, connecting Jersey City with Philadelphia, and connecting with other lines of the system.

The lines of telegraph along the railways in New Jersey were originally constructed

by the American Telegraph Company, a corporation of the state of New Jersey, with the consent of, or under contracts and arrangement with, the railway company then owning the said lines of railway, and were constructed more than forty years ago; and since the 20th of September, 1881, the telegraph lines over the right of way of said railroads have been maintained and operated and compensation paid therefor under the provisions of a contract between the telegraph company and the railroad company. The contract granted to the telegraph company the right to place, maintain, and use upon the line of the right of way of the railroad company, and of the railroads owned, operated, or leased by it, a single line of telegraph poles (in certain cases two were authorized), with the privilege of erecting and maintaining thereon such number of wires as the telegraph company might from time [543] to time elect, said lines *to be located and placed under the direction of an officer of the railroad company.

The telegraph company agreed to pay annually for the privileges granted the sum of \$75,000, in monthly instalments of \$6,250, and to deliver to the railroad company certain poles and wire, which were then on certain of their roads. The telegraph company also agreed to transmit the messages of the railroad company at a compensation which was stated.

The provisions for the termination of the agreement and in the event of its termination are as follows:

"Thirteenth. This agreement is to continue in force for and during the term of twenty years from its date, and shall be binding upon the respective companies, their successors and assigns, and neither party shall have the right to assign the whole, or any part hereof, without the consent of the other, given in writing.

"Fifteenth. If any monthly payment herein provided for be not made within sixty days after it shall have become due, and shall have been demanded by written notice, delivered to the treasurer, or an executive officer of the party in default, or if any other covenant herein made shall not, after sixty days' written notice of default and demand made by either party in the manner herein provided, be fulfilled by the other party, the contract may, at the option of the party demanding such fulfilment, be rescinded, and such rescission shall not relieve the party in default from liability for any amount due, or for damages for nonfulfilment of such covenant or of any other covenant.

"Sixteenth. If no new agreement be made by the parties hereto, the telegraph company

shall, at the termination of this contract, or at any time hereafter, upon receiving written notice from the railroad company, remove, within six months from the receipt of said notice, all of its poles and wires, and leave the property of the railroad company in good condition *and free from the encumbrance thereof to the satisfaction of the general manager or other proper officer of the railroad company, and if not so removed the railroad company may remove them at the expense of the telegraph company: *Provided, however,* That the payment agreed to be made by the telegraph company to the railroad company in the sixth clause hereof, and by the railroad company in the eighth clause, shall not apply to the said six months, the companies respectively hereby expressly agreeing to waive the same."

The agreement contains the following provision:

"Any easement or right of way heretofore acquired by the telegraph company upon any of the roads embraced in this agreement, either directly by contract or by assignment of contracts or agreements made by other companies with the railroad company, or with any of the companies whose roads or property are embraced in the schedule hereto attached, is hereby relinquished and abandoned, and the rights and easements of the telegraph company upon the right of way of said railroad company shall be such only as are granted by this agreement, and shall cease with its termination."

The agreement was carried out and the payments made as provided, the last being made on the 20th of June, 1902.

On the 14th of May, 1902, the railroad company notified the telegraph company in writing to remove its poles, wires, and other property from the right of way and property of the railroad company and of the other companies mentioned in the agreement, within six months from the 1st day of June, 1902. The notice stated that in default of compliance the railroad company would itself cause such poles, wires, and other property of the telegraph company to be removed from the right of way at the expense of the latter company.

It is alleged in the bill that, by reason of the facts set forth, and by reason of the receipt of payments after the 21st of September, 1901, and after the notice of removal, the agreement was continued in force, and that the railroad company had no right, notwithstanding the notice of May 14, *1902, to [545] remove or cause to be removed from the line of its railways the poles, wires, and telegraph property of the telegraph company at the end of six months from the 1st day of June, 1902.

It is also alleged that the lines of tele-

graph have been maintained and operated over the lines of railway without interfering with the ordinary use and operation thereof, or the ordinary travel thereon, and, as now located, maintained, and operated, can be continued so as not to interfere with the future operation and maintenance of the said railways, or the ordinary travel upon them, subject only to such slight changes of some of the poles of said lines as may be incident to the construction of additional tracks upon said right of way, or shifting the tracks already existing on said railways.

May 20, 1902, the president and general manager of the telegraph company, in a letter addressed to the president of the railroad company, acknowledged receipt of the notice of removal of May 14, and stated that he understood that negotiations had been in progress between the officers of the respective companies for a renewal of the contract of September 20, 1881, and declared that he would be glad to take up the matter actively either in New York or in Philadelphia, at the convenience of the president of the railroad company. The following day the president of the railway company replied, stating that none of the companies named "desires to renew or extend its contract with the Western Union Telegraph Company," and that the contract between the companies had terminated under its terms on the 20th of September, 1901, and the notice to the telegraph company to remove its poles had been given in accordance with the provisions of the contract. A willingness to discuss any temporary arrangement which might be necessary during the time allowed for the removal of the poles of the telegraph company was expressed. A somewhat lengthy reply was made, in which the telegraph company claimed that since some of the contracts referred to by the [546] railroad company were perpetual *in their terms, or ran during the life of the parties, they could not be terminated by one party without the consent of the other; asserted a right, under the laws of Congress and the laws and Constitution of the state of Pennsylvania, to maintain and operate its lines of telegraph on the railroad company's roads, subject only, at most, to make a fair and reasonable compensation for such right, which it offered to pay, and requested, if the railroad company declined to contract further with it, a meeting for the purpose of agreeing upon the amount of such compensation, or to submit the matter to arbitration. The railroad company replied that the meeting requested would be useless, as the telegraph company asserted rights upon the lines of the railroad company which could not be conceded. It was stated in the reply that the railroad company had agreed

195 U. S.

and contracted with the Postal Telegraph Cable Company covering the railroads included in the contract with the telegraph company, and that the Postal Telegraph Cable Company would immediately commence transacting a commercial telegraph business at the stations of the railroad company. The railroad company offered to permit the telegraph company to do business at the railroad stations until September 30 next ensuing (1902); and for the purpose of avoiding unnecessary loss to the telegraph company, incident to the removal of its poles, the railroad company expressed a willingness to purchase, at a fair valuation, such of the lines as it could make use of.

It is alleged in the bill that the notice given to the telegraph company to remove its poles from the railroads, and the refusal of the railroad company to negotiate further with the telegraph company, were not induced from any compulsion or necessity to use the space occupied by the telegraph lines, but that the purpose of the railroad company is to place upon the lines of railway telegraph lines to be owned or used by another telegraph company; and it is alleged that the lines of the telegraph company will not interfere with the ordinary travel and use of the railways.

*The directors of the telegraph company [547] accepted the act of July 24, 1866, and filed an acceptance with the Postmaster General of the United States June 8, 1867.

The acts of Congress hereinafter mentioned and set out are referred to in the bill, and a full compliance therewith alleged, whereby, it is further alleged, the telegraph company became and is entitled to maintain its lines on the railroads of the railroad company upon paying just compensation, the payment of which was offered. The prayer is that the court order and decree the amount of compensation to be paid by the telegraph company, or, if the court order compensation to be ascertained at law, it then be decreed that upon payment of such compensation a perpetual injunction issue.

A preliminary injunction was ordered. 120 Fed. 981. It was reversed by the circuit court of appeals. 59 C. C. A. 113, 123 Fed. 33.

A controversy ensued upon the form of the decree. The circuit court of appeals simply reversed the order of the circuit court granting a preliminary injunction. The telegraph company moved that the decree be modified so as to direct the dismissal of the bill. The motion was refused, and the telegraph company took an appeal to this court. Subsequently the circuit court *sua sponte* entered an order dismissing the bill, and the telegraph company appealed therefrom to the circuit court of appeals.

The case was then removed to this court by certiorari.

Messrs. H. D. Estabrook, Rush Taggart, and John F. Dillon argued the cause, and, with **Mr. Richard Vliet Lindabury**, filed a brief for the Western Union Telegraph Company:

A telegraph company accepting the provisions of the act of July 24, 1866, is a direct agency of the government of the United States, and is also an instrument of foreign and interstate commerce.

Western U. Teleg. Co. v. Texas, 105 U. S. 460, 26 L. ed. 1067; *Pensacola Teleg. Co. v. Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708; *Western U. Teleg. Co. v. Atty. Gen.* 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961.

The post roads of the United States are made subject to occupation and use by such telegraph company as such public agency of the government of the United States, by this act of Congress.

Pensacola Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 1, 24 L. ed. 708.

The owner of such post road cannot arbitrarily prohibit the occupation and use by such telegraph company under the conditions and restrictions named in the act, but such owner is entitled to reasonable compensation for the property or the use of the property which is occupied.

St. Louis v. Western U. Teleg. Co. 148 U. S. 92, 37 L. ed. 380, 13 Sup. Ct. Rep. 485.

In the determination of the amount of such reasonable compensation to be paid for such occupation and use, the determination of the owner of the property is not conclusive or binding upon the telegraph company, but the courts may determine the amount of such compensation upon hearing and proof.

Ibid.

By no form of agreement or stipulation can the owner of such post road prohibit any telegraph company which has accepted the provisions of the act of Congress of July 24, 1866, from occupying, pursuant to its provisions and under its restrictions, such post road with its telegraph lines, and maintaining and operating the same thereon.

United States v. Union P. R. Co. 160 U. S. 1, 40 L. ed. 319, 16 Sup. Ct. Rep. 190.

No exclusive method of procedure to enforce and secure to the telegraph company the benefit of the provisions of the act has been adopted. The mode of procedure to fix the amount of compensation may be varied to meet the requirements of each case.

Postal Teleg. Cable Co. v. Southern R. Co. 89 Fed. 190; *Postal Teleg. Cable Co. v. Oregon Short Line R. Co.* 104 Fed. 623, 114 Fed. 787; *Kohl v. United States*, 91 U. S. 367, 23 L. ed. 449; *Mississippi & R. River Boom*

Co. v. Patterson, 98 U. S. 403, 25 L. ed. 206; *United States v. Jones*, 109 U. S. 513, 27 L. ed. 1015, 3 Sup. Ct. Rep. 346; *High Bridge Lumber Co. v. United States*, 16 C. C. A. 460, 37 U. S. App. 234, 69 Fed. 320; *D. M. Osborne & Co. v. Missouri P. R. Co.* 147 U. S. 248, 37 L. ed. 155, 13 Sup. Ct. Rep. 299; *New York v. Pine*, 185 U. S. 93, 46 L. ed. 820, 22 Sup. Ct. Rep. 592; *Galway v. Metropolitan Elev. R. Co.* 128 N. Y. 132, 13 L. R. A. 788, 28 N. E. 479; *Shepard v. Manhattan R. Co.* 117 N. Y. 442, 23 N. E. 30; *St. Paul, M. & M. R. Co. v. Western U. Teleg. Co.* 55 C. C. A. 263, 118 Fed. 497; *McElroy v. Kansas City*, 21 Fed. 257.

The suggestion is made that little importance is to be attached, either to the title of the act or to the proceedings in Congress relating to the bill, in order to determine its meaning. This court, however, has taken a different view of a matter of this sort, where the meaning of the act is uncertain or doubtful.

Church of Holy Trinity v. United States, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511; *Coosaw Min. Co. v. South Carolina*, 144 U. S. 559, 36 L. ed. 541, 12 Sup. Ct. Rep. 689; *Priece v. Forrest*, 173 U. S. 410, 43 L. ed. 749, 19 Sup. Ct. Rep. 434; *Emerson v. Hall*, 13 Pet. 409, 413, 10 L. ed. 223, 225; *Wilson v. Spaulding*, 19 Fed. 304; *Hahn v. Salmon*, 20 Fed. 801.

While to ascertain the meaning of an act the mere discussion in Congress is not given special weight in some of the decisions of this court, yet reference is frequently made to reports of committees for the purpose of confirming the construction adopted by the court.

Hepburn v. Griswold, 8 Wall. 610, 19 L. ed. 522; *Untermeyer v. Freund*, 50 Fed. 80; *Northern P. R. Co. v. United States*, 36 Fed. 285; *United States v. Union P. R. Co.* 37 Fed. 554.

A report of a committee of either House of Congress, unanimous in its character, submitting an accompanying amendment to the bill, may be considered by the court in construing such amendment, in case of doubtful interpretation.

Austin v. United States, 25 Ct. Cl. 454.

So, likewise, the actual proceedings of Congress may be looked to, and were considered in the case of the *United States v. Burr*, 159 U. S. 85, 40 L. ed. 84, 15 Sup. Ct. Rep. 1002, as practically determining whether the statute under consideration in that case had a retrospective action, or a prospective effect only.

Evidently Congress intended to confer something which the telegraph company accepting the provisions of the act did not have prior to acceptance.

If, in the case of a highway which is a

post road of the United States by act of Congress, the right to construct, maintain, and operate telegraph lines thereon is dependent upon the will of the state or the city, as the owner of the highway, and the telegraph company can construct only after receiving the consent of such owner or custodian, then Congress has granted nothing, because the act means simply the permission to the telegraph company to construct its lines if it acquires the permission of the owner of the post road. Having the permission of the owner, the telegraph company would not need the permission of Congress, and therefore the act upon this construction confers nothing upon the telegraph company.

On the other hand, if in the case of the post road—a line of railway—the telegraph company can construct, operate, and maintain a line of telegraph only upon the consent of the railway company, owner of such post road, first obtained, and upon such terms as such railway company sees fit to grant, then nothing is granted to the telegraph company by the act of Congress, because having the consent of the railway company to build along its lines, and being an agency of interstate commerce, as held by the Supreme Court (*Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357; *Pensacola Teleg. Co. v. Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708; *Western U. Teleg. Co. v. Texas*, 105 U. S. 460, 26 L. ed. 1067), it would not need an act of Congress to enable it to construct, maintain, and operate its telegraph lines, even in a state foreign to its creation and organization,—a construction which would make the pretended grant in the 1st section of the act of Congress meaningless.

The railways over and along which it is desired to acquire the right to continue to maintain and operate telegraph lines are public highways.

Civil Rights Cases, 109 U. S. 3, 27 L. ed. 836, 3 Sup. Ct. Rep. 18; *Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115; *Lake Superior & M. R. Co. v. United States*, 93 U. S. 442, 23 L. ed. 965; *Trunick v. Smith*, 63 Pa. 18; *People's Teleph. & Teleg. Co. v. Berks & D. Turnp. Road*, 199 Pa. 411, 49 Atl. 284.

Mr. John G. Johnson argued the cause and filed a brief for the railroad company:

In Pennsylvania, as in many of the other states, there are two kinds of highways. Both are public highways in a certain sense; but in the one case the highway is public property, used by the public directly, while in the other case the ownership of the highway is in a private corporation which owes, subject to the condition that it will use the same for the benefit of the public. In the first case the legislature can authorize a

user without compensation. In the latter it cannot.

Turnpike companies often occupy public highways at one time owned by the state, which they improve by paving and on which they are allowed to collect tolls; but the public use them directly. They constitute in the country districts the ordinary thoroughfares.

Northern C. R. Co. v. Com. 90 Pa. 305; *People's Teleph. & Teleg. Co. v. Berks & D. Turnp. Road*, 199 Pa. 415, 49 Atl. 284.

A railroad is not a public highway in the sense in which those words are used in the acts authorizing telegraph companies to appropriate lands and other property.

The right of way acquired by a railroad company is exclusive at all times and for all purposes.

Junction R. Co. v. Philadelphia, 88 Pa. 427.

A railway company is a purchaser, in consideration of public accommodation and convenience, of the exclusive possession of the ground paid for to the proprietors of it.

Philadelphia & R. R. Co. v. Hummell, 44 Pa. 375, 84 Am. Dec. 457.

The title of the company is not a mere easement, but a fee in the surface and so much beneath as may be necessary for support.

Pennsylvania S. Valley R. Co. v. Reading Paper Mills, 149 Pa. 18, 24 Atl. 205; *Philadelphia v. Ward*, 174 Pa. 45, 34 Atl. 458.

It is a great deal more than a right of way. It has the actual possession of the property, and that possession is exclusive at all times and for all purposes, except where a way crosses it.

Pittsburgh, Ft. W. & C. R. Co. v. Peet, 152 Pa. 488, 19 L. R. A. 467, 25 Atl. 612.

It is thoroughly well settled by the Pennsylvania decisions that a right of way appropriated by a corporation for a quasi-public use cannot be appropriated by another quasi-public corporation for its uses, by implication.

Pennsylvania R. Co.'s Appeal, 93 Pa. 150; *Pittsburgh Junction R. Co.'s Appeal*, 122 Pa. 511, 9 Am. St. Rep. 128, 6 Atl. 564; *Sharon R. Co.'s Appeal*, 122 Pa. 533, 9 Am. St. Rep. 133, 17 Atl. 234; *Groff's Appeal* (*Groff v. Bird in Hand Turnp. Co.*) 128 Pa. 621, 5 L. R. A. 661, 18 Atl. 431; *Twelfth Street Market Co. v. Philadelphia & R. Terminal R. Co.* 142 Pa. 580, 21 Atl. 902; *Pittsburgh Junction R. Co. v. Allegheny Valley R. Co.* 146 Pa. 297, 23 Atl. 313; *Perry County R. Extension Co. v. Newport & S. Valley R. Co.* 150 Pa. 193, 24 Atl. 709; *Pennsylvania S. Valley R. Co. v. Schuylkill Nav. Co.* 167 Pa. 576, 31 Atl. 858; *Youghiogeny Bridge Co. v. Pittsburg & O. R. Co.* 201 Pa. 457, 51 Atl. 115; *Pennsyl-*

vania Teleph. Co. v. Hoover, 24 Pa. Super. Ct. 96.

No right is conferred upon telegraph companies by the act of 1866 to appropriate any portion of the right of way of railroad companies.

Pensacola Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 1, 24 L. ed. 708; *Western U. Teleg. Co. v. Ann Arbor R. Co.* 178 U. S. 239, 44 L. ed. 1052, 20 Sup. Ct. Rep. 867.

Mr. Justice **McKenna**, after stating the case as above, delivered the opinion of the court:

By an act of Congress approved July 7, 1838 [5 Stat. at L. 271, chap. 172], and by subsequent acts (March 3, 1853, 10 Stat. at L. 255, chap. 146; Rev. Stat. § 3964, U. S. Comp. Stat. 1901, p. 2707; June 8, 1872 [17 Stat. at L. 283, chap. 335]), railroads within the limits of the United States were made post routes or roads.

By act of March 1, 1884, it is provided "that all public roads and highways, while kept up and maintained as such, are hereby declared to be post routes." 23 Stat. at L. 3, chap. 9, U. S. Comp. Stat. 1901, p. 2708.

The act of 1866 is as follows:

[558] *"Be it enacted by the Senate and House of Representatives of *the United States of America in Congress assembled*, That any telegraph company now organized, or which may hereafter be organized under the laws of any state in this Union, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by act of Congress, and over, under, or across the navigable streams or waters of the United States: *Provided*, That such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads. And any of said companies shall have the right to take and use from such public lands the necessary stone, timber, and other materials for its posts, piers, stations, and other needful uses in the construction, maintenance, and operation of said lines of telegraph, and may pre-empt and use such portion of the unoccupied public lands subject to pre-emption, through which its said lines of telegraph may be located, as may be necessary for its stations, not exceeding forty acres for each station; but such stations shall not be within fifteen miles of each other.

"Sec. 2. *And be it further enacted*, That telegraphic communications between the several departments of the government of the

United States and their officers and agents shall, in their transmission over the lines of any of said companies, have priority over all other business, and shall be sent at rates to be annually fixed by the Postmaster General.

"Sec. 3. *And be it further enacted*, That the rights and privileges hereby granted shall not be transferred by any company acting under this act, to any other corporation, association, or person: *Provided, however*, That the United States may at any time after the expiration of five years from the passage of this act, for postal, military, or other purposes, purchase all the telegraph lines, property, and effects of any or all of said companies at an appraised value, to be ascertained *by five competent, disinterested [559] persons, two of whom shall be selected by the Postmaster General of the United States, two by the company interested, and one by the four so previously selected.

"Sec. 4. *And be it further enacted*, That before any telegraph company shall exercise any of the powers or privileges conferred by this act, such company shall file their written acceptance, with the Postmaster General, of the restrictions and obligations required by this act."

The construction of this act is the fundamental question in the case. The telegraph company contends that the necessary implication from the provisions of the act is that telegraph companies may enter and appropriate for their poles and lines a part of the rights of way of railroads *in invitum* upon paying just compensation. In other words, that the act invests telegraph companies with the right of eminent domain. The railroad company denies this construction, and asserts that the act gives the consent of the government to telegraph companies to construct lines through its public domain and over and along its military and post roads, which are not the property of private corporations, and across navigable streams and waters. The act gives no right, the railroad company contends, to appropriate private property, but is an exercise by Congress of the national power over interstate commerce to secure telegraph companies from "hostile state legislation or contracts violative of an announced public policy." In other words, the contention of the railroad company is that, after the act of 1866 was passed, it "became impossible for the states, by any legislation, to exclude telegraph companies from the post roads." The contentions of the parties are opposed, therefore, only as to the degree of right conferred by the act. It is asserted by one party, and unqualifiedly admitted by the other, that Congress has power to grant the power of eminent domain to corporations organized for national purposes, and the arguments of the parties are

[560] addressed only to the considerations which serve to determine *the intention of Congress. Both parties also claim authority for their respective contentions.

1. The act of 1866 came before this court for consideration over twenty-five years ago, in *Pensacola Teleg. Co. v. Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708. The language of the court defining the rights conferred by the act has recently been repeated and sanctioned in *Western U. Teleg. Co. v. Ann Arbor R. Co.* 178 U. S. 239, 44 L. ed. 1052, 20 Sup. Ct. Rep. 867. In both cases the judgment of the court was adverse to the rights claimed under that act by the telegraph company in the case at bar. A review of those cases, therefore, and a consideration of the arguments directed against them and in support of them will constitute the most appropriate discussion of the questions now presented, and apply immediately to their solution the authority of this court.

In *Pensacola Teleg. Co. v. Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708, the legislature of Florida in 1866 granted to the Pensacola Telegraph Company "the sole and exclusive privilege and right" of maintaining and operating lines of telegraph through certain counties of the state. In 1872 the property of the Alabama & Florida Railroad Company was transferred to the Pensacola & Louisville Railroad Company. On the 14th of February, 1873, the legislature of Florida passed an act, which was amended in 1874, authorizing the last-named company to construct and maintain a telegraph line along its railroad, and to connect with lines in and out of the state. This was in the territory embraced by the exclusive grant to the Pensacola Telegraph Company.

On the 24th of June, 1874, the Pensacola & Louisville Railroad Company granted to the Western Union Telegraph Company the right to erect a telegraph line upon its right of way, and transferred to it all the rights and privileges conferred by the act of February, 1873, and 1874. The Western Union Company immediately commenced the erection of the line, but before its completion the Pensacola Telegraph Company filed a [561] bill to enjoin the work, on account *of the alleged exclusive right of that company under its charter. Upon the hearing a decree was passed dismissing the bill, and an appeal was taken to this court. The Western Union Telegraph Company had accepted the act of 1866, and claimed to erect and maintain a telegraph line under its agreement with the Pensacola & Louisville Railroad Company, and under the provisions of that act. The case, therefore, presented an issue between rights asserted under a statute of Florida and rights given and protected by the act of 1866. The issue was important.

195 U. S.

The act of 1866 was presented for the first time for interpretation, and upon it depended not only the private rights of the contending companies, but the more serious conflict of powers derived from the national and state governments. The questions, therefore, which bore on these issues called for, and, it is evident from the opinion of the court, received, careful attention.

The first of these questions was whether the act of 1866 was a grant to telegraph companies of portions of the public domain and of rights in the public domain, or a grant of rights having a broader field of exercise,—a grant of rights having operation and to be exercised throughout the whole of the United States. There was a marked difference in the rights contended for, and they depended upon different powers. In the public domain the government was proprietor as well as sovereign, elsewhere only sovereign, and on its powers as sovereign there were limitations, arising not only from the rights of the states, but arising from the ownership of private property and the necessity of a grant of eminent domain to appropriate it. These limitations were of consequence in fixing exactly the rights conferred by the act of 1866, and were regarded by the court in its construction of that act.

The court declared, through Chief Justice Waite, that the act of 1866 was an exercise of the power of Congress over interstate commerce, and the power to establish post-offices and post roads, and, like other powers of the national government, could be exercised "upon every foot of territory under [562] its jurisdiction." It was held, therefore, that the act was not a grant of rights only in the public domain, and the character of the rights was made unmistakable. The statute, the court said, "*in effect amounts to a prohibition of all state monopolies*" in commercial intercourse by telegraph. This is expressed more than once as the fundamental idea and sole purpose of the statute. The court further said: "It [the statute] substantially declares, in the interest of commerce and the convenient transmission of intelligence from place to place by the government of the United States and its citizens, that the erection of telegraph lines shall, so far as state interference is concerned, be free to all who will submit to the conditions imposed by Congress, and that corporations organized under the laws of one state for constructing and operating telegraph lines shall not be excluded by another from prosecuting their business within its jurisdiction, if they accept the terms proposed by the national government for this national privilege. To this extent, certainly, the statute is a legitimate regulation of commercial intercourse among the states, and is appro-

priate legislation to carry into execution the powers of Congress over the postal service."

And this construction, making the act of 1866 merely an exercise of national power to withdraw from state control or interference commercial intercourse by telegraph, is further emphasized in the opinion and the objections to it completely answered, which were based on the ownership of the post roads by individuals or corporations, and the necessity of implying a grant of the power of eminent domain to telegraph companies to appropriate them. The court said:

"It [the act of 1866] gives no foreign corporation the right to enter upon private property without the consent of the owner, and erect the necessary structures for its business; but it does provide that, whenever the consent of the owner is obtained, no state legislation shall prevent the occupation of post roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges."

[563] *And again:

"No question arises as to the authority of Congress to provide for the appropriation of private property to the uses of the telegraph, for no such attempt has been made. The use of public property alone is granted. If private property is required, it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized. State sovereignty under the Constitution is not interfered with. Only national privileges are granted."

This language and the distinctions imported by it were approved in *Western U. Teleg. Co. v. Ann Arbor R. Co.* 178 U. S. 239, 44 L. ed. 1052, 20 Sup. Ct. Rep. 867. It was a bill in equity filed in the circuit court of Benzie county, Michigan, by a telegraph company against a railway company to restrain the latter from interfering with the rights of the telegraph company in a certain telegraph line along the right of way of the railroad. It was removed to the circuit court of the United States. The circuit court dismissed the bill, and its action was affirmed by the circuit court of appeals. 33 C. C. A. 113, 61 U. S. App. 741, 90 Fed. 379. The Western Union Telegraph Company brought the case here. The decrees of both courts were reversed, and the case remanded to the circuit court, with directions to remand the case to the state court. This was decreed on the ground that, by the statement of the complainant's (telegraph company) own case, it was not brought "within the category of cases arising under the laws or Constitution of the United States." We said that the bill was in effect

for the specific performance of a contract. "It is not argued," we said, by the Chief Justice, "by counsel for the telegraph company that the telegraph company had any right under the statute, and independently of the contract, to maintain and operate this telegraph line over the railroad company's property; and it has been long settled that that statute did not confer on telegraph companies the right to enter on private property without the consent of the owner, and erect the necessary structures for their business; *but it does provide that, when-[564] ever the consent of the owner is obtained, no state legislation shall prevent the occupation of post roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges."

And further: "As we have said, it was not asserted in argument that the telegraph company had the right, independently of the contract, to maintain its line on the railroad company's property, and, in view of the settled construction of the statute, we could not permit such a contention to be recognized as the basis of jurisdiction." In other words, by the decision in the *Pensacola Case* no such Federal question remained to be based on the act of 1866.

Counsel, however, pronounce the extracts quoted from the *Pensacola Case* and their repetition in the *Ann Arbor Case* as *dicta*, and urge, besides, that the irresistible logic of other cases overthrows the authority of both. Neither proposition is tenable. We have said enough to demonstrate that the language we have quoted was the deliberate resolution of the court, and we might content ourselves by observing that, as the *Ann Arbor Case* is the last expression of this court interpreting the act of 1866, prior cases, if not reconcilable with its exposition of that act, are superseded. We think they are so reconcilable.

One of the cases which is relied on (*Western U. Teleg. Co. v. Atty. Gen.* 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961) asserted the very valuable right obtained by telegraph companies under the act of 1866, and vindicated it against a statute of Massachusetts, which provided for an injunction against the prosecution of business by the company as a means of enforcing the payment of taxes. This is the very essence of the effect given to the act of 1866 by the *Pensacola* and *Ann Arbor Cases*. The telegraph company was in occupation of the post roads of the state of Massachusetts, whether railroads or the ordinary highways does not appear. Its right to be there was not controverted, and how it got there was of no consequence. Its right to do business after and during such occupation was *in-[565] volved and was decided, and to this right

the language of the court was addressed, and receives limitation from it. The language of the court was substantially the same as that of the act of Congress. It enforced the right given by that act, and gave to the telegraph company the protection of the national power and supremacy, and differs only in the instance, not in the principle, declared in the *Pensacola Case*. The telegraph company, indeed, sought for more than the mere exercise of a right. It sought to turn the act of 1866 from a mere permission to exercise a right to the creation of such an instrumentality of the national government as to be exempt from state taxation. The court rejected that view.

So also must be limited the language in *Western U. Teleg. Co. v. Texas*, 105 U. S. 460, 26 L. ed. 1067, and *United States v. Union P. R. Co.* 160 U. S. 1, 40 L. ed. 319, 16 Sup. Ct. Rep. 190. In the first the distinction which was necessary to make was between intra- and inter-state commerce, and to determine what rights as to the latter were conferred by the act of 1866. In the second case the efficacy of the act to prevent binding contracts against its policy was involved. The case called for that, but no more, as far as the act of 1866 was concerned. Such an agreement was set up, and under it the Western Union Telegraph Company claimed the right to exclude all other telegraph companies from the roadway of the railway company, notwithstanding the act of 1866. Mr. Justice Harlan, speaking for the court, said that such an agreement "directly tended to make the act of July 24, 1866, ineffectual, and was, therefore, hostile to the object contemplated by Congress. *Pensacola Teleg. Co. v. Western U. Teleg. Co.* 96 U. S. 1, 11, 24 L. ed. 708, 711."

We need not dissent from these views, or qualify the general language by which they were amplified and supported. Whatever rights were granted by the act of 1866 were granted to all telegraph companies, and could not be defeated by a binding contract with some one company; nor could such an agreement be used to evade or escape the [566] commands of the statute "constituting the Union Pacific Railway, passed in 1862 [12 Stat. at L. 489, chap. 120], or the supplementary act of 1888 [25 Stat. at L. 382, chap. 772, U. S. Comp. Stat. 1901, p. 3583], which was passed by virtue of a power reserved in the act of 1862. The suit was brought to enforce the duties and obligations imposed by those statutes on the railway company. The statutes are quoted in the opinion, and the act of 1866 is referred to only as reinforcing the provisions of the statute of 1862. It was only necessary, therefore, to declare the policy of the act of 195 U. S. U. S., Book 49.

1866 as a grant of rights to all telegraph companies. The consideration of the court was not directed to anything else. The extent of the rights granted as presented in the case at bar could not have been in contemplation. They were not in issue, and it could not have been intended to anticipate and decide the controversies which might be based upon them.

St. Louis v. Western U. Teleg. Co. 148 U. S. 93, 37 L. ed. 381, 13 Sup. Ct. Rep. 485, is also urged by the telegraph company as inconsistent with the *Ann Arbor Case*. It is clearly not so. The case involved the validity of a charge or rental made by the city of St. Louis for the use of its streets by the telegraph company. The charge was imposed by the same ordinance that gave permission to the telegraph company to occupy the streets of the city. The telegraph company resisted the charge upon several grounds, among which were the provisions of the act of 1866, and its acceptance by the company. The charge was held to be a valid one, but on no ground which involved the consideration of the right of the telegraph company to occupy the streets. The right was not disputed. The ordinance of the city conferred it. The claim made under the act of 1866 was that it exempted the telegraph company from a payment of any compensation. But compensation was decreed on the ground that the franchise or privilege granted by the act of 1866 could only be exercised in subordination to public as well as private rights, and, as entry upon the latter could only be made upon the payment of just compensation, entry upon the former was subject to the same payment. This was all that was necessary to decide to sustain the charge made by the *city. In [567] other words, it was all that was necessary to decide to meet the extreme contention made by the telegraph company, that under the act of 1866 it was entitled to occupy the streets without charge, notwithstanding its occupation was exclusive and permanent, as the court said it was. It is manifest, to hold that there can be no entry upon property without payment of compensation is not to decide that such entry can be made upon tender of compensation. Certainly, as to private property or rights, the nonconsent of the owner is a factor to be dealt with. Nonconsent, if resolute, can only be overcome by power conferred by law; in other words, by the exercise of eminent domain. The act of 1866 was not considered in that regard.

By this review of the cases it is evident that there is no inconsistency between them and the *Pensacola Case* and the *Ann Arbor Case*, and we are brought to the discussion of the general considerations urged against

the latter cases. Construed as they construe the act of 1866, it becomes meaningless, counsel say. If the act grants no rights, it is urged, except by permission of the railroad companies, it confers no more than can be obtained from the railroad companies. The objection is best answered by examples. The telegraph company had such permission in the *Pensacola Case*. It needed, however, the act of 1866 to make its exercise effectual against the legislation of the state of Florida. In the *Union Pacific Case* a claim of a monopoly by one telegraph company was answered by the act construed as a grant of rights to all companies. These examples show important results achieved by the act, and the principles of the cases may come to be applied to prevent other hostile action of states or individuals.

This court, when it came to consider the act of 1866 in the *Pensacola Case*, was confronted, as we are confronted now, with the serious nature of the right of eminent domain. It is indeed "inseparable from sovereignty," but it is accompanied and restrained by inexorable limitations. The property taken must be for a public use, and [568] there must be compensation *made for it, and compensation, whether it be regarded as part of the power or a limitation upon the power, is so far essential that the absence of a provision for it has been regarded as important in determining the intention of the legislature when a grant of such power is claimed. 1 Lewis, Em. Dom. § 240, and cases cited. We said in *Sweet v. Rechel*, 159 U. S. 399, 40 L. ed. 196, 16 Sup. Ct. Rep. 48, by Mr. Justice Harlan: "It is a condition precedent to the exercise of such power [eminent domain] that the statute make provision for reasonable compensation to the owner." Many state cases were cited, and also *Cherokee Nation v. Southern Kansas R. Co.* 135 U. S. 641, 34 L. ed. 295, 10 Sup. Ct. Rep. 965. The act of Congress under review in the latter case, it was contended, did not provide for compensation for the property taken. In reply, Mr. Justice Harlan, delivering the opinion of the court, said: "The objection to the act cannot be sustained. The Constitution declares that private property shall not be taken 'for public use without just compensation.' It does not provide or require that compensation shall be actually paid in advance of the occupancy of the land to be taken. But the owner is entitled to reasonable, certain, and adequate provision for obtaining compensation before his occupancy is disturbed. Whether a particular provision be sufficient to secure the compensation to which, under the Constitution, he is entitled, is sometimes a question of difficulty." The requirements of the Con-

stitution were held to be fully met because the act which was under consideration provided that, before the railway which was authorized should be constructed through any of the lands proposed to be taken, full compensation should be made to the owner for all property taken, or damage done by reason of the construction of the road, and in the event of an appeal from the finding of the referee the railway company should pay into court double the amount of the award to abide the judgment.

In *Kohl v. United States*, 91 U. S. 367, 23 L. ed. 449, acts of Congress were considered, one providing for the acquisition of a site *for a public building, the other an [569] appropriation act. The appropriation made by the latter was "for the purchase, at a private sale or by condemnation, of ground for a site" for the building. The real controversy in the case was whether the acts of Congress intended the site to be obtained under the authority of the state government in the exercise of its power of eminent domain, or by the United States government in its own right and by virtue of its own eminent domain. The court held the latter, and, commenting on the sufficiency of the acts to give the right, said: "The authority here given [the first act] was to purchase. If that were all, it might be doubted whether the right of eminent domain was intended to be invoked. . . . That Congress intended more than this is evident, however, in view of the subsequent and amendatory act passed June 10, 1872 [17 Stat. at L. 352, chap. 415, U. S. Comp. Stat. 1901, p. 2457], which made an appropriation 'for the purchase, at private sale or by condemnation, of the ground for a site' for the building."

But in the act of July, 1866, there is not a word which provides for condemnation or compensation. The rule that when a right is given all the means of exercising it are given does not, as we have seen, apply to the extent contended for by the telegraph company. The exercise of the power of eminent domain is against common right. It subverts the usual attributes of the ownership of property. It must, therefore, be given in express terms or by necessary implication; and this was the reasoning in the *Pensacola Case*, and applied directly to the act of 1866. We may repeat the language of the court: "If private property is required it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized."

In *Sweet v. Rechel*, *Cherokee Nation v. Southern Kansas R. Co.*, and *Kohl v. United States*, the property to which the constitutional protection was applied was prop-

erty in private use. Their doctrine applies as well to private property devoted to a public use. There is no difference whatever in principle arising from the difference in the [570]uses. *A railroad right of way is a very substantial thing. It is more than a mere right of passage. It is more than an easement. We discussed its character in *New Mexico v. United States Trust Co.* 172 U. S. 171, 43 L. ed. 407, 19 Sup. Ct. Rep. 128. We there said that if a railroad's right of way was an easement it was "one having the attributes of the fee, perpetuity and exclusive use and possession; also the remedies of the fee, and, like it, corporeal, not incorporeal, property." And we drew support for this from a New Jersey case, in which state the rights of way in the case at bar are situated. We quoted *New York, S. & W. R. Co. v. Trimmer*, 53 N. J. L. 1, 3, 20 Atl. 761, as follows: "Unlike the use of a private way,—that is, discontinuous,—the use of land condemned by a railroad company is perpetual and continuous." And it is held in Pennsylvania "that a railway company is a purchaser, in consideration of public accommodation and convenience, of the exclusive possession of the ground paid for to the proprietors of it." *Philadelphia & R. R. Co. v. Hummell*, 44 Pa. 375, 84 Am. Dec. 457. It is "a fee in the surface and so much beneath as may be necessary for support. . . . But whatever it may be called, it is, in substance, an interest in the land, special and exclusive in its nature." *Pennsylvania S. Valley R. Co. v. Reading Paper Mills*, 149 Pa. 18, 4 Atl. 205; *Philadelphia v. Ward*, 174 Pa. 45, 34 Atl. 458; *Pittsburgh, Ft. W. & C. O. R. Co. v. Peet*, 152 Pa. 488, 19 L. R. A. 467, 25 Atl. 612.

A railroad's right of way has, therefore, the substantiality of the fee, and it is private property, even to the public, in all else but an interest and benefit in its uses. It cannot be invaded without guilt of trespass. It cannot be appropriated in whole or part except upon the payment of compensation. In other words, it is entitled to the protection of the Constitution, and in the precise manner in which protection is given. It can only be taken by the exercise of the powers of eminent domain; and a condition precedent to the exercise of such power is, we said in *Sweet v. Rechel*, that the statute conferring it make provision for reasonable compensation to the owner of the property taken. This condition is expressed [571]*with even more emphasis in *Cherokee Nation v. Southern Kansas R. Co.*

A few words more may be necessary to avoid all possible misunderstanding of the purpose for which we have cited those cases and *Kohl v. United States*. We have cited 195 U. S.

them, not as tests of the validity of the act of 1866, but as tests of its meaning, supporting the authority of the *Pensacola Case* and *Ann Arbor Case*. We have no occasion to consider the validity of the act of 1866 as an attempt to grant the power of eminent domain. We decide the act to be an exercise by Congress of its power to withdraw from state interference interstate commerce by telegraph. As such, of course, the act is an efficient and constitutional enactment.

Certain cases decided at circuit are cited for our consideration, and we will close this branch of our discussion by a brief review of them.

In *Postal Teleg. Cable Co. v. Oregon Short Line R. Co.* 104 Fed. 623, and *Postal Teleg. Cable Co. v. Oregon Short Line R. Co.* 114 Fed. 787, there were views expressed favorable to the contentions made in the case at bar by the telegraph company, but the judgments in both cases were ultimately rested upon the local statutes,—Idaho and Montana,—which granted the right of eminent domain to telegraph companies. We may also observe that the first case went to the circuit court of appeals of the ninth circuit. That court sustained the judgment of the circuit court, upon the statute of Idaho and upon general legal principles. It did not refer to the act of 1866. 49 C. C. A. 663, 111 Fed. 843.

In *Postal Teleg. Cable Co. v. Southern R. Co.* 89 Fed. 190, and *Postal Teleg. Cable Co. v. Cleveland, C. C. & St. L. R. Co.* 94 Fed. 234, the act of 1866 was more directly passed on. Both cases were proceedings in eminent domain,—one brought in the courts of North Carolina and removed to the circuit court of the United States; the other brought in the circuit court of the United States for the *northern district of Ohio. In [572] passing on the sufficiency of the petition in the first case, Judge Simonton said that the right of petitioner to construct its lines along the right of way of post roads of the United States was given under the act of Congress of 1866; but, he observed, the mode or method of exercising the right conferred was fixed by the laws of the several states, and it was exclusive in its character in ascertaining the amount of compensation to be allowed. The right of the telegraph company was, therefore, considered and adjudged under the North Carolina statutes.

In the second case a motion was made to dismiss on the ground that the power of eminent domain was not conferred by any law of the United States or the state of Ohio. The motion was sustained. District Judge Ricks said: "The act of July 24, 1866, made no provision for compensation or payment for property to be taken; hence the proce-

ture cannot be sustained by virtue of that act." He cited the *Pensacola Case*, 96 U. S. 1, 11, 24 L. ed. 708, 711.

Western U. Teleg. Co. v. Ann Arbor R. Co. 33 C. C. A. 113, 61 U. S. App. 741, 90 Fed. 379, and *St. Paul, M. & M. R. Co. v. Western U. Teleg. Co.* 55 C. C. A. 263, 118 Fed. 497, were respectively decided by the circuit court of appeals of the sixth circuit and the circuit court of appeals of the eighth circuit. It is difficult to reconcile them. In one it was decided, following the authority of the *Pensacola Case*, that the telegraph company could not occupy the line of the defendant's railroad without its consent or that of some predecessor in title. This was wanting. In the other it was conceded that the right of entry upon private property was not conferred by the act of 1866, without the owner's consent, yet held that, as consent had been given, no reason could be perceived why a court of equity should compel a removal of the telegraph company's lines from the railway's right of way,—“especially where it appears that no express agreement was made that they should be removed when its lines were erected.”

[573] *2. It is contended by the telegraph company that the charters under which the several railway companies constituting the system of the railroad company were organized expressly created them “public highways,” and that in the acquisition of land for their purposes they were public agents, “and the land was taken by the government, and in the eye of the law as completely subject to public uses as though it had been taken by the state itself,”—that is to say, if we understand the argument, have become highways in the full sense of that word. And counsel further say the difference between them and ordinary highways “is not a legal difference, but is the difference of the kind of use to which the highway is subject,—in the one case, wheel vehicles drawn by horses; in the other, to steam vehicles drawn by locomotives along and upon iron rails.” They are subject, therefore, it is urged, as ordinary highways and streets of a city are subject, to the control of Congress by virtue of its power over interstate commerce.

Counsel in advancing the argument exhibits a consciousness of taking an extreme position. It would seem, certainly if considered with other parts of their argument, to make a railroad right of way public property. To that extreme we cannot go, for the reasons which we have already indicated. The right of way of a railroad is property devoted to a public use, and has often been called a highway, and as such is subject, to a certain extent, to state and Federal control; and for this many cases may be cited. But it has always been recognized, as we

have pointed out, that a railroad right of way is so far private property as to be entitled to that provision of the Constitution which forbids its taking, except under the power of eminent domain and upon payment of compensation. The right of way of a railroad was recognized as private property in the *Pensacola Case*, and we are brought back to the main question,—the interpretation of the act of July, 1866, and upon that we have sufficiently dilated.

It follows from these views that the act of 1866 does not *grant the right to telegraph [574] companies to enter upon and occupy the rights of way of railroad companies, except with the consent of the latter, or grant the power of eminent domain. Nor does the statute of New Jersey make those rights of way public property so as to subject them to such occupation under the provisions of the act of 1866.

It is admitted that the statutes of New Jersey do not confer the right of eminent domain upon the telegraph company.

3. In view of our conclusion, it is not necessary to consider the question whether, if the power of eminent domain were granted by the act of 1866, it would be within the competency of a court of equity to ascertain compensation, or that compensation might be determined at law. That question was pertinent in *Kohl v. United States*. It is not pertinent in this case. The acts of Congress passed on in *Kohl v. United States*, as we have seen, provided for the appropriation of a site for a public building by purchase or by condemnation. By the act of 1866 power of condemnation is not given, and, of course, methods of procedure are not involved in its construction.

It is equally unnecessary to consider the questions which might arise if the state of New Jersey gave the right of eminent domain to the telegraph company. It is conceded by counsel that such right does not exist, and it happens that under the policy of New Jersey the right of way of the railroad company enjoys in that state immunity from compulsory proceedings instituted by the telegraph company. But this has no bearing on the act of 1866, nor does it make that act, as construed by us, a grant to railroads of greater power over commercial intercourse by telegraph than the states have. Indeed, we think, a comparison between the states and railroads in that regard is misleading, and overlooks the essential difference between restraints on the legislative power of the states and the rights of property.

On account of those restraints, it may be, and finding no *impediment in the rights of [575] property, interstate commerce by telegraph

has marched to a splendid development, although in the acquisition of the means for its exercise it has relied on the consent of the owner of private property, or the power of eminent domain conferred by the states. We cannot but feel, therefore, that there is something inadequate in the argument which is based on the apprehension that the act of July 24, 1866, construed as we construe it gives a sinister power to railroad companies. It gives no power to those companies but that which appertains to the ownership of their property.

Decree affirmed.

Mr. Justice **Harlan**, dissenting:

In view of the importance of these cases I do not feel that any dissent from the opinion and judgment of the court should be expressed unless the grounds of such dissent be fully disclosed.

The controlling question before the court is whether the Western Union Telegraph Company is entitled, in virtue of any existing acts of Congress, to keep and maintain its telegraph lines upon the right of way of the Pennsylvania Railroad Company, assuming that the ordinary travel on that road will not be thereby interfered with.

Congress, having power to establish post-offices and post roads, has declared all railroads in operation within the limits of the United States to be post roads and post routes. 5 Stat. at L. 263, chap. 172; 10 Stat. at L. 255, chap. 146; Rev. Stat. § 3964, U. S. Comp. Stat. 1901, p. 2707; 23 Stat. at L. 3, chap. 9, U. S. Comp. Stat. 1901, p. 2708.

[576] There was, for many years, as all know, and therefore as the court may judicially know, a widespread belief that the government and the people of the country were at great disadvantage in matters of business and intercourse as involved in the use of the telegraph. The conviction was strong and universal that the control of the post roads of the country was being exerted by great railroad corporations in such way as to subserve private and corporate interests at the expense of the United States and without any regard for the convenience of the general public. As a remedy for those evils Congress passed the act of July 24th, 1866, entitled "An Act to Aid in the Construction of Telegraph Lines, and to Secure to the Government the Use of the Same for Postal, Military, and Other Purposes." 14 Stat. at L. 221, chap. 230, U. S. Comp. Stat. 1901, p. 3579. By that act Congress conferred upon any telegraph company organized under the laws of any state "the right to construct, maintain, and operate lines of telegraph," not only through and over the

public domain, and over, under, or across the navigable streams or waters of the United States, but "over and along any of the military or post roads of the United States." By the same act it is declared that on the lines of such companies telegraphic communications between the several departments of the government should be at rates to be annually fixed by the Postmaster General, and have priority over all other business. § 2. To the exercise of the right thus given, Congress annexed several conditions, but the only one pertinent to the present discussion is the condition that the telegraph lines erected by any company accepting the provisions of the act should be so constructed and maintained as not to obstruct the navigation of the navigable streams and waters of the United States, or "interfere with the ordinary travel on such military or post roads."

The object of the act, this court has said, all its members concurring, "was not only to promote and secure the interests of the government, but to obtain for the benefit of the people of the entire country every advantage in the matter of communication by telegraph which might come from competition between corporations of different states:" that "it was very far from the intention of Congress, by any legislation, to so exert its power as to enable one telegraph corporation, Federal or state, to acquire exclusive rights over any post road;" and that "no railroad company operating a post road of the United States over which interstate commerce is carried on can consistently with the act of July 24th. 1866, bind itself by agreement to exclude from its roadway any telegraph company incorporated under the laws of a state, which accepts the provisions of that act, and desires to use such roadway for its line in such manner as will not interfere with the ordinary travel thereon." *United States v. Union P. R. Co.* 160 U. S. 1, 44, 49, 40 L. ed. 319, 334, 336, 16 Sup. Ct. Rep. 190, 206, 208. Yet, by its present construction of the act of 1866, the court—if we do not misapprehend its opinion—holds that the right which that act gives to construct, maintain, and operate a telegraph line upon a post road cannot, in virtue of that act, or under any existing legislation, be exercised by the Western Union Telegraph Company, against the will of the railroad company operating such road; and this, notwithstanding it be absolutely clear that the occupancy of the post road by the telegraph lines of the particular company proposing or desiring to erect them would not, in the slightest degree, interfere with the ordinary travel on such road. It is now held, in effect, that, so far as that act is concerned, and despite its explicit provisions,

even the government cannot, except with the assent of the railroad company, enjoy the advantages sought to be secured by its passage. I think it was intended by the act of 1866, in the interest of the postal service and of interstate trade and intercourse, to throw open all the post roads of the country to the use of telegraph companies accepting its provisions, subject to the condition that such use should not interfere with ordinary travel on the post roads so occupied. And that intention is in harmony with the doctrine often announced by this court, that "a railroad is a public highway, established primarily for the convenience of the people and to subserve public ends, and therefore subject to governmental control." *Cherokee Nation v. Southern Kansas R. Co.* 135 U. S. 641, 657, 34 L. ed. 295, 302, 10 Sup. Ct. Rep. 965; *Olcott v. Fon* [578] *du Lac County*, 16 *Wall. 676, 694, 21 L. ed. 382, 388; *United States v. Joint Traffic Asso.* 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; *Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115.

But it is suggested that the telegraph company has not been expressly invested with the power of eminent domain. Nevertheless, it has been given, by express words, the right to construct, maintain, and operate its lines on any *post road* of the United States; and, as it is not contended that Congress has exceeded its power in granting that right, the question is whether the right so given can be made effective by any mode of procedure known to our jurisprudence. I have always supposed it to be competent for a court of the United States having general jurisdiction of suits at law and in equity, in some efficient mode, by some process or form of procedure, to enforce and protect any right constitutionally conferred by the legislative department. The principle is illustrated in *D. M. Osborne & Co. v. Missouri P. R. Co.* 147 U. S. 248, 259, 37 L. ed. 155, 161, 13 Sup. Ct. Rep. 299, 303, which was an action to enjoin the construction of a track along a public street, because of irreparable damage to be thereby inflicted on the plaintiff. This court, following the decision of Judge Brewer, now of this court, in *McElroy v. Kansas City*, 21 Fed. 257, said: "If the defendant had an ultimate right to do the act sought to be restrained, but only upon some condition precedent, and compliance with the condition was within the power of the defendant, the injunction would almost universally be granted until the condition was complied with; but, if the means of complying with the condition were not at defendant's command, then the court would adjust its order so as to give complainant the substantial benefit of the condition while

not restraining defendant from the exercise of its ultimate rights. Inasmuch as, while the statutes of Missouri provided for the assessment of damages resulting from the taking of property for public use, there existed no provision to attain that result where the property was merely damaged, an injunction was granted, with leave to the defendant to apply for the appointment of a board of commissioners to ascertain and report the damages which complainant would *sustain, upon payment of which the injunc-[579] tion would be vacated." This principle was recognized in the recent case of *New York v. Pine*, 185 U. S. 93, 46 L. ed. 820, 22 Sup. Ct. Rep. 592.

It is said by counsel that the right given by the act of 1866 is necessarily subject to the condition prescribed by the constitutional provision that private property shall not be taken for public use without just compensation, and that the property interest of the railroad company in its right of way cannot be permanently taken from it for public purposes, against its will, without making such compensation.

Upon the subject of compensation the court reproduces from the opinion in *Sweet v. Rechel*, 159 U. S. 380, 399, 40 L. ed. 188, 196, 16 Sup. Ct. Rep. 43, 48, this detached sentence: "It is a condition precedent to the exercise of such power [eminent domain] that the statute make provision for reasonable compensation to the owner." But the court does not apply any such rule to the present case, and holds that the act of 1866 is invalid *as not making provision for compensation*. Besides, the above sentence, taken in connection with the one immediately preceding it, shows clearly that what was said had reference to the taking of *private* property for public use without provision being made in the statute for compensation. The entire paragraph from which the above sentence was taken reads: "When, however, the legislature provides for the actual taking and appropriation of private property for public uses, its authority to enact such a regulation rests upon its right of eminent domain,—a right vital to the existence and safety of government. But it is a condition precedent to the exercise of such power that the statute make provision for reasonable compensation to the owner." What was said in *Sweet v. Rechel* plainly had no reference to property of a public or quasi public nature. The same observations may be made in reference to the quotation made from *Cherokee Nation v. Southern Kansas R. Co.* 135 U. S. 641, 34 L. ed. 295, 10 Sup. Ct. Rep. 965. What was said in that case had also reference to the taking of private property. If the court were now of opinion that the act of 1866 was invalid *as *not making* [580]

provision for compensation, then the object of citing *Sweet v. Rechel* and *Cherokee Nation v. Southern Kansas R. Co.* would be both manifest and appropriate. But the court does not hold that the act of 1866 is objectionable on any such ground. On the contrary, it holds a railroad right of way to be private property, and yet, despite its citation of the above cases, recognizes the validity of the act, although it makes no provision for compensation to the owner. It may not be appropriate for me to say that I adhere to what was said in *Sweet v. Rechel* and *Cherokee Nation v. Southern Kansas R. Co.*, the opinions in both of which cases were written by myself, speaking for the court. Whether a railroad right of way over a post road of the United States—such road being a public highway established primarily for the public convenience and subject to governmental control—is private property within the rule that a statute authorizing private property to be taken for public use must make provision for compensation, is a question not wholly free from doubt, and it need not be here discussed; for the court does not hold that the act of 1866 is subject to that objection.

But let it be granted, for the purposes of this case, that a railroad company has such a property interest in its right of way that it is entitled to compensation if such right of way be appropriated to the use of a telegraph company accepting the act of 1866; still, the question remains, In what way or by what mode may such compensation be legally ascertained? May it not be ascertained by a court of general jurisdiction, when all parties in interest are regularly being brought in? Here the telegraph company comes into the circuit court of the United States, and seeks, in virtue of the act of Congress, to enforce the right expressly granted to it, of occupying the post road in question with its lines. It expresses its readiness to make such compensation to the railroad company as the law requires, and informs the court that it has instituted an action at law to ascertain the amount of such compensation. The bill alleges:

[581] *"Your orator says further that it is diligently prosecuting said action on the law side of this court for the ascertainment of the amount of compensation to the said railway companies defendant herein, for the right to the use of said railroads to maintain and operate its telegraph line along and over the lines of said railways as prescribed in said act of Congress of July 24th, 1866; and that it will continue to prosecute the same to a final determination as rapidly as the business in said court will permit the
195 U. S.

said cause to be heard and determined, and without any unnecessary delay."

"Your orator prays that this court ascertain, order, adjudge, and decree the amount of compensation to be paid by your orator to the defendants, as their rights may severally appear, for the construction, maintenance, and operation of your orator's telegraph lines over and along the right of way of the defendants' said railroads, under the terms, provisions, and restrictions of said acts of Congress hereinbefore mentioned, or, if this court shall order and determine that the amount of such compensation to the defendants shall be such amount as shall be determined or adjudged in the said action at law, that upon due payment of such compensation by your orator to the defendants this court will order, adjudge, and decree that your orator is entitled to a perpetual injunction against the defendants herein and each of them, restraining them and each of them from in any manner interfering with the location, construction, maintenance, and operation of your orator's said lines of telegraph upon the roadway or right of way of the said defendants, under and subject to the provisions and restrictions of the said act of Congress of July 24th, 1866, and meanwhile and until the final decree of this court that a temporary injunction be issued against the defendants, prohibiting and restraining them and each of them from in any manner interfering with the use and operation of the telegraph lines of your orator upon the said roadway and right of way of the defendants pending the determination of the said action at law, or until the further order of this court in the premises. *And for such other and further [582] relief as the case may require and to your honors may seem just."

Kohl v. United States, 91 U. S. 367, 375, 376, 23 L. ed. 449, 452, 453, was an application filed in pursuance of acts of Congress authorizing and directing the Secretary of the Treasury to purchase a site for a public building. A site was selected, but the Secretary and private owners could not agree as to price, and the acts of Congress did not direct the particular mode by which the land should be condemned and the compensation to be made by the government ascertained. The Secretary of the Treasury, in order to carry out the will of Congress, did not institute formal proceedings of condemnation, as one of the acts, under which he proceeded, authorized him to do. But he instituted a suit in a circuit court of the United States to appropriate a certain parcel of land for the proposed building. It was objected that the circuit court was without jurisdiction, but that objection was overruled. It was contended in argument that,

while the United States had the right of eminent domain, Congress had not given to the circuit court jurisdiction of a proceeding for the condemnation of property brought by the United States in the assertion or enforcement of that right; and that the act of Congress meant that the land for the proposed public building was to be obtained under the authority of the state government, in the exercise of its right of eminent domain. It was further contended that if the proceeding was properly instituted in the circuit court, then the act of Congress required that it should conform to the provisions of the state law in a like proceeding in the state court. This court said: "Doubtless Congress might have provided a mode of taking the land and determining the compensation to be made, which would have been exclusive of all other modes. They might have prescribed in what tribunal or by what agents the taking and the ascertainment of the just compensation should be accomplished. The mode might have been by a commission, or it might have been referred expressly to the circuit court; but this, we think, was not necessary. *The in-*

[583] *vestment of the *Secretary of the Treasury with power to obtain the land by condemnation, without prescribing the mode of exercising the power, gave him also the power to obtain it by any means that were competent to adjudge a condemnation . . . It is quite immaterial that Congress has not enacted that the compensation shall be ascertained in a judicial proceeding. That ascertainment is in its nature at least quasi judicial. Certainly no other mode than a judicial trial has been provided. . . . But there is no special provision for ascertaining the just compensation to be made for land taken. That is left to the ordinary processes of the law; and hence, as the government is a suitor for the property under a claim of legal right to take it, there appears to be no reason for holding that the proper circuit court has not jurisdiction of the suit under the general grant of jurisdiction made by the act of 1789."*

In *United States v. Jones*, 109 U. S. 513, 518, 519, 27 L. ed. 1015, 1017, 3 Sup. Ct. Rep. 346, which was a proceeding to condemn property for the use of the United States, this court, referring to a certain proposition advanced by counsel, said: "There is in this position an assumption that the ascertainment of the amount of compensation to be made is an essential element of the power of appropriation; but such is not the case. The power to take private property for public uses, generally termed the right of eminent domain, belongs to every independent government. It is an incident of sovereignty, and, as said in

Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403, 25 L. ed. 206, requires no constitutional recognition. The provision found in the 5th Amendment to the Federal Constitution and in the Constitutions of the several states, for just compensation for the property taken, is merely a limitation upon the use of the power. It is no part of the power itself, but a condition upon which the power may be exercised. . . . But there is no reason why the compensation to be made may not be ascertained by any appropriate tribunal capable of estimating the value of the property. There is nothing in the nature of the matter to be determined which calls for the establishment of any special tribunal by the *appropriating power.[584] The proceeding for the ascertainment of the value of the property and consequent compensation to be made is merely an inquiry to establish a particular fact as a preliminary to the actual taking; and it may be prosecuted before the commissioners, or special boards, or the courts, with or without the intervention of a jury, as the legislative power may designate. All that is required is that it shall be conducted in some fair and just manner, with opportunity to the owners of the property to present evidence as to its value, and to be heard thereon."

The vital object of the present suit was to secure the recognition and enforcement of the right of the telegraph company, under the act of 1866, to keep and maintain its lines upon the railroad's right of way. If it had such a right,—the authority to confer the right is, we repeat, not disputed,—then this suit in equity was an appropriate mode by which the right could be adequately protected and compensation secured to the railroad company. To assert the right and to ask that the amount of compensation shall be ascertained made the proceeding a suit or controversy within the meaning of the judiciary acts, and made the case one—in legal effect—for condemnation. I perceive no reason why the court, in advance of a final decree recognizing and enforcing that right, could not have instituted, as it was asked to do, an inquiry in respect of the compensation which the railroad company was entitled to receive for the proposed use of its right of way, and have made the payment of such compensation a condition precedent to the exercise by the telegraph company of the right given by the act of 1866. Having all the parties interested before it, could not the court have directed a jury to be impaneled to inquire, under the direction of the court, as to the amount of compensation to be paid to the railroad company? Could it have done any more under regular proceedings of condemnation? Instead of adopting

that course, the circuit court proceeded upon the ground that even if the use of the defendant's road by the telegraph company would not interfere with ordinary travel on [585] and *over it, it was compelled by the former decisions of this court to hold that neither in virtue of the act of 1866, nor of any other existing Federal statute, could the telegraph company occupy the railroad's right of way without the consent of the railroad company.

The cases in this court which, it is supposed, adopted this view of the act of 1866, are *Pensacola Telég. Co. v. Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708, and *Western U. Teleg. Co. v. Ann Arbor R. Co.* 178 U. S. 239, 243, 44 L. ed. 1052, 1054, 20 Sup. Ct. Rep. 867. But the utmost ingenuity is inadequate to show that the present question was involved in either of those cases, or that the decision in either case depended in the slightest degree on its solution.

It appears from the *Pensacola Case* that the Western Union Telegraph Company had the right to place and operate its lines upon the right of way of a certain railroad company between points in Alabama and points in Florida. There was no controversy in that case between the railroad company and the telegraph company as to the right of the latter to have its lines on the railroad right of way. The railroad company, as the report of the case shows, had consented to the occupancy of its right of way by the lines of the telegraph company, and that fact was not disputed. The railroad company was not even a party to the suit. It had no quarrel with the telegraph company. What need, then, had the court to consider the rights of the Western Union Telegraph Company, under the act of 1866, when it was conceded that that company had the consent of the railroad company to occupy its right of way? This view of the case was distinctly announced by this court when it said in the *Pensacola Case* that "*the present case is satisfied if we find that Congress has power, by appropriate legislation, to prevent the states from placing obstructions in the way of its [the telegraph's] usefulness.*" The sole question in the case was as to the validity of a Florida statute, under which a Florida telegraph company was given *exclusive* telegraphic rights over the route to be occupied by the Western Union Telegraph Company with the consent of the [586] railroad *company; and the charter of the Florida company authorized it to locate and construct its lines within certain named counties of Florida, "along and upon any public road or highway, or across any water, or upon any railroad or private property for which permission shall first have

been obtained from the proprietors thereof." This court held that the attempt of the state to exercise exclusive control over telegraphic communications between it and other states was in conflict with the commerce clause of the Constitution of the United States, and that the Florida statute was void so far as it assumed to grant exclusive privileges to a particular telegraph company.

Referring to the act of 1866 the court said: "It substantially declares, in the interest of commerce and the convenient transmission of intelligence from place to place by the government of the United States and its citizens, that the erection of telegraph lines shall, so far as state interference is concerned, be free to all who will submit to the conditions imposed by Congress, and that corporations organized under the laws of one state for constructing and operating telegraph lines shall not be excluded by another from prosecuting their business within its jurisdiction, if *they accept the terms proposed by the national government for this national privilege.* To this extent, certainly, the statute is a legitimate regulation of commercial intercourse among the states, and is appropriate legislation to carry into execution the powers of Congress over the postal service. It gives no foreign corporations the right to enter upon private property without the consent of the owner, and erect the necessary structures for its business; but it does provide that, whenever the consent of the owner is obtained, no state legislation shall prevent the occupation of post roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges." What was meant by the words, "but it [the act] does provide that, whenever the consent of the owner is obtained," I cannot understand. The act of 1866 does not contain any such provision, nor anything like it. Not a single word is to be found in it *that refers to the consent [587] of the owner of the property to be taken. The court proceeds: "It is insisted, however, that the statute extends only to such military and post roads as are upon the public domain; but this, we think, is not so. The language is, 'through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States, which have been or may hereafter be declared such by act of Congress, and over, under, or across the navigable streams or waters of the United States.' There is nothing to indicate an intention of limiting the effect of the words employed, and they are, therefore, to be given their natural and ordinary signification. Read in this way, the grant evidently extends to the public domain, the military and post roads, and the navigable waters of

the United States. These are all within the dominion of the national government to the extent of the national powers, and are, therefore, subject to legitimate congressional regulation. No question arises as to the authority of Congress to provide for the appropriation of private property to the uses of the telegraph, for no such attempt has been made. The use of *public* property alone is granted. If private property is required, it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized. State sovereignty under the Constitution is not interfered with. Only national privileges are granted."

This language, it seems to me, has not been correctly interpreted. Undue stress has been laid upon the words "private property without the consent of the owner," and the words "private property . . . obtained by private arrangement with its owner." They have been so interpreted as to make the court decide a question not before it, not necessary to the decision, not involved in the issues made, and never suggested by counsel. The briefs of counsel in that case show that no such question was in their minds; for they as well as the court knew, from the record before them, and as we may know from an examination of that record, that the Western Union Company [588]* was entitled, so far as the consent of the railroad company was concerned, to maintain its lines on the railroad right of way. Upon the above-quoted words the contention is based that the court intended to decide that no railroad right of way could, *in virtue of the act of 1866* be occupied by any telegraph company without the consent of the railroad company first obtained. I cannot believe that any such question was intended to be decided. As already shown, the court expressly said that the only question to be decided was whether Congress had power to prevent a state from obstructing interstate telegraphic communications, by granting exclusive privileges to a particular telegraph company of its own creation. It is a mistake to say that the court declared that the *sole* purpose of the act of 1866 was to prevent state monopolies, or that the act was merely an exercise of national power to forbid state interference with telegraphic communications. It did say that the case then before the court would be satisfied if the question as to state interference was decided, that is, that the case involved no other question. Besides, the whole context of the opinion in the *Pensacola Case* shows that the court did not include railroad property employed in commerce when it used the above-quoted words.

It was argued in that case that the act of 1866 had reference only to the "public domain," that is, to the public lands owned by the United States. This view was distinctly rejected, and post roads were placed by the court, so far as the privileges granted by the act were concerned, on the same plane as the public domain, so that not even a state could interfere with the national privilege granted by Congress, if the telegraph company accepted the terms of the act. The court said that any telegraphic company accepting the provisions of the act could put its lines on any post road, if ordinary travel thereon was not interfered with, and that not even the state could stand in the way. It then added, as if out of abundant caution, and to show that Congress had no purpose to interfere with the rights of private owners, that no attempt was made by Congress to provide for *the* [589] appropriation of private property, and that "the use of *public* property *alone* is granted." That meant that the act had not granted any right to telegraph companies to occupy *private* property with telegraph lines. Having said that the act granted the use of post roads for telegraphic purposes, that it embraced the use of such roads *equally* with the public domain, and that "the use of *public* property *alone* is granted," it is inconceivable that the court employed in the same connection the words "private property" as embracing post roads, or the use of such roads. To relieve the minds of those who apprehended danger arising from the act of 1866 to state sovereignty and to rights that were strictly private, the court took care to say that neither state sovereignty nor private rights were interfered with; that only national privileges were granted; but that, in respect of the use of the public domain and military and *post roads*, Congress had power to pass the act of 1866, and in dealing with the use of post roads by telegraph companies it dealt with public property.

When the court held in the *Pensacola Case* that telegraphic communications between the states could be regulated by Congress under its power to regulate commerce, and that the statute of Florida which assumed to give to a Florida telegraph company an exclusive right in respect of telegraphic communications over certain territory in that state was inconsistent with the act of 1866, that was an end of that case, and nothing remained to be done except to dismiss the suit. The court itself so declared. Nothing more was in issue between the parties. The case involved, I confidently insist, no question as to the previous assent of the railroad company being a condition of the exercise by the Western Union Tele-

graph Company of the rights given by the act of 1866.

Nor is the case of *Western Union Teleg. Co. v. Ann Arbor R. Co.* 178 U. S. 239, 243, 244, 44 L. ed. 1052, 1054, 20 Sup. Ct. Rep. 867, 869, an authority for the action of the circuit court. That was a case in which the only relief sought was the *specific performance* of a contract under which a telegraph company claimed the right to remain in the [590] occupancy *of the right of way of a railroad company. The court pertinently observed in that case that it was not claimed that "the telegraph company had any right under the statute, and independently of the contract, to maintain and operate this telegraph line over the railroad company's property." It was, however, claimed that, as the telegraph company was in the discharge of public duties, the circuit court "should have so framed its decree as to preserve the occupancy of the telegraph company, subject to making compensation to the railroad company, the value of the alleged easement to be ascertained by the court." But that view was rejected because the bill "was not framed in that aspect" and so as to protect the occupancy of the telegraph company subject to the condition of its making compensation; and the court also said that the relief asked could not be given under the prayer for general relief, because not "agreeable to the case made by the bill."

Now, the present bill has been framed so that the court can protect the right given to the telegraph company by the act of 1866 to have its wires and poles on the company's right of way, upon its being ascertained that such use will not interfere with the ordinary travel on the railroad, just compensation being made for that use, and the amount of compensation to be ascertained by the court in some appropriate way.

In my judgment, nothing involved or in judgment in the *Pensacola* and *Ann Arbor Cases* requires the affirmance of the decree of the circuit court.

The affirmance of that decree of the circuit court will mean that the efforts of Congress, by the act of 1866, to obtain for the people of the country the advantages accruing from competition between corporations of the different states in the matter of telegraphic communications, and also to promote and secure the interests of the government as involved in the conduct of its postal and military business, will prove of but little value. Indeed, as construed, it might have been better for the country if the act of 1866 had not been passed, and the states left free to establish such regulations in refer-

[591]erence *to telegraphic communications, within and over its territory, as would be appropriate and valid in the absence of congress-

sional legislation on the subject. As the matter now stands, the whole subject is practically committed to the railroad companies. The court says that the act of 1866 is an efficient enactment for the purpose of preventing state interference with interstate telegraphic communications. As now construed, it would seem to be most efficient in tying the hands of the state, and leaving railroad companies operating post roads, so far as existing legislation is concerned, absolute masters of interstate communication by telegraph.

In the *Pensacola Case* it was decided, and I think rightly, that in respect at least of interstate telegraphic communications, a state could not give exclusive privileges to a particular telegraph company. But, as just stated, by the necessary operation of the judgment now rendered a railroad company operating a post road can, in effect or practically, confer exclusive privileges upon a particular telegraph company, in respect of its right of way, by simply withholding its consent for a second telegraph company to occupy any part of such right of way with its wires and poles. If the government should be of opinion that the public business imperatively required another telegraph line upon the post road now occupied by the Pennsylvania Railroad, that company need only object to other telegraph lines being placed upon its right of way, and that will be the end of the matter, so far as the act of 1866, as now construed, is concerned. If the government and a telegraph company fully equipped should jointly represent to the railroad company that an additional company can be admitted to its right of way without obstructing the ordinary travel on that road, the company need only reply that no other telegraph company than the one now there can occupy its right of way, and that will be the end of the matter, so far as the act of 1866, as now construed, is concerned. And all this is now made possible, notwithstanding the decision of this court in *United States v. Union P. R. Co.* *above cited. In that case we propounded [592] this question: "Can it be said that after the passage of the act of 1866, and while it was in force, a railway company operating a post road of the United States could, by any form of agreement, exclude from its roadway a telegraph company which had accepted the provisions of that act?" We said that this question could be answered only in one way, "namely, that every railroad company operating a post road of the United States, over which commerce among the states is carried on, was inhibited, after the act of July 24th, 1866, took effect, from making any agreement inconsistent with its provisions or that tended to defeat its oper-

ation." The court added that it was very far from the intention of Congress by any legislation to so exert its power as to enable one telegraph corporation, Federal or state, to acquire exclusive rights over any post road. But now a railroad corporation operating a post road, and wishing its right of way occupied only by a single company with which it may have a special business arrangement for its own purposes, need not make even a secret agreement granting exclusive privileges to that company. It need only keep silence and withhold its assent to the occupancy of its right of way by another company, and in that way give exclusive privileges to the company with which it has a special arrangement; it may be to one organized wholly in the interest of the railroad company. In the *Pensacola Case* it was said that one of the objects of the act of 1866 was to prevent state monopolies in telegraphic communication, and that the privilege granted by that act was a national privilege. Now, although state monopolies cannot exist, railroad monopolies in telegraphic communications may exist; and the national privilege granted by the act of 1866 is left at the mercy of railroad companies operating the post roads of the United States.

[593] Practically, the railroad corporations operating post roads—looking to their own interests and perhaps caring little for the general welfare—are recognized as now having more power *than a state. I cannot assent to any interpretation of the act of 1866 from which such a result can follow. No such result is, in my opinion, consistent either with the words of the act or with the objects which Congress, as this court has said, intended to accomplish by its passage. The act, reasonably interpreted, was, I think, intended to give a telegraph company accepting its provisions the absolute right to put its wires and poles upon any post road,—a public highway established primarily for the public convenience,—if the ordinary travel on such road was not thereby interfered with.

For these reasons, I am constrained to dissent from the opinion and judgment of the court.

Brewer, J., concurring:

I concur in the judgments in these cases, but do so distinctly on the ground that the questions have been settled in prior cases. If the matter was *res integra*, the views expressed by Mr. Justice Harlan would be very persuasive. *Pensacola Teleg. Co. v. Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708, and *Western U. Teleg. Co. v. Ann Arbor R. Co.* 178 U. S. 239, 44 L. ed. 1052, 20 Sup. Ct. Rep. 867, seem to me controlling. In

the first of these cases the scope of the power and authority granted by the act of 1866 was distinctly presented. It was within the proper limits of inquiry, and the opinion of the court shows that it was fully considered. The declarations in that opinion are clear and precise, and cannot be considered in any just sense *obiter dicta*. The decision was announced in 1877, and was reaffirmed in 1890 in the *Ann Arbor Case*. If the court erred in its construction of the act, Congress has had twenty-seven years in which to correct the mistake. Its omission to take any action must be considered as an acquiescence on its part in that construction. And I am of the opinion that when this court has construed a statute of Congress, and that construction has remained for more than a *quarter of a century, nei- [594] ther changed by any judicial decisions nor set aside by any congressional legislation, it ought not to be disturbed except for the most cogent reasons.

WESTERN UNION TELEGRAPH COMPANY, *Plff. in Err.*,

v.

PENNSYLVANIA RAILROAD COMPANY.

(See S. C. Reporter's ed. 594-604.)

Eminent domain—rights of telegraph companies on railway rights of way—exercise of eminent domain by lessees.

1. Railways are not "highways" within the meaning of a provision in the charter of a telegraph company giving it the right to occupy with its telegraph lines any of the roads, highways, streets, and waters within the state.
2. The lessee of a telegraph company cannot, as such lessee, exercise the right of eminent domain possessed by its lessor.

[No. 90.]

Argued October 19, 20, 1904. Decided December 12, 1904.

IN ERROR to the United States Circuit Court of Appeals for the Third Circuit to review a judgment which affirmed an order of the Circuit Court for the Western District of Pennsylvania dismissing a petition by which the Western Union Telegraph Company sought to acquire by condemnation the use of certain railway rights of way for telegraph purposes. *Affirmed.*

See same case below, 59 C. C. A. 113, 123 Fed. 33.

The facts are stated in the opinion.

Messrs. H. D. Estabrook, Rush Taggart, and John F. Dillon argued the cause and filed a brief for the Western Union Telegraph Company:

Congress, under the power to regulate commerce among the several states, as well as to provide for postal accommodations and military exigencies, has power to pass any laws germane to these subjects.

Western U. Teleg. Co. v. James, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. Rep. 934; *Re Debs*, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900; *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23; *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465.

To trace historically the evolution of this doctrine, see 2 Story, Const. chap. 18; 1 Kent Com. pp. 267 *et seq.*, and the portion of Elliott's Debates therein referred to; also *United States v. Koehersperger*, 9 Am. Law Reg. 145, Fed. Cas. No. 15,541; and the various cases growing out of the abandonment of the Cumberland Road, particularly *Searight v. Stokes*, 3 How. 151, 11 L. ed. 537; *Neil v. Ohio*, 3 How. 720, 11 L. ed. 800; *Achison v. Huddleson*, 12 How. 293, 13 L. ed. 993.

The old doctrine that Federal sovereignty could only appropriate property within a state with the consent or acquiescence of the state was forever dissipated by the invincible logic of Judge Cooley in *People ex rel. Trombley v. Humphrey*, 23 Mich. 471, 9 Am. Rep. 94, followed by his masterly work on Constitutional Limitations, both cited with approval by Mr. Justice Strong, in *Kohl v. United States*, 91 U. S. 367, 23 L. ed. 449.

The constitutionality of the act of July 24, 1866, has never been questioned, except, perhaps, in dissenting opinions. It has uniformly been held that under this act telegraph companies accepting its provisions have the right to occupy with their lines of telegraph the streets of a city and the roads of a state, which by act of Congress have been established post roads of the United States.

Postal Teleg. Cable Co. v. Oregon Short Line R. Co. 114 Fed. 787; *Western U. Teleg. Co. v. Texas*, 105 U. S. 460, 26 L. ed. 1067; *Western U. Teleg. Co. v. Atty. Gen.* 125 U. S. 554, 31 L. ed. 794, 8 Sup. Ct. Rep. 961. See also *Western U. Teleg. Co. v. New York*, 3 L. R. A. 449, 2 Inters. Com. Rep. 533, 38 Fed. 552; *St. Louis v. Western U. Teleg. Co.* 148 U. S. 92, 37 L. ed. 380, 13 Sup. Ct. Rep. 485; *United States v. Union P. R. Co.* 160 U. S. 1, 40 L. ed. 319, 16 Sup. Ct. Rep. 190; *Postal Teleg. Cable Co. v. Oregon Short Line R. Co.* 23 Utah, 474, 90 Am. St. Rep. 705, 65 Pac. 735; *Hewett v. Western U. Teleg. Co.* 4 Mackey, 424.

The primary use of a highway is for the

purpose of travel, but the occupation of a highway by telegraph lines, if so maintained and operated as not to interfere with the primary use, is not only permissible, but, thus limited, has been held not to constitute an additional servitude.

Julia Bldg. Asso. v. Bell Teleph. Co. 88 Mo. 258, 57 Am. Rep. 398; *Cater v. Northwestern Teleph. Exch. Co.* 60 Minn. 539, 28 L. R. A. 310, 51 Am. St. Rep. 543, 63 N. W. 111; *Magee v. Overshiner*, 150 Ind. 127, 40 L. R. A. 370, 65 Am. St. Rep. 358, 49 N. E. 951; *People v. Eaton*, 100 Mich. 208, 24 L. R. A. 721, 59 N. W. 145; *Pierce v. Drew*, 136 Mass. 75, 49 Am. Rep. 7; *Hershfield v. Rocky Mountain Bell Teleph. Co.* 12 Mont. 103, 29 Pac. 883.

A railroad is a highway, not simply *sub modo*, but intrinsically and *per se*, in the same category precisely as roads, streets, alleys, turnpikes, plank roads, tramways, bridges, ferries, canals, and navigable rivers.

Oleott v. Fond du Lac County, 16 Wall. 678, 21 L. ed. 382; *Re Debs*, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900; *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622. See also *Cherokee Nation v. Southern Kansas R. Co.* 135 U. S. 641-657, 34 L. ed. 295-300, 10 Sup. Ct. Rep. 965; *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Trunick v. Smith*, 63 Pa. 18; *California v. Central P. R. Co.* 127 U. S. 1, 39, 32 L. ed. 150, 157, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; *Wiseonsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 296, 297, 45 L. ed. 194, 199, 200, 21 Sup. Ct. Rep. 115; *Chicago, B. & Q. R. Co. v. Otoe County*, 16 Wall. 667, 21 L. ed. 375; *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 696, 40 L. ed. 857, 16 Sup. Ct. Rep. 714; *Michigan Teleph. Co. v. Charlotte*, 93 Fed. 11.

Taxes may be imposed for its construction and maintenance.

Chicago, B. & Q. R. Co. v. Otoe County, 16 Wall. 667, 21 L. ed. 375; *Queensbury v. Culver*, 19 Wall. 91, 22 L. ed. 104; *People ex rel. McLean v. Flagg*, 46 N. Y. 401.

By the act of July 24, 1866, and correlated acts, Congress declared a policy and a purpose that, to encourage and facilitate intercommunication among the people, the companies operating the railroads and telegraphs of the United States should be mutually accommodating and co-operative, and should, so far as practicable, construct their lines of railroad and telegraph along the same rights of way.

Western U. Teleg. Co. v. Atty. Gen. 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961; *United States v. Union P. R. Co.* 160 U. S. 1, 41, 44, 49, 40 L. ed. 319, 333, 334, 336, 16

Sup. Ct. Rep. 190; *Western U. Teleg. Co. v. Texas*, 105 U. S. 460, 26 L. ed. 1067; *Postal Teleg. Cable Co. v. Oregon Short Line R. Co.* 114 Fed. 787; *Postal Teleg. Cable Co. v. Southern R. Co.* 89 Fed. 190; *Postal Teleg. Cable Co. v. Oregon Short Line R. Co.* 23 Utah, 474, 90 Am. St. Rep. 705, 65 Pac. 735; *Western U. Teleg. Co. v. Burlington & S. W. R. Co.* 3 McCrary, 130, 11 Fed. 1; *Western U. Teleg. Co. v. Baltimore & O. Teleg. Co.* 19 Fed. 660; *Southern Bell Teleph. & Teleg. Co. v. Richmond*, 78 Fed. 858.

The statutes of many states extend the right to occupy the highways of the state, including the highways called railroads, to telephone companies,—the Supreme Court of the United States having limited the application of the act of July 24, 1866, to telegraph companies proper.

New Orleans, M. & T. R. Co. v. Southern & A. Teleg. Co. 53 Ala. 211; *Union P. R. Co. v. Colorado Postal Teleg.-Cable Co.* 30 Colo. 133, 97 Am. St. Rep. 106, 69 Pac. 564; *Savannah, F. & W. R. Co. v. Postal Teleg.-Cable Co.* 112 Ga. 941, 38 S. E. 353; *Postal Teleg. Cable Co. v. Oregon Short Line R. Co.* 104 Fed. 623; *St. Louis & C. R. Co. v. Postal Teleg. Co.* 173 Ill. 508, 51 N. E. 382; *Postal Teleg. Cable Co. v. Mobile & O. R. Co.* 21 Ky. L. Rep. 1188, 54 S. W. 727; *Postal Teleg. Cable Co. v. Morgan's L. & T. R. & S. Co.* 49 La. Ann. 58, 21 So. 183; *Mobile & O. R. Co. v. Postal Teleg. Co.* 76 Miss. 731, 45 L. R. A. 223, 26 So. 370; *Phillips v. Postal Teleg. Cable Co.* 130 N. C. 513, 89 Am. St. Rep. 868, 41 S. E. 1022; *Mobile & O. R. Co. v. Postal Teleg. Cable Co.* 101 Tenn. 62, 41 L. R. A. 403, 46 S. W. 571; *Texas & N. O. R. Co. v. Postal Teleg. Cable Co.* (Tex. Civ. App.) 52 S. W. 108; *Postal Teleg. Cable Co. v. Farmville & P. R. Co.* 96 Va. 661, 32 S. E. 468; *Postal Teleg. Cable Co. v. Oregon Short Line R. Co.* 23 Utah, 474, 90 Am. St. Rep. 705, 65 Pac. 735.

Rather than that a statute should fail of its purpose or be nullified by the courts as unconstitutional, the courts will read into it the constitutional inhibition against the taking of private property without just compensation, and will provide the court machinery necessary to determine judicially the amount of just compensation to be paid therefor.

The courts will do this for the following reasons:

First. If the implication in favor of the intended exercise of the power is very strong,—for example, that the grant itself would be defeated if the company were not allowed to condemn,—the right to condemn may be exercised on the theory that an implied right has been granted.

10 Am. & Eng. Enc. Law, p. 1054.

Second. It is a cardinal rule that all stat-

utes are to be so construed as to sustain, rather than ignore or defeat them; to give them operation, if the language will permit, instead of treating them as meaningless; *ut res magis valeat, quam pereat*. Whenever an act can be so construed and applied as to avoid conflict with the Constitution and give it the force of law, this will be done.

Sutherland, Stat. Constr. § 332.

Third. When the use is granted, everything is granted by which the grantee may have and enjoy the use; or, as stated in Broom's Maxims: *Lex est cuicunque aliquis, quod concedit, concedere videtur et id sine quo res ipsa non potuit*.

Charles River Bridge v. Warren Bridge, 11 Pet. 630, 9 L. ed. 857.

Fourth. Whenever anything is authorized to be done by law, and it is found impossible to do that thing unless something else not authorized in express terms be also done, then that something else will be supplied by necessary intendment.

Fenton v. Hampton, 11 Moore, P. C. C. 360. See also Sutherland, Stat. Constr. §§ 295, 324, 332, 340, 341, 343, 344, 379, 382, 388.

Fifth. The constitutional inhibition against taking private property without just compensation, being negative, is self-executing and is to be read into every law and statute where applicable.

Re Rugheimer, 36 Fed. 369; *Hickman v. Kansas*, 41 Am. St. Rep. 684, and note, 120 Mo. 110, 23 L. R. A. 658, 25 S. W. 225; *Western U. Teleg. Co. v. Williams*, 86 Va. 696, 8 L. R. A. 429, 19 Am. St. Rep. 908, 11 S. E. 106; *Neal v. Delaware*, 103 U. S. 370, 26 L. ed. 567; *East St. Louis v. Amy* (*East St. Louis v. United States*) 120 U. S. 600, 30 L. ed. 798, 7 Sup. Ct. Rep. 739; *Kentucky Railroad Tax Cases* (*Cincinnati, N. O. & T. P. R. Co. v. Kentucky*) 115 U. S. 321, 334, 29 L. ed. 414, 417, 6 Sup. Ct. Rep. 57.

Sixth. Where a right is given by law or statute, and no special machinery is provided for the enforcement of the law, the courts will supply the machinery, either by adopting the machinery already in use, or the machinery in vogue at common law, which, in cases of condemnation, was the writ *ad quod damnum*. The writ of *ad quod damnum* simply means that the amount of compensation to be paid to an owner for the appropriation of his private property to a public use shall be determined by a full jury.

Kohl v. United States, 91 U. S. 367, 23 L. ed. 449; *United States v. Jones*, 109 U. S. 513, 27 L. ed. 1015, 3 Sup. Ct. Rep. 346; *High Bridge Lumber Co. v. United States*, 16 C. C. A. 460, 37 U. S. App. 234, 69 Fed. 320; *Dashiell v. Grosvenor*, 27 L. R. A. 67, 13 C. C. A. 593, 25 U. S. App. 227, 66 Fed.

338; *New York v. Pine*, 185 U. S. 93, 46 L. ed. 820, 22 Sup. Ct. Rep. 592; *D. M. Osborne & Co. v. Missouri P. R. Co.* 147 U. S. 248, 37 L. ed. 155, 13 Sup. Ct. Rep. 299; *McElroy v. Kansas City*, 21 Fed. 257; *United States v. Great Falls Mfg. Co.* 112 U. S. 645, 28 L. ed. 846, 5 Sup. Ct. Rep. 306.

As to the writ ad quod damnum, see —

2 Lewis, Em. Dom. § 402; *Scudder v. Trenton Delaware Falls Co.* 1 N. J. Eq. 694, 23 Am. Dec. 756; *Hooker v. New Haven & N. Co.* 14 Conn. 146, 36 Am. Dec. 477; *Jerome v. Ross*, 7 Johns. Ch. 315, 11 Am. Dec. 484; *Wheelock v. Young*, 4 Wend. 650; *Stevens v. Middlesex County*, 12 Mass. 466; *Bloodgood v. Mohawk & H. R. R. Co.* 18 Wend. 9, 31 Am. Dec. 313; *Beekman v. Saratoga & S. R. Co.* 3 Paige, 45, 22 Am. Dec. 679.

Whether a telegraph company that had accepted the conditions of the act of Congress of July 24, 1866, could appropriate private property was not in issue in either *Pensacola Teleg. Co. v. Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708; or *Western U. Teleg. Co. v. Ann Arbor R. Co.* 178 U. S. 239, 44 L. ed. 1052, 20 Sup. Ct. Rep. 867; and all that is said therein, as to the scope of the act, beyond the points directly in issue, is clearly *obiter*.

While the principal issue in this case has never been presented to the Supreme Court of the United States, lesser courts have several times passed upon it, and, with one exception, have construed the act of Congress of July 24, 1866, according to the principles contended for by the petitioner in error.

Postal Teleg. Cable Co. v. Oregon Short Line R. Co. 114 Fed. 787; *Postal Teleg. Cable Co. v. Southern R. Co.* 89 Fed. 190; *Postal Teleg. Cable Co. v. Oregon Short Line R. Co.* 23 Utah, 474, 90 Am. St. Rep. 705, 65 Pac. 735; *St. Paul, M. & M. R. Co. v. Western U. Teleg. Co.* 55 C. C. A. 263, 118 Fed. 497; *St. Louis v. Western U. Teleg. Co.* 148 U. S. 92, 37 L. ed. 380, 13 Sup. Ct. Rep. 485; *United States v. Union P. R. Co.* 160 U. S. 1, 41, 40 L. ed. 319, 333, 16 Sup. Ct. Rep. 190; *Southern Bell Teleph. & Teleg. Co. v. Richmond*, 78 Fed. 858; *Union Trust Co. v. Atchison, T. & S. F. R. Co.* 8 N. M. 327, 43 Pac. 701; *Mercantile Trust Co. v. Atlantic & P. R. Co.* 63 Fed. 513; *Western U. Teleg. Co. v. Los Angeles Electric Co.* 76 Fed. 178. Contra, *Postal Teleg. Cable Co. v. Cleveland C. C. & St. L. R. Co.* 94 Fed. 234.

Mr. John G. Johnson argued the cause and filed a brief for the railroad company.

For his contentions see his brief as reported in *Western U. Teleg. Co. v. Pennsylvania R. Co.*, ante, 312.

195 U. S.

Mr. Justice McKenna delivered the opinion of the court:

This is a petition on the law side of the circuit court for the western district of Pennsylvania to condemn part of the defendant's right of way and appropriate it to telegraph purposes. There was also a bill on the equity side praying for an injunction to restrain defendant in error from dispossessing *plaintiff in error during the[596] pending of the condemnation proceedings.

The circuit court refused to approve the bond tendered with the petition for condemnation, and ordered the petition dismissed. 120 Fed. 362. The circuit court of appeals affirmed that action. 59 C. C. A. 113, 123 Fed. 33.

The bill in equity, though not before us technically, has been freely referred to in argument, and, besides, many of the allegations of the petition are the same as those in the bill and appeal passed on in Nos. 89 and 199. The same rights are asserted under the act of July 24, 1866 (14 Stat. at L. 221, chap. 230), as there considered. The contention here, as there, is that the telegraph company has the right to maintain its lines of telegraph over and along the railroads of the railroad company upon making compensation to the railroad company for the use so appropriated, so long as the maintenance of its telegraph lines does not materially interfere with the ordinary travel of such roads, and that the right can be asserted by proceedings in eminent domain. It is conceded that there is no general law of Pennsylvania giving that right to the telegraph company. The contention that such right is given by the act of 1866 we considered in Nos. 89 and 199, and decided against the contention. But there are other elements in this case. The telegraph company is the lessee of the Atlantic & Ohio Telegraph Company (the lease is terminable at the option of either party by giving six months' notice), and claims eminent domain as successor of that company. The claim rests upon the statute of Pennsylvania incorporating the Atlantic & Ohio Telegraph Company. That statute was passed in 1849, and provided, in § 5, that it should be lawful for the company "to erect and construct works, edifices, fixtures, and structures along and across any of the roads, highways, streets, and waters within this state; the said works to be so placed as not to interfere with the common use of such roads, highways, streets, and waters." The company was authorized to enter into and occupy any land for the purposes of locating and *constructing its[597] lines, upon securing or tendering such compensation as might be agreed on between it and the owners of the land, or in the

manner mentioned in the statute. The circuit court and the circuit court of appeals rejected the claim of the telegraph company based on that act. The decision was rested on two grounds: (1) That railroads were not highways within the meaning of the statute; (2) as expressed in the opinion of the circuit court of appeals:

"No authority to enter upon the right of way of railroads was plainly and distinctly granted, and it is well settled that the right of eminent domain may be exercised by a corporation, in any case, only when granted in express terms or by necessary implication; and that property held and applied by one corporation for a public use cannot be appropriated by another for its use without authority clearly expressed, or which may be implied from the fact (which in this case does not exist) that the use claimed is absolutely necessary to the accomplishment of the purpose for which the claimant corporation was created. *Pennsylvania R. Co's Appeal*, 93 Pa. 150; *Pittsburgh Junction R. Co's Appeal*, 122 Pa. 511, 9 Am. St. Rep. 128, 6 Atl. 564; *Sharon R. Co.'s Appeal*, 122 Pa. 533, 9 Am. St. Rep. 133, 17 Atl. 234; *Groff's Appeal*, 128 Pa. 621, 5 L. R. A. 661, 18 Atl. 431; *Perry County R. Extension Co. v. Newport & S. Valley R. Co.* 150 Pa. 193, 24 Atl. 709; *Phillips v. Dunkirk, W. & P. R. Co.* 78 Pa. 177; *Glover v. Boston*, 14 Gray, 282."

(1) In the opinion in Nos. 89 and 199 we marked a distinction between highways and railroads, against a contention which identified them in legal meaning and effect. We need not enlarge upon what we there said. Highways and railroads may be assimilated in legal contemplation to a certain extent, and considerations which apply to one within that extent apply to the other. To apply them beyond that extent would be to confound the distinctions of common speech and practice, and destroy property rights long recognized to exist. And we do not deem it necessary to follow and answer in detail the very able arguments of counsel. It is enough to say that they have carried the analogies between [598] ordinary highways *and railroads too far; indeed, have gone beyond analogy, and have contended for almost legal coincidence in attributes and effect.

(2) But there is another rule applicable to grants of eminent domain, which is also fatal to the contention of the telegraph company of the rights claimed by the telegraph company under the lease from the Atlantic & Ohio Telegraph Company. Eminent domain cannot be delegated. Lessees cannot exercise it. 1 Lewis, Em. Dom. § 243, and cases cited. It is to meet this prohibition, probably, that certain allegations of

the petition are made. It is alleged that the Atlantic & Ohio Telegraph Company entered into a "contract to lease" with the telegraph company the 1st of April, 1864; that afterwards the former company made an agreement with the railroad company whereby the latter company granted to the said Atlantic & Ohio Telegraph Company permission to construct and maintain a line of telegraph wires "along and adjacent to the line of railroad" from Philadelphia to Pittsburg, "without limit as to term and duration," which contract was afterwards assigned to the telegraph company (plaintiff in error), and the assignment was ratified and affirmed by the act of the legislature of Pennsylvania, entitled "An Act Supplemental to an Act Entitled 'An Act to Incorporate the Atlantic & Ohio Telegraph Company, Approved March 24, 1849, and to Confirm Certain Agreements Executed by Said Company,'" approved May three, one thousand eight hundred and seventy-one, the same as if the said lease and contract had been made by virtue of express authority of law, the said act of assembly also providing that said Atlantic & Ohio Telegraph Company should have and possess all the rights, powers, and privileges conferred by the 3d and 4th sections of the act of the legislature of Pennsylvania to incorporate the Eastern Pennsylvania Telegraph Company, approved the 5th day of April, 1866.

This act, the petition alleged, gave to the telegraph company "all the corporate rights, powers, privileges, and franchises *of said [599] Atlantic & Ohio Telegraph Company, including the right to appropriate, on inability to agree with the owner, all lands necessary for the construction, maintenance, and operation of the said lines of telegraph from Philadelphia to Pittsburg, with any and all such branches therefrom as it may think proper."

The acts cited affirmed agreements or leases theretofore made. Subsequent agreements were provided for, if at all, by §§ 3 and 4 of the act incorporating the Eastern Telegraph Company, as follows:

"Sec. 3. That the said corporation shall have power to connect by contract with other persons or corporations having other telegraphic lines within or out of this state, for the purpose aforesaid; and it may also form a union with or lease to other corporations, associations, or individuals incorporated by this commonwealth or any other state, its own lines, with their fixtures and apparatus, or lease from any individuals, associations, or corporations incorporated by this commonwealth, or any other state, their lines, fixtures, and apparatus; and when such unions as afore-

said are formed the stock may form a common stock upon such terms and conditions as the said companies or associations respectively shall agree upon; and that as soon as such union shall be effected and a true copy of the agreement made for that purpose, duly certified under the corporate seal of the said companies, shall have been filed in the office of the secretary of the commonwealth, the stockholders of the said companies shall become one body, corporate and politic, under such name and style as they shall adopt and agree upon and embody in their certificate, with all the rights and privileges incident to a corporation and with all the rights, powers, and privileges which, by virtue of this act, are vested in the company hereby incorporated.

"Sec. 4. That the said corporation shall have power to purchase, make, use, and maintain any connecting or side lines."

[600] Under those sections the Atlantic & Ohio Telegraph Company* was authorized to lease its lines to the telegraph company. A lease had already been made, as we have seen. Those sections also authorized the companies to "form a union" and "become a body corporate and politic, under such name and style" as they should adopt. That was not done. The telegraph company, therefore, is the simple lessee of the Atlantic & Ohio Company, and has only the powers of a lessee, and as such cannot exercise the right of eminent domain conferred on the Atlantic & Ohio Company.

It is, however, further alleged that the telegraph company, by the power vested in it by the lease from the Atlantic & Ohio Company and the acts of the Pennsylvania legislature confirming the same, and "in the exercise of all and every other power enabling it in anywise to do so," duly located a single line of telegraph along and upon the right of way of the railroad company, and attempted to agree with the latter company upon the prices of compensation therefor; and "that the aforesaid corporate action of the Western Union Telegraph Company has been duly ratified and approved by corporate action in that behalf by the said Atlantic & Ohio Telegraph Company."

It will be observed that the location, so called, was made by the telegraph company and in its own name. It was not made by the Atlantic & Ohio Company and in its name. And the Atlantic & Ohio Company is not a party to this action. The action was commenced and is prosecuted by the telegraph company alone. The prayer is that, upon the payment of the compensation which shall be directed to be paid for the "rights and interests acquired thereby (that is, by the statutes and proceedings set out

in the petition) by the said Western Union Telegraph Company, possession be adjudged to the Western Union Telegraph Company by this court of the said use, right, and interests according to law, and that the title to the said rights and interests, as against the defendant, thereby vest in the said Western Union Telegraph Company for the purposes aforesaid; . . ."

*If it can be said that under the allegations of the petition the Atlantic & Ohio Company retains its rights as the lessor of the telegraph company, still as to such rights it is a necessary party. To have made it a party might have precluded jurisdiction in the circuit court.

But the telegraph company contends for eminent domain in its own right as lessee of the Atlantic & Ohio Telegraph Company, and in its own name, and combats the view that it cannot receive a delegation of that power. The following cases are relied on: *California C. R. Co. v. Hooper*, 76 Cal. 404, 18 Pac. 599; *Crolley v. Minneapolis & St. L. R. Co.* 30 Minn. 541, 16 N. W. 422; *Chicago & W. I. R. Co. v. Illinois C. R. Co.* 113 Ill. 156; *Kip v. New York & H. R. Co.* 6 Hun, 24, 67 N. Y. 227; *Abbott v. New York & N. E. R. Co.* 145 Mass. 450, 15 N. E. 91.

These cases do not sustain the contention. In the case in 76 Cal. a corporation commenced proceedings in eminent domain. It afterwards consolidated with other corporations. The new corporation thus created was held to be entitled to continue the proceedings in its own name and for its benefit, because it had acquired that right in the manner provided by the statutes of the state.

In 30 Minn. a railroad corporation condemned, paid for, and took certain land for its right of way. Without constructing its road, it transferred the right of way to another railroad corporation. The owner of the land taken brought ejectment for it, alleging the invalidity of the transfer. It was held that his interests were not affected by the transfer, and he could not question the capacity of the first company to make, nor the second company to receive, the transfer.

In 113 Ill. the facts are somewhat complicated, but the point decided relevant to our present discussion is that it mattered not that the necessity for an increase of a right of way of a railroad company for additional tracks was caused by the use of the road by other companies acting under lease or by contract, nor by what company or companies the road was operated. It was still a public use, and (to quote the court) "the needs of the lessees are as those of the lessor company, and any con-

demnation for their wants may proceed in such latter company's name, and it all the while stands responsible for the running of the road." *Kip v. New York & H. R. Co.* 6 Hun, 24, and 67 N. Y. 227, were cited.

If this case supports one contention of the telegraph company, it destroys another. It establishes that, if the right of eminent domain is given to the telegraph company by the lease from the Atlantic & Ohio Telegraph Company, that right can only be exercised in the name of the latter company. And such is also the effect of the cited cases, or, rather, the cited case, for it is only one case appearing at different stages in the reports. The plaintiff in the case, who was appellant in the court of appeals (67 N. Y. 227), brought suit against the defendant company to restrain it from prosecuting proceedings to condemn certain lands owned by him in the city of New York. He had leased them to the company for twenty-one years, and his contention was that the condemnation proceedings would impair the obligation of the lease and should be enjoined.

The plaintiff alleged also a lease by the defendant of its road and property to the New York Central & Hudson River Railroad Company for 401 years, and claimed that the lease abrogated the proceedings to condemn the land, and terminated and removed all necessity for its acquisition for the use of the defendant. It was held (1) that the relation created by the lease was no impediment to the exercise of eminent domain conferred upon the company by the statute of the state; and (2) that the proceedings to condemn were not affected by the lease. The court observed that the same necessity existed in favor of the defendant after as before the lease, and if the necessity was only in favor of the lessee it was competent for "the lessee to continue the proceedings in the name of the defendant." (Italics ours.)

[603] *In *Abbott v. New York & N. E. R. Co.* the questions involved were whether the power to take land by eminent domain may be given to a foreign corporation, and whether a corporation by the consent of the legislature may take the power as a quasi successor of another corporation to which it was originally granted. Under the statutes of the state those questions were answered in the affirmative, and it was in regard to those questions and statutes that Chief Justice Holmes, now a justice of this court, said that the reasons which have led some courts and judges to doubt the necessity of the consent of the legislature to a transfer of the right of eminent domain from one corporation to another "show that the *delectus personarum* is of little more

than theoretical importance, and is the least determining element in the more common cases where the power is conferred." The case is not like that at bar, and need not be further analyzed.

A case more applicable to the case at bar is *Worcester v. Norwich & W. R. Co.* 109 Mass. 103. In that case the railroad company was required to unite with others in establishing a passenger station. Resisting the proceedings which were brought to appoint commissioners to select a location, it was urged that it might become necessary to exercise the right of eminent domain, and against that the railroad pleaded a lease to the Boston, Hartford, & Erie Railroad Company, which had been confirmed by the legislature. There were other transfers of interests, and of them and the lease the court said: "Yet none of these leases or assignments can be construed to extend to the lessees or assignees the power to exercise the right of eminent domain, or to restrict the right of the legislature to alter or repeal the charters." And again: "The lease by the Norwich & Worcester Railroad Company did not make the lessees, or their representatives, parties to the grant of power to exercise the right of eminent domain. That right remained in the original corporation, and the legislature might properly deal with it exclusively in amending their (its) charter."

Judgment affirmed.

*Mr. Justice Harlan dissenting:

[604]

The judgment of the circuit court in this case rests mainly upon the same grounds as the judgment in cases Nos. 89 and 199. For the reasons stated in my opinion in those cases, I dissent from the opinion and judgment in this case.

Ex parte THE REPUBLIC OF COLOMBIA,
Petitioner.

(See S. C. Reporter's ed. 604-606.)

Appeal—construction of decree of appellate court—allowance of interest—arbitration.

1. The proper construction of a decree of the Federal Supreme Court "reversing" a decree of a circuit court which had confirmed in part an award in arbitration proceedings, and had ordered interest to be paid on the remainder from the date fixed by the award for payment, and remanding the cause with directions to confirm the award for and up to a lesser and specified sum, does not prohibit the circuit court, in entering its decree pursuant to this decision, from allowing interest on that sum from the date so fixed, where, in the opinion of the Supreme Court, the items of the award were treated as sep-

arate matters, some of which, it was said, might be disallowed without affecting the rest.

2. A Federal circuit court whose action was invoked by the Republic of Colombia to set aside an award made against it in arbitration proceedings has the same power to decree the payment of interest from the date fixed for payment by the award as in an ordinary case.

[No. 13, Original.]

Argued November 28, 1904. Decided December 12, 1904.

PETITION for a writ of mandamus to the Circuit Court of the United States for the Northern District of West Virginia, to compel it to correct a decree entered in pursuance of a decision of the Supreme Court of the United States, on an appeal from the Circuit Court. *Denied.*

The facts are stated in the opinion.

Mr. William G. Johnson argued the cause and filed a brief for petitioner.

Mr. John W. Beaumont argued the cause, and, with *Messrs. J. Walter Lord* and *Hugh L. Bond*, filed a brief for respondent.

It is well established that the word "reversed," when used in a decree, must be considered in connection with the accompanying opinion. Both must be considered by the lower court in connection, also, with the original decree of the lower court. Although the word "reversed" may be used, yet the decree of the lower court will be modified only in accordance with the decree and opinion of the higher court. And whenever a part of the decree of the lower court can possibly stand together with the decree of the higher court, it not only ought to stand, but must stand.

Gaines v. Rugg (*Gaines v. Caldwell*) 148 U. S. 228, 37 L. ed. 432, 13 Sup. Ct. Rep. 611; *Latta v. Granger*, 167 U. S. 81, 42 L. ed. 85, 17 Sup. Ct. Rep. 746; *Kneeland v. American Loan & T. Co.* 138 U. S. 509, 34 L. ed. 1052, 11 Sup. Ct. Rep. 426.

It is true that there is a uniform line of decisions in this court, which hold that where the Supreme Court has simply affirmed the decree of the lower court, and where neither the original decree nor the decree of affirmance makes any provision for interest, then in executing the mandate of this court the lower court cannot properly, for the first time, include interest in its final decree. The cases most frequently cited to sustain this contention are the following:

Himely v. Rose, 5 Cranch, 313, 3 L. ed. 111; *The Santa Maria*, 10 Wheat. 431, 442, 6 L. ed. 359, 361; *Boycce v. Grundy*, 9 Pet. 275-289, 9 L. ed. 127-132; *Mitchell v. Harmony*, 13 How. 115, 14 L. ed. 75; *Perkins v.* 195 U. S.

Fourniquet, 14 How. 328, 14 L. ed. 441; *Re Washington & G. R. Co.* 140 U. S. 91, 35 L. ed. 339, 11 Sup. Ct. Rep. 673.

An examination of these cases clearly indicates that they are all distinguishable from the case at bar in the following important particulars:

1. They are all cases in which the judgment or decree of the lower court was affirmed in its entirety.

2. They are all cases in which there was absolutely no provision for interest in the original judgment or decree.

On the other hand, there are several well-considered cases where the original decree by the lower court was reversed, or reversed in part and affirmed in part, the appellate court saying nothing as to interest, and where a subsequent allowance of interest by the lower court was thereafter sustained by the appellate court.

Kneeland v. American Loan & T. Co. 138 U. S. 509, 34 L. ed. 1052, 11 Sup. Ct. Rep. 426; *Metcalf v. Watertown*, 16 C. C. A. 37, 34 U. S. App. 107, 68 Fed. 859; *The Grapeshot*, 2 Woods, 42, Fed. Cas. No. 5,703; *Wilson's Appeal* (Pa.) 10 Cent. Rep. 303, 11 Atl. 678.

In the revision of a separable award, it seems to be well established that the objectionable part is rejected as mere surplusage.

1 Am. & Eng. Enc. Law, p. 710.

Moreover, suit may be maintained in assumpsit upon the award, to recover the valid separable items, even though the award is for an aggregate sum. Or if such suit were for the aggregate sum, the court would disallow the bad and render judgment for the balance.

Morse, *Arbitration*, p. 484; *Dalrymple v. Whittingham*, 26 Vt. 345.

So, in a New York case, where a part of the award was valid and a part bad for uncertainty, the court holds that so much of the award as directs security to be given is undoubtedly void, and it leaves the award as though that part had been omitted and it had been a simple award to pay the money. The giving of the security is not the consideration for anything to be done by the plaintiff. It may, therefore, be rejected without impairing the residue of the award.

Stanley v. Chappell, 8 Cow. 235.

Mr. Justice Holmes delivered the opinion of the court:

This is a petition for a writ of mandamus to the circuit court, ordering it to correct its decree entered in pursuance of the decision in *Colombia v. Cauca Co.* 190 U. S. 524, 47 L. ed. 1159, 23 Sup. Ct. Rep. 704. *The decree appealed from in that case confirmed an award against the Republic of Colombia after rejecting certain items, and ordered

interest to be paid on the remainder from January 26, 1898, the date fixed for payment by the award. In this court other items of the award were disallowed, and a decree was made reversing the decree below, and remanding the case "with directions to enter a decree confirming the award for and up to the sum of \$193,204.02." The circuit court thereupon entered a decree for that sum, with interest from the above-mentioned date. The giving of interest is the error alleged; and it is contended that, by the proper construction of the decree of this court, interest should not have been allowed.

Of course, the only question open in this proceeding is whether the decree of this court prohibits the allowance of interest. *Re Sanford Fork & Tool Co.* 160 U. S. 247, 40 L. ed. 414, 16 Sup. Ct. Rep. 291. As to that it is to be noticed that nothing is said upon the subject, either in the decree or in the discussion of the case. In the opinion, however, the items were treated as separate matters, "some of which," it was said, "may be disallowed without affecting the rest." The only ground suggested for reversal was the inclusion of the separable items. By confirming the award as to the others, this court, in effect, declared that they should have been paid in gold coin of the United States of America, in the city of New York, on January 26, 1898, in accordance with the terms of the award. To that extent the decree below stood approved; and as no disapproval was expressed of the consequence attached by that decree to the failure to pay, it is impossible to say that there was any implied prohibition of again attaching the same consequence in the new decree. "The mandate and the opinion, taken together, although they used the word 'reversed,' amount to a reversal only in respect of the accounting, and to a modification of the decree in respect of the accounting, and to an affirmance of it in all other respects." *Gaines v. Rugg*, 148 U. S. 228, 238, 37 L. ed. 432, 434, 13 Sup. Ct. Rep. 611, 615. This language is sufficiently applicable to be *in-

[606]structive, although not absolutely in point. See also *Kneeland v. American Loan & T. Co.* 138 U. S. 509, 34 L. ed. 1052, 11 Sup. Ct. Rep. 426.

It may not be improper to add that when the Republic of Colombia made its voluntary submission to arbitration, it agreed that, if the award was against it, in excess of a sum paid in advance, the government should "pay the excess at such time, in such manner, and on such terms as may be determined by the commission." Art. 10. See art. 9. This language authorized the allowance of interest; and the first draft of the award gave interest at 6 per cent in case of failure to pay at the time fixed, allowing, on

the other hand, a discount of 5 per cent for cash. Both of these provisions were omitted from the final award, which stopped with fixing the time. But when the Republic submitted itself to the courts, it must be taken to have done so on the same terms as other litigants, so far as fixing the amount which it was to pay was concerned; that being the matter on which the action of the courts was invoked, it seems to us that it was competent for the circuit court to decree the payment of interest as in an ordinary case.

Rule discharged. Petition denied.

SPENCER S. BULLIS, *Plff. in Err.*,
v.

JAMES R. O'BEIRNE, on Behalf of Himself and All Other Bondholders of the Allegheny & Kinzua Railroad Company, and the Central Trust Company of New York.

(See S. C. Reporter's ed. 606-621.)

Bankruptcy — discharge — judgments in actions for fraud.

A judgment of a state court is rendered in "an action for fraud" so as to be exempted by the bankruptcy act of July 1, 1898 (30 Stat. at L. 550, chap. 541, U. S. Comp. Stat. 1901, p. 3428), § 17, subd. 2, from the operation of a discharge in bankruptcy, where such judgment, whatever may be the form of the action, was based upon actual, as distinguished from constructive, fraud of the bankrupt.

[No. 60.]

Argued November 10, 11, 1904. Decided December 12, 1904.

IN ERROR to the Supreme Court of the State of New York to review a judgment of that court, entered pursuant to a judgment of the Court of Appeals of that State, affirming the judgment of the Appellate Division of the Supreme Court, Fourth Department, which had, in turn, affirmed a judgment of the Supreme Court, entered at a special term held in and for the County of Erie, denying an application to cancel certain judgments as having been released by a discharge in bankruptcy. *Affirmed.*

See same case below in Court of Appeals, 171 N. Y. 689, 64 N. E. 1119; and in Appellate Division, 68 App. Div. 508, 73 N. Y. Supp. 1047.

Statement by Mr. Justice **Day**:

The plaintiff in error, Spencer S. Bullis, having been discharged in bankruptcy on September 19, 1899, which discharge covered provable debts existing on November 14, 1898, made application under the New York

Code, § 1268, for the cancelation and discharge of certain judgments rendered against him in the supreme court of New York. The defendants in error, judgment creditors of said Bullis, opposed the granting of the order upon the ground that the judgments against Bullis were in an action for fraud, and therefore not discharged under the terms of the bankrupt law. The supreme court of New York denied the application. Upon appeal to the appellate division, fourth department, this judgment was affirmed. 68 App. Div. 508, 73 N. Y. Supp. 1047. Bullis then appealed to the court of appeals of New York, which affirmed the judgment of the court below without opinion. 171 N. Y. 689, 64 N. E. 1119.

The facts necessary to be noticed in this case are in substance: James R. O'Beirne, in behalf of himself and other bondholders, filed a complaint, setting forth, among other things, that, on September 8, 1899, Bullis and one Barse owned the capital stock of three railroads,—two organized under the laws of Pennsylvania and one under the laws of the state of New York,—which railroads were constructed for the purpose of reaching timber on large tracts of land. At that time the length of the railroads was about 16 miles, but an extension of the lines was contemplated so as to cover about 30 miles. Certain agreements are alleged between said Bullis and Barse and a firm of bankers,—Newcombe & Company, of New York,—by the terms of which Bullis and Barse were to execute a mortgage to the Central Trust Company of New York, to secure \$250,000 of first-mortgage bonds, running thirty years, which mortgage was to cover the railroad properties and 30,000 [608] acres of timber lands in McKean *county, Pennsylvania. The property was to be under the management of a new corporation, to be organized with a capital stock of \$250,000. Various agreements were made as to the organization and management of said corporation. Another agreement was entered into between the parties, providing for the merger and consolidation of the railroads into a new company, with a capital stock of \$500,000, and for a mortgage to the Central Trust Company, as trustee, to secure \$500,000 of first-mortgage bonds. The railroad lines were to be extended to 70 miles, and 16,000 acres of timber lands to be included, making 46,000 acres to be owned by the new company. \$300,000 of the bonds were to be put upon the market, to represent 46 miles of the railroad. Newcombe & Company were to dispose at par of \$260,000 of these bonds, in accordance with the terms of the agreement. Bullis and Barse were to enter into an agreement

for consolidating the said railroads into one system, by agreement with the International Interior Construction & Improvement Company. On September 10, 1899, the construction company made a contract with the Allegheny & Kinzua Railroad Company, owned by Bullis and Barse, and one with Bullis and Barse, providing for the construction and consolidation of the railroads and for the distribution of the proceeds of the bonds, a considerable portion of which were to be given to Bullis and Barse.

The complaint specifically charges: That Bullis and Barse falsely and fraudulently pretended and represented to the said firm of I. B. Newcombe & Company that said tract of 30,000 acres to be conveyed was free and clear from all encumbrances; that all of said land was contiguous or adjacent to the line of said railroad as the same was then constructed or surveyed or projected, and the said land was covered by a large quantity of merchantable timber, capable of yielding and producing 70 tons of freight in timber, lumber, and bark for each acre of land, for transportation over said railroad. It is further alleged that, in fulfillment of said agreements, the *defendant rail- [609] road corporation, on the 1st day of February, 1890, executed its first mortgage deed of trust to said trust company, conveying to it said railroad properties and franchises, and providing for an issue of bonds limited to \$500,000, to be secured by said properties and the 46,000 acres of timber to be conveyed by said Bullis and Barse to said trustee. That the defendants Bullis and Barse caused the said Bullis and Sarah E., his wife, to join with said railroad company in said mortgage, and that by said mortgage they assumed to convey to said trustee land contiguous to the line of said railroad, and free from encumbrances, and covered by a quantity of merchantable timber, aggregating 30,954.10 acres, and which, by the terms of said agreements, was to be a condition precedent to the issue of \$300,000 of said bonds, to be used in building and completion of said 46 miles of said railroad; that, in reliance upon the conveyance of said lands, bonds to the amount of \$300,000 were issued and were sold by Newcombe & Company, ten of which were purchased by the plaintiff in the action; that all the proceeds of the said bonds have been used in the construction of said lines and in the payment of prior liens upon the property and the constituent lines, and that the defendant railroad company, which is the consolidated company, is wholly without funds, and that the extension thereof is essential to enable it to obtain money to meet its liabilities; that said Bullis and Barse refused to convey to said trustees the remaining 16,000

acres of such land and to provide for the building of the balance of said railroad, whereby the construction company is unable to proceed with its work of completing the same.

[610] The complaint further alleges that said 30,954.10 acres of land, conveyed by Bullis and his wife, were not free from encumbrances; that the same at the time were subject to prior liens aggregating \$159,000, besides interest; that \$144,776.07 of said indebtedness still remain unsatisfied; that said land was not covered with merchantable timber, but was waste land, from which the salable timber had been removed, *and that a large portion of said land was not adjacent to the line of said railroad, and the timber thereon not accessible to be transported thereon; that a large portion of the land so assumed to be conveyed was not owned by either of the said defendants, and was not conveyed at all by said deed. All of which facts the said Bullis and Barse well knew at the time they made said pretended conveyance, and said conveyance is in reality false and fraudulent; that by reason of the fraud and failure of said Bullis and Barse to convey said land free of liens a great fraud has been committed by them which will cause irreparable injury to the bondholders, including the plaintiff, unless the performance of the said agreements and the conveyance of 30,000 acres of unencumbered timber land to said trustee are specifically decreed.

The prayer of the complaint is—

“Wherefore, plaintiff demands judgment that immediate specific performance by the said defendants Bullis and Barse and said defendant railroad company of their said agreements to convey unto the trustee of said defendant railroad company’s mortgage, and place under the lien of said instrument, 30,000 acres of timber land contiguous or tributary to the line of railroad of said railroad company, as in said agreements stated, free of all encumbrance of whatsoever nature prior to the said mortgage above mentioned; or that said defendants pay to said trustee, for the security of said bondholders, such a sum of money as the court shall ascertain to be equivalent to the value of said lands and real estate, conveyed as aforesaid, which are not in conformity with the terms of said several agreements, and said bonds, and the mortgage, or deed of trust, securing the same; and in addition thereto 16,000 acres of like timber land, in all respects similarly situated, and free from encumbrance, as security to authorize the issue of \$200,000 of bonds in said agreements specified, and set apart for the construction of the 24

miles of railroad of said company additional to the 46 miles above mentioned.”

*And for injunction and general relief. [611]

The case was tried at special term of the New York supreme court. That court dismissed the complaint, holding that, as Bullis and Barse did not own the lands, specific performance could not be decreed, and the case could not be held for the assessment of damages. This judgment was reversed by the general term. 80 Hun, 570, 30 N. Y. Supp. 588. Upon appeal taken by the Allegheny & Kinzua Railroad Company, one of the defendants, this judgment in general term was affirmed by the court of appeals of New York. 151 N. Y. 372, 45 N. E. 873. Bullis and Barse, after the reversal at general term, went to trial at special term, and, upon the allegations of fraud, findings were made, among others: That Bullis and Barse pretended and represented to the said firm of Newcombe & Company that the 30,000 acres of land were timbered, free and clear of all encumbrances, and contiguous and adjacent to the line of the defendant railroad company, as the same was then constructed and projected, and that said land was covered by a large quantity of merchantable timber, which would actually provide said railroad company with at least 70 tons to the acre, for conveyance over said railroad at rates from 25 to 50 cents per ton, in addition to the percentage accruing to said defendant railroad company from divisions of other lines. That said agreements were entered into at the request of Bullis and Barse; that engineers were sent from New York to inspect the timber on the land to be conveyed; they were escorted through certain timber lands by said Bullis, and these lands were heavily timbered, and said Bullis stated that said lands were to be placed under the mortgage to the trustee, and a report in accordance with this statement was made by the engineers, and upon this report said Newcombe & Company embarked in the enterprise, and entered into said scheme of consolidation and extension. That the lands so defined and pointed out were worth from \$18 to \$20 an acre. That Bullis and Barse had stated to Newcombe & Company that the mortgage was to be a first lien, the lands to be well timbered, *and contiguous and tributary to said line of railroad; that said trust mortgage was approved and accepted in the belief that said representations were true in fact, and that Bullis and Barse were, in good faith, performing their said covenants. [612]

The court further found that the plaintiff was, in fact, deceived by said statements and representations; that said statements and representations were false; that

said agreement was, in fact, fraudulently made with respect to the lands agreed to be conveyed by Bullis and Barse; that a great part of the lands included in the deed was not the property of Bullis, and the value of that owned by him, and not timbered, was \$13,350, while that apparently covered by the deed, but not owned by him, was worth \$175,502.77, and a considerable part of that included in the conveyance was encumbered; that the statements of Bullis and Barse with respect to said timber lands were false and fraudulent, and made with intent to deceive.

As a conclusion of law, the court decided that it had jurisdiction to proceed in the cause by reason of the fraud practised by the defendants Bullis and Barse in the premises, and because of the fact that the plaintiff had been deceived by the fraudulent statements and misrepresentations of the defendants. This decision was affirmed. *O'Beirne v. Bullis*, 2 App. Div. 545, 38 N. Y. Supp. 4. Upon appeal to the court of appeals of New York this judgment was affirmed. 158 N. Y. 466, 53 N. E. 211.

It appearing that Bullis and Barse were unable to specifically perform the original agreement, but that they were liable for false representations, judgment was rendered against them in favor of the Central Trust Company, representing the bondholders, in the sum of \$341,745.65, and for the plaintiff in the sum of \$3,586.40.

Mr. Adelbert Moot argued the cause, and, with **Mr. Charles S. Cary**, filed a brief for plaintiff in error:

In the litigation resulting in the judgment the New York courts clearly apprehended and stated, in substance, that the case was one brought for the specific performance of contracts.

Wiechers v. Central Trust Co. 80 Hun, 576, 30 N. Y. Supp. 595; *O'Beirne v. Allegheny & K. R. Co.* 151 N. Y. 383, 45 N. E. 873, 2 App. Div. 548, 38 N. Y. Supp. 4, 158 N. Y. 469, 53 N. E. 211.

It would be extraordinary if the successful counsel on those appeals could now step into the shoes of defeated counsel, and get the courts to face about and now determine that the action was always an action for fraud or misappropriation of money, wherein a jury trial is a matter of right, no matter how many equitable causes of action are added to it in the complaint.

Davis v. Morris, 36 N. Y. 569; *Davison v. Jersey Co.* 71 N. Y. 333; *Wheelock v. Lee*, 74 N. Y. 495.

This case is within the decision in *Burnham v. Pidcock*, 58 App. Div. 273, 68 N. Y. Supp. 1007. See also *Hargadine-McKittrick* 195 U. S.

Dry Goods Co. v. Hudson, 111 Fed. 361, 58 C. C. A. 596, 122 Fed. 232; *Re Rhutassel*, 96 Fed. 597; *Collins v. McWalters*, 35 Misc. 650, 72 N. Y. Supp. 203.

The New York courts erred in overlooking the broad distinction between actions *ex delicto* and actions *ex contractu*.

Ryxbie v. Wood, 24 N. Y. 607; *Ledwich v. McKim*, 53 N. Y. 307; *Scgelken v. Meyer*, 94 N. Y. 473; *Brackett v. Griswold*, 112 N. Y. 454, 20 N. E. 376; *Lorillard v. Clyde*, 99 N. Y. 196, 1 N. E. 614; *Gould v. Cayuga County Nat. Bank*, 86 N. Y. 75.

Having elected to bring an action in equity for equitable relief,—in other words, an action *ex contractu*,—instead of an action at law for damages and for fraud,—in other words, an action *ex delicto*,—the election so made fixes the character of the action brought by plaintiff, and amounts to a waiver of any claim to a judgment for fraud.

Madge v. Puig, 71 N. Y. 608; *Nefitel v. Lightstone*, 77 N. Y. 96; *Goodwin v. Griffiths*, 88 N. Y. 638; *Rothschild v. Mack*, 115 N. Y. 1, 21 N. E. 726; *People v. Wood*, 121 N. Y. 522, 24 N. E. 952; *Terry v. Munger*, 121 N. Y. 161, 8 L. R. A. 216, 18 Am. St. Rep. 803, 24 N. E. 272; *Missouri Sav. & Loan Co. v. Rice*, 28 C. C. A. 305, 55 U. S. App. 205, 84 Fed. 131; *Slaughter v. La Compagnie Francaises Des Cables Telegraphiques*, 57 C. C. A. 19, 119 Fed. 588.

Fraud in the subsequent transactions of the parties does not vitiate an innocent contract.

Chesterman v. Gardner, 5 Johns. Ch. 29, 9 Am. Dec. 265; *Oatley v. Lewin*, 47 Barb. 18.

Representations as to future events cannot be a constituent of fraud in fact.

Francis v. New York Elev. R. Co. 17 Abb. N. C. 1; *Sparman v. Keim*, 83 N. Y. 245.

If the contract is fair and honest when made, although the debtor subsequently may be guilty of fraudulent conduct in respect of it, yet such conduct does not cut off the benefit of the discharge.

Brown v. Broach, 52 Miss. 536.

This case is controlled in principle by *Stitt v. Little*, 63 N. Y. 427.

Recent cases observe the distinction between actions *ex contractu* and *ex delicto*. Breach of promise, with seduction added, does not result in a judgment that cannot be discharged, because the basis of the action is the breach of the contract to marry.

Disler v. McCauley, 66 App. Div. 42, 73 N. Y. Supp. 270.

But an action for criminal conversation, or for seduction alone, will result in a judgment that is not discharged by bankruptcy.

Colwell v. Tinker, 169 N. Y. 531, 58 L.

R. A. 765, 98 Am. St. Rep. 587, 62 N. E. 668.

The parties opposing the discharge of Bullis elected to waive the alleged fraud and bring an action in equity for the performance of the contracts. They thus rested their action on contract. Without the contracts they had no cause of action. With the contracts out, they were under no obligation to put up land, or money in the place of land. With the contracts in, the real question was, Had they been fully performed? The nonperformance in part gave rise to the right to enforce the part not performed. The judgment is, Perform the contracts so far as they are not performed.

Kauffman v. Raeder, 54 L. R. A. 247, 47 C. C. A. 278, 108 Fed. 171.

Even if there were fraud, bringing an action in equity on contract, express or implied, for equitable relief, waives the fraud and results in a simple action on contract.

Rothschild v. Mack, 115 N. Y. 1, 21 N. E. 726.

Mr. **Frank Sullivan Smith** argued the cause, and, with Mr. *Adrian H. Joline*, filed a brief for defendant in error:

"Fraud," in the act of Congress defining the debts from which a bankrupt is not relieved by a discharge in bankruptcy, means positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, as does embezzlement, and not implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality.

Neal v. Clark (*Neal v. Seruggs*) 95 U. S. 704, 709, 24 L. ed. 586, 587; *Wolf v. Stix*, 99 U. S. 1, 7, 25 L. ed. 309, 312; *Hennequin v. Clews*, 111 U. S. 676, 682, 28 L. ed. 565, 568, 4 Sup. Ct. Rep. 576; *Strang v. Bradner*, 114 U. S. 555, 559, 29 L. ed. 249, 5 Sup. Ct. Rep. 1038; *Noble v. Hammond*, 129 U. S. 65, 67, 32 L. ed. 621, 622, 9 Sup. Ct. Rep. 235; *Upshur v. Briscoe*, 138 U. S. 365, 34 L. ed. 931, 11 Sup. Ct. Rep. 313. See also *Brandenburg*, Bankr. § 434; *Collier*, Bankr. 3d ed. 681.

Applying the test which this court has established through the opinion of Mr. Justice Bradley, in *Hennequin v. Clews*, 111 U. S. 681, 28 L. ed. 567, 4 Sup. Ct. Rep. 576, to the fraud of the plaintiff in error, the facts meet every requirement of that test, and are convincing that the fraud referred to means positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, and not implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality.

Forsyth v. Vehmeyer, 177 U. S. 177, 44 L. ed. 723, 20 Sup. Ct. Rep. 623.

If this court will not rest upon the findings of the state courts as to the existence and nature of the fraud for which the judg-

ment against the plaintiff in error was obtained, it will determine the same by the record upon which the judgment is based.

Brandenburg, Bankr. § 432; *Collier*, Bankr. p. 197.

A debt created by fraud is not discharged in bankruptcy, even though reduced to a simple judgment for money, in which there is no mention of fraud. If the original action was based upon fraud, the fraud is not merged in the judgment.

Warner v. Cronkhite, 6 Biss. 453, 13 Nat. Bankr. Reg. 52, Fed. Cas. No. 17,180.

Wherever the debt, no matter whether it be in the shape of a judgment or in any other form, was created by fraud, had its root and origin in fraud, it is not to be discharged.

Re Patterson, 2 Ben. 155, 1 Nat. Bankr. Reg. 307, Fed. Cas. No. 10,817.

There is no distinction between a fraud proved in a court of law, and a fraud proved in equity.

Re Alsberg, 16 Nat. Bankr. Reg. 116, Fed. Cas. No. 261.

If the bankrupt is not entitled to be protected from arrest on an execution upon the judgment, he is not entitled to a discharge in bankruptcy.

Re Marcus, 45 C. C. A. 115, 105 Fed. 907.

The debt was created by means of, and the judgment was obtained for, a fraud involving moral turpitude and intentional wrong, and the plaintiff in error is not entitled to a discharge from the judgment.

Ames v. Moir, 138 U. S. 306, 34 L. ed. 951, 11 Sup. Ct. Rep. 311; *Forsyth v. Vehmeyer*, 177 U. S. 177, 44 L. ed. 723, 20 Sup. Ct. Rep. 623; *Hoyt v. Godfrey*, 88 N. Y. 669; *Pacific Mut. Ins. Co. v. Machado*, 16 Abb. Pr. 451; *People ex rel. Caldwell v. Kelly*, 35 Barb. 444; *Brandenburg*, Bankr. § 434; *Re Levensohn*, 99 Fed. 73; *Brackett v. Griswold*, 112 N. Y. 454, 20 N. E. 376.

Judgments in actions for fraud, or obtaining property by false pretenses or false representations, are excepted from the operation of a discharge; and the cause of action does not become merged in a judgment thereon, so as to preclude the plaintiff from showing that the original debt was created in fraud.

Brandenburg, Bankr. 2d ed. p. 275; *Packer v. Whittier*, 33 C. C. 658, 63 U. S. App. 37, 91 Fed. 511; *Re Pettis*, 2 Nat. Bankr. Reg. 44, Fed. Cas. No. 11,046; *Warner v. Cronkhite*, 6 Biss. 453, Fed. Cas. No. 17,180.

Mr. Justice **Day** delivered the opinion of the court:

This action involves the construction of § 17 of the bankrupt act of 1898 (30 Stat.

at L. 550, chap. 541, U. S. Comp. Stat. 1901, p. 3428), as it stood prior to the amendment of February 5, 1903 [32 Stat. at L. 797, chap. 487]. So far as it pertains to this case, this section is as follows:

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts except such as . . . (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another, . . . (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in a fiduciary capacity."

In *Crawford v. Burke*, decided at this term, 195 U. S. 176, ante, 147, 25 Sup. Ct. Rep. 9, this court held that subd. 4 of this act was limited to frauds, embezzlements, misappropriations, or defalcations while acting in an official character, or in a fiduciary capacity, and did not apply to other debts or obligations fraudulently created. The question, therefore, presented in this case, is, Was the judgment against Bullis and Barse, as finally reached in the New York courts, one in "an action for fraud" within the meaning of the act?

[616] *It is distinctly charged in the complaint, and found in the judgment, that the agreement was fraudulently made; that Bullis and Barse falsely and fraudulently pretended that the large tract of timber land which they were to put under the mortgage for the security of the bondholders was free from all encumbrances; that it was near the line of the projected railroads, and covered by a large quantity of merchantable timber; when, in fact, as Bullis and Barse well knew, the 30,000 acres of timber land actually mortgaged was not free from encumbrances, but was subject to \$159,000 and interest of prior encumbrances, and that it was waste land from which the timber had been removed; that the lands were not adjacent to the lines of the railroads; that the timber was not accessible, and that a large portion of the land to be conveyed was not owned by either of the defendants; that all of these facts were well known to Bullis and Barse when they made the false and fraudulent representations aforesaid, and were relied upon to the prejudice of the bondholders. The New York courts found that the agents of the New York brokers attempting to negotiate the bonds, when they went to see the lands, were shown those not included in the mortgage, and which were falsely and fraudulently pointed out as being the intended lands. Under these allegations and

proofs the New York courts have seen fit to render a money judgment, not for specific performance, as upon contract, but for the frauds charged against the defendants.

As was said of the action and the relief granted, in the opinion of the appellate division (68 App. Div. 508, 73 N. Y. Supp. 1047, Affirmed in 171 N. Y. 689, 64 N. E. 1119): "The action for specific performance, in the strictest sense thereof, was founded upon the actual, positive fraud of the defendants Bullis and Barse. They had in fact, in pretended compliance with their agreements, conveyed to the designated trustee 30,000 acres of land. The plaintiff alleged that the defendants fraudulently included in this conveyance lands not owned by the grantors, and the bulk of the tract was not timber land, was encumbered, and was *not adjacent to the railroad lines de-[617] scribed. . . . The gist, the intrinsic ingredient of the action, was consequently the fraudulent scheme—the false representations—of these defendants."

Considerable argument was made by the learned counsel for the plaintiff in error as to the essential allegations of a pleading where relief for fraud is sought. It is said that there is no averment in the complaint in this case of knowledge or intent to deceive upon the part of the plaintiff in error; but it is averred that the representations were falsely and fraudulently made, with the intent to further the pecuniary interest of the plaintiff in error, and were known to be false when made. Such allegations have frequently been held the equivalent of averments of specific intent. Indeed, it is difficult to perceive how a statement falsely and fraudulently made can be otherwise than intended to deceive. A statement fraudulently made, with knowledge of its falsity, must necessarily be intended to deceive. *Bank of Montreal v. Thayer*, 2 McCrary, 1, 7 Fed. 625, and cases cited in the opinion. It is argued that Bullis, one of the defendants, regarding the case as one for fraud, demanded a jury trial, which was denied him, and that this shows the character of the case. But, as appears in the opinion of the New York court of appeals (158 N. Y. 466-468, 53 N. E. 211), when the demand for a jury trial was made the defendants had not set up their inability to perform the contract, but had taken issue upon the allegations of fraud and misrepresentation. In this attitude of the case it was held that a jury trial was properly denied.

But it is unnecessary to further consider questions of practice peculiar to the jurisdiction where the judgment was rendered.

Whether the complaint sufficiently charged fraud to warrant the judgment given is not a Federal question. *Forsyth v. Vehmeyer*, 177 U. S. 177, 180, 44 L. ed. 723, 725, 20 Sup. Ct. Rep. 623. The question for this court is whether the judgment rendered by the New York court is in an action for fraud. If so, it is excepted from the effect of a discharge in bankruptcy.

[618] *We think an inspection of the record as well as the interpretation put upon the pleadings and judgment by the courts of New York in the various trials and proceedings had show that the relief was granted upon the ground of fraud. When the case was first before the New York court of appeals, Judge Gray, delivering the opinion of that court, said:

"The theory of the complaint and the tendency of the proof upon the trial were that a fraudulent scheme was devised by Bullis and Barse, having for its object the consolidation of certain railroad properties owned and controlled by them, and the issuance of a large number of bonds by the consolidated company, which should be placed with the public at par through the coöperation of Newcombe & Company, whose assistance to the scheme, in the negotiation of the bonds, should be gained by representations and agreements of such a nature, as to the timber tracts to be furnished as additional security under the mortgage, that the bonds would appear to be attractive and salable securities. We are not called upon, at the present time, to pass upon the liability of Bullis and Barse for the parts they have played in the development and consummation of this scheme, inasmuch as they have gone back to a new trial; but, on the face of this record, that the evidence amply warranted the findings by the trial court is not to be denied; and it would have justified the granting of relief to the plaintiff had the case been in a shape to make that possible." 151 N. Y. 372-384, 45 N. E. 873-876.

When the case was sent back for trial, after it had been held that it might be retained for the assessment of damages, in its conclusions of law the supreme court at special term decided that it "had jurisdiction to proceed in the cause by reason of the fraud practised by the defendants Bullis and Barse in the premises." This manner of exercising jurisdiction by the lower court was expressly affirmed by the supreme court at general term (2 App. Div. 545, 38 N. Y. Supp. 4), and finally by the court of appeals of New York (158 N. Y. 466, 53 N. E. 211). In the latter case the court said:

[619] *"The theory upon which the decision pro-

ceeded was that they [Bullis and Barse] devised a fraudulent scheme for the consolidation of certain railroads owned and controlled by them, issued bonds upon false representations as to the timber lands to be furnished as added security under the mortgage to make the bonds secure and salable; that upon those facts the court would have been justified in granting relief to the plaintiff against them, and that the corporation, having been the instrumentality employed by them, was also liable. Thus it was that the liability of the appellants was involved in the decision. We adhere to the principle of our decision upon that appeal."

It is thus apparent that the courts of New York, in conformity to their own practice, have rendered a judgment against Bullis and Barse by reason of the fraudulent scheme found, and because of the fraudulent representations made to and relied upon by the parties to whom the relief was granted. The Federal question is, Is such a judgment entitled to be discharged in bankruptcy? Under the bankrupt law of 1867 it was provided: "No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy; but the debt may be proved, and the dividend thereon shall be a payment on account of such debt." Rev. Stat. § 5117.

In the law of 1898, for reasons which have been the subject of much diversity of view in the courts, but which were sufficient in the judgment of Congress in passing the act to necessitate a change, it is provided, instead of exempting debts created by fraud from the operation of the discharge, that only judgments in actions for fraud shall be exempted. Under this act (as it was before the passage of the act of February 5, 1903) claims grounded in fraud will not be exempted unless reduced to judgment; but the essential character of the fraud which is here meant has not been changed. By the decisions of this court, which are collected in the *opinion delivered in *Forsyth* [620] v. *Vehmeyer*, 177 U. S. 177, 180, 44 L. ed. 723, 725, 20 Sup. Ct. Rep. 623, it was held, reviewing the former cases in this court, that, under the act of 1867, the fraud referred to meant positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, and not implied fraud, which may exist without an imputation of bad faith. "Such a construction of the statute," it was said in *Neal v. Clark*, 95 U. S. 704, 709, 24 L. ed. 586, 587, "is consonant with equity, and consistent with the object

and intention of Congress in enacting a general law by which the honest citizen may be relieved from the burden of hopeless insolvency. A different construction would be inconsistent with the liberal spirit which pervades the entire bankrupt system." This language, we think, equally applies to the present case. The difference is that, under the act of 1898, claims for fraud prosecuted to judgment will not be exempted. The reason for this change, as suggested by Mr. Justice Brown, in delivering the opinion in *Crawford v. Burke*, may be that Congress did not intend to offer any inducement to change unliquidated claims into actions for fraud, and therefore limited the exception from the operation of the discharge to such cases only as had been litigated and reduced to actual judgment. When such is the case we think a correct interpretation of the law does not require a close examination into the form of the action to determine whether technically it is one *ex delicto* or otherwise, but the real question is, Was the relief granted in the judgment based upon actual, **195 U. S.**

as distinguished from constructive, fraud of the bankrupt? If the judgment is thus founded, whatever the form of the action, it is the intent and purpose of the law that the bankrupt shall not be discharged from it, but shall still rest under its obligation, so far as the bankrupt law is concerned.

As thus interpreted, we think there can be no question that the judgment rendered in this case was based upon the fraud of Bullis and Barse. The facts charged and found showed false and fraudulent representations as to the character of the property which was to be the security of those who should *purchase the bonds, and resulted[621] in depriving them wrongfully of valuable rights. These findings were held sufficient in the state tribunals to warrant relief on the ground of fraud, and the judgment in this case is, in our opinion, in an action for fraud within the meaning of the bankrupt law.

The judgment of the Supreme Court of New York is, therefore, affirmed.

MEMORANDA

OF

CASES DISPOSED OF WITHOUT OPINIONS.

[623]*RUFUS BINYON, *Plaintiff in Error, v. UNITED STATES*. [No. 176.]

In Error to the United States Court of Appeals for the Indian Territory.

See same case below (Ind. Terr.) 76 S. W. 265.

Mr. W. H. Green for plaintiff in error.

The Attorney General and Assistant Attorney General Purdy for defendant in error.

October 17, 1904. *Dismissed* for the want of jurisdiction, on the authority of *Brown v. United States*, 171 U. S. 631, 43 L. ed. 312, 19 Sup. Ct. Rep. 56; *Cross v. United States*, 145 U. S. 571, 36 L. ed. 821, 12 Sup. Ct. Rep. 842.

LEE LOOK, *Plaintiff in Error, v. PEOPLE OF THE STATE OF CALIFORNIA*. [No. 333.]

In Error to the Supreme Court of the State of California.

See same case below, 143 Cal. 216, 76 Pac. 1028.

Messrs. Henry C. McPike and A. H. Jarman for plaintiff in error.

Messrs. N. S. Webb and Jas. H. Campbell for defendant in error.

October 17, 1904. *Dismissed* for the want of jurisdiction, but without costs.

PEDRO PEREA *et al.*, Administrators, *etc.*, *Appellants, v. GUADALUPE PEREA DE HARRISON et al.* [No. 45.]

Appeal from the Supreme Court of the Territory of New Mexico.

See same case below (N. M.) 70 Pac. 558.

Mr. T. B. Catron for appellants.

Mr. W. B. Childers for appellees.

October 24, 1904. *Dismissed* for the want of jurisdiction. *McLish v. Roff*, 141 U. S. 661, 35 L. ed. 893, 12 Sup. Ct. Rep. 118; *Mcagher v. Minnesota Thresher Mfg. Co.* 145 U. S. 608, 36 L. ed. 834, 12 Sup. Ct. Rep. 876; *Chicago & N. W. R. Co. v. Osborne*, 146 U. S. 354, 36 L. ed. 1002, 13 Sup. Ct. Rep. 281; *Haseltine v. Central Nat. Bank*, 183 U. S. 130, 46 L. ed. 117, 22 Sup. Ct. Rep. 49.

195 U. S.

*NATHAN C. JESSUP, *Plaintiff in Error, v. TRUSTEES OF THE FREEHOLDERS AND COMMONALTY OF THE TOWN OF SOUTHAMPTON*. [No. 25.]

In error to the Supreme Court of the State of New York.

See same case below in Court of Appeals, 173 N. Y. 84, 65 N. E. 949, and in Appellate Division, 64 App. Div. 525, 72 N. Y. Supp. 312, 780.

Mr. Charles M. Stafford for plaintiff in error.

Mr. Thomas Young for defendants in error.

October 31, 1904. *Dismissed* for the want of jurisdiction. *Cummings v. Chicago*, 188 U. S. 410, 47 L. ed. 525, 23 Sup. Ct. Rep. 472; *Montgomery v. Portland*, 190 U. S. 89, 47 L. ed. 965, 23 Sup. Ct. Rep. 735. See *Southampton v. Jessup*, 162 N. Y. 122, 56 N. E. 538; *Southampton v. Jessup*, 173 N. Y. 84, 65 N. E. 949; *People ex rel. Howell v. Jessup*, 160 N. Y. 249, 54 N. E. 682.

MINNIE KILPATRICK, *Plaintiff in Error, v. CHOCTAW, OKLAHOMA, & GULF RAILROAD COMPANY*. [No. 30.]

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 57 C. C. A. 255, 121 Fed. 11.

Mr. W. O. Davis for plaintiff in error.

Mr. J. W. McLoud for defendant in error.

October 31, 1904. Judgment *affirmed*, with costs, on the authority of *Southern P. Co. v. Seley*, 152 U. S. 145, 38 L. ed. 391, 14 Sup. Ct. Rep. 530, and case remanded to the United States court for the central district of the Indian Territory.

SIEGMUND LUBIN, *Appellant, v. THOMAS A. EDISON*. [No. 66.]

Appeal from the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 58 C. C. A. 604, 122 Fed. 240.

Mr. Charles N. Butler for appellant.

Mr. Melville Church for appellee.

November 7, 1904. *Dismissed* for the want of jurisdiction, on the authority of *McLish v. Roff*, 141 U. S. 661, 35 L. ed. 893, 12 Sup. Ct. Rep. 118; *Union Mut. L. Ins. Co. v. Kirchoff*, 160 U. S. 374, 40 L. ed. 461, 16 Sup. Ct. Rep. 318.

SEATTLE DOCK COMPANY, *Plaintiff in Error*, v. SEATTLE & LAKE WASHINGTON WATERWAY COMPANY *et al.* [No. 390]; CAN-NEL COAL COMPANY, *Plaintiff in Error*, v. SEATTLE & LAKE WASHINGTON WATERWAY COMPANY *et al.* [No. 391].

In Error to the Supreme Court of the State of Washington.

See same case below, 35 Wash. 503, 77 Pac. 845.

[625] Messrs. R. A. Ballinger, J. T. Ronald, and M. A. Ballinger *for plaintiffs in error.

Messrs. Julius F. Hale and Eugene Scmple for defendants in error.

October 31, 1904. Judgments affirmed, with costs. *New Orleans v. New Orleans Waterworks Co.* 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142; *Yesler v. Washington Harbor Line*, 146 U. S. 646, 36 L. ed. 1119, 13 Sup. Ct. Rep. 190; *Shively v. Bowlby*, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548; *Allen v. Forrest*, 8 Wash. 700, 24 L. R. A. 606, 36 Pac. 971; *Mississippi Valley Trust Co. v. Hafins*, 20 Wash. 272, 55 Pac. 54; and *Seattle & L. W. Waterway Co. v. Seattle Dock Co.* 35 Wash. 503, 77 Pac. 845.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, *Plaintiff in Error*, v. HENRY TRUMAN. [No. 57.]

In Error to the Circuit Court of Franklin County, State of Mississippi.

Messrs. J. M. Dickinson and Edward Mayes for plaintiff in error.

No appearance for defendant in error.

November 14, 1904. Judgment reversed, with costs, on the authority of *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797, and cause remanded for further proceedings.

WILLIAM M. MEFFERT, *Plaintiff in Error*, v. E. B. PACKER *et al.*, as THE STATE BOARD OF MEDICAL REGISTRATION AND EXAMINATION. [No. 64.]

In Error to the Supreme Court of the State of Kansas.

See same case below, 66 Kan. 710, 72 Pac. 247.

Mr. J. Jay Buck for plaintiff in error.

Messrs. C. C. Coleman and Glad Hamilton for defendants in error.

November 14, 1904. Judgment affirmed, with costs. *Hawker v. New York*, 170 U. S. 189, 42 L. ed. 1002, 18 Sup. Ct. Rep. 573; *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *Reetz v. Michigan*, 188 U. S. 505, 47 L. ed. 563, 23 Sup. Ct. Rep. 390; *Gray v. Connecticut*, 159 U. S. 74, 40 L. ed. 80, 15 Sup. Ct. Rep. 985; Case below, 66 Kan. 710, 72 Pac. 247.

J. W. TONEY *et al.*, *Plaintiffs in Error*, v. *MAYOR & CITY COUNCIL OF THE CITY OF MACON. [No. 214.]

In Error to the Supreme Court of the State of Georgia.

See same case below, 119 Ga. 83, 46 S. E. 80.

Mr. John Randolph Cooper for plaintiffs in error.

Mr. Minter Wimberly for defendants in error.

December 5, 1904. Dismissed for the want of jurisdiction, on the authority of *Meagher v. Minnesota Thresher Mfg. Co.* 145 U. S. 608, 611, 36 L. ed. 834, 835, 12 Sup. Ct. Rep. 876; *Haseltine v. Central Nat. Bank*, 183 U. S. 130, 46 L. ed. 117, 22 Sup. Ct. Rep. 49, and cases cited. See *Charleston & W. C. R. Co. v. Miller*, 115 Ga. 92, 41 S. E. 252; *Augusta R. Co. v. Andrews*, 92 Ga. 706, 19 S. E. 713.

CHARLES F. DODGE, *Appellant*, v. GEORGE ELLIS & JOHN J. HERLIHY. [No. 219.]

Appeal from the District Court of the United States for the Southern District of Texas.

Messrs. Wayne MacVeagh, Frederic D. McKenney, and J. Spalding Flannery for appellant.

Messrs. Howard S. Gans and Henry G. Gray for appellees.

December 5, 1904. Final order affirmed, with costs. *Ex parte Reggel*, 114 U. S. 642, 29 L. ed. 250, 5 Sup. Ct. Rep. 1148; *Roberts v. Reilly*, 116 U. S. 80, 29 L. ed. 544, 6 Sup. Ct. Rep. 291; *Kohl v. Lehlback*, 160 U. S. 293, 40 L. ed. 432, 16 Sup. Ct. Rep. 304; *Hyatt v. New York*, 188 U. S. 691, 47 L. ed. 657, 23 Sup. Ct. Rep. 456.

UNITED STATES *ex rel.* FRANK B. EDWARDS, Lieutenant, etc., *Plaintiff in error*, v. WILLIAM H. TAFT, Secretary of War, *et al.* [No. 301.]

In Error to the Court of Appeals of the District of Columbia.

See same case below, 22 App. D. C. 419.

Messrs. Henry A. Craig and J. W. Catharine for plaintiff in error.

The Attorney General and Solicitor General Hoyt for defendants in error.

December 5, 1904. Dismissed for the want of jurisdiction, on the authority of *South Carolina v. Seymour (United States ex rel. South Carolina v. Seymour)* 153 U. S. 353, 38 L. ed. 742, 14 Sup. Ct. Rep. 871; *United States v. Lynch*, 137 U. S. 280, 34 L. ed. 700, 11 Sup. Ct. Rep. 114; *United States ex rel. Phillips v. Ware*, 189 U. S. 507, 47 L. ed. 922, 23 Sup. Ct. Rep. 852.

[627]*ST. LOUIS EXPANDED METAL FIREPROOFING COMPANY, *Plaintiff in Error*, v. STANDARD FIREPROOFING COMPANY. [No. 179.]
In Error to the Supreme Court of the State of Missouri.

See same case below, 177 Mo. 559, 76 S. W. 1008.

Mr. James A. Carr for plaintiff in error.
Messrs. Frank L. Shepard and Hervey S. Knight for defendant in error.

December 12, 1904. *Dismissed* for the want of jurisdiction. *Mutual L. Ins. Co. v. McGrew*, 188 U. S. 291, 47 L. ed. 480, 23 Sup. Ct. Rep. 375; *Turner v. Richardson*, 180 U. S. 87, 45 L. ed. 438, 21 Sup. Ct. Rep. 295; *Home for Incurables v. New York*, 187 U. S. 155, 47 L. ed. 117, 63 L. R. A. 329, 23 Sup. Ct. Rep. 84; *Layton v. Missouri*, 187 U. S. 356, 47 L. ed. 214, 23 Sup. Ct. Rep. 137.

COPPER KING OF ARIZONA, *Appellant*, v. PETER JOHNSON *et al.* [No. 356.]

Appeal from the Supreme Court of the Territory of Arizona.

See same case below (Ariz.) 76 Pac. 594.

Mr. Wm. C. Prentiss for appellant.

Mr. Allen R. English for appellees.

December 12, 1904. Judgment *affirmed*, with costs. *Rio Grande Irrig. & Colonization Co. v. Gildersleeve*, 174 U. S. 603, 609, 43 L. ed. 1103, 1105, 19 Sup. Ct. Rep. 761; *Sparrow v. Strong*, 4 Wall. 584, 18 L. ed. 309; *Kerr v. Clappitt*, 95 U. S. 188, 24 L. ed. 493; *Ariz. Rev. Stat. (1901)*, §§ 1214, 1389, 1493, 4104.

TACOMA MILL COMPANY, *Petitioner*, v. BLACK HILLS & NORTHWESTERN RAILWAY COMPANY *et al.* [No. 337.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Messrs. Frederic D. McKenney, James H. Ashton, and E. C. Hughes for petitioner.

Mr. James B. Howe for respondents.

October 17, 1904. *Granted*.

[628]*THOMAS F. CURLEY *et al.*, *Petitioners*, v. UNITED STATES. [No. 236.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

See same case below, 64 C. C. A. 369, 130 Fed. 1.

Mr. Heman W. Chaplin for petitioners.

The Attorney General and Solicitor General Hoyt for respondent.

October 17, 1904. *Denied*.

195 U. S.

BETTENDORF PATENTS COMPANY, *Petitioner*, v. J. R. LITTLE METAL WHEEL COMPANY. [No. 253.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 59 C. C. A. 473, 123 Fed. 433.

Mr. James S. Harlan for petitioner.

Mr. John R. Bennett for respondent.

October 17, 1904. *Denied*.

WILLIAM BURRILL *et al.*, *Petitioners*, v. GEORGE W. CROSSMAN *et al.* [No. 258.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 130 Fed. 763.

Mr. Lawrence Kneeland for petitioners.

Mr. Everett P. Wheeler for respondents.

October 17, 1904. *Denied*.

WESTERN UNION TELEGRAPH COMPANY, *Petitioner*, v. CHARLES J. SWAN. [No. 268.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 67 L. R. A. 153, 63 C. C. A. 550, 129 Fed. 318.

Messrs. H. D. Estabrook and H. N. Low for petitioner.

Mr. Henry Calver for respondent.

October 17, 1904. *Denied*.

JOHN T. ANDREWS, *Petitioner*, v. CHICAGO & NORTHWESTERN RAILWAY COMPANY. [No. 276.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 64 C. C. A. 399, 130 Fed. 65.

Mr. A. C. Parker for petitioner.

Mr. James C. Davis for respondent.

October 17, 1904. *Denied*.

WILLIAM H. FLANNERY *et al.*, *Petitioners*, v. *ISAAC B. LEWIS. [No. 277.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 64 C. C. A. 582, 130 Fed. 336.

Messrs. James J. Macklin, La Roy S. Gove, and Robert D. Benedict for petitioners.

Mr. Herbert Green for respondent.

October 17, 1904. *Denied*.

ÆTNA INSURANCE COMPANY, Petitioner, v. ISAAC B. LEWIS. [No. 278.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 64 C. C. A. 210, 129 Fed. 1006.

Mr. La Roy S. Gove for petitioner.

Mr. Herbert Green for respondent.

October 17, 1904. *Denied.*

MUNICH ASSURANCE COMPANY, LIMITED, et al., Petitioners, v. DODWELL & COMPANY, LIMITED. [No. 284.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 63 C. C. A. 152, 128 Fed. 410.

Mr. Milton Andros for petitioners.

Messrs. Charles Page and *E. J. McCutchen* for respondent.

October 17, 1904. *Denied.*

PORTLAND FLOURING MILLS COMPANY, Petitioner, v. BRITISH & FOREIGN MARINE INSURANCE COMPANY, LIMITED. [No. 310.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 65 C. C. A. 344, 130 Fed. 860.

Messrs. C. E. S. Wood, Geo. H. Williams, A. B. Browne, and Thos. D. Rambaut for petitioner.

Messrs. Zera Snow and *Wallace M. McCamant* for respondent.

October 17, 1904. *Denied.*

BUNKER HILL & SULLIVAN MINING & CONCENTRATING COMPANY, Petitioner, v. CHARLES T. JONES. [No. 318.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 130 Fed. 813.

Mr. Myron A. Folsom for petitioner.

Messrs. Thomas O'Day and *F. C. Robertson* for respondent.

October 17, 1904. *Denied.*

[630] **BRENNAN & Co. SOUTHWESTERN AGRICULTURAL WORKS et al., Petitioners, v. DOWAGIAC MANUFACTURING COMPANY.* [No. 372.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 62 C. C. A. 257, 127 Fed. 143.

Messrs. A. E. Willson and *Border Bowman* for petitioners.

Mr. Fred L. Chappell for respondent.

October 17, 1904. *Denied.*

MINNESOTA MOLINE PLOW COMPANY et al., Petitioners, v. DOWAGIAC MANUFACTURING COMPANY. [No. 377.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 61 C. C. A. 352, 126 Fed. 746.

Mr. Ephraim Banning and *Thos. A. Banning* for petitioners.

Mr. Fred L. Chappell for respondent.

October 17, 1904. *Denied.*

M. S. BUCKINGHAM, Trustee, et al., Petitioners, v. FIRST NATIONAL BANK OF CHICAGO et al. [No. 379.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 131 Fed. 192.

Mr. Wm. H. Carroll for petitioners.

Mr. Thomas B. Turley for respondents.

October 17, 1904. *Denied.*

OHIO BAKING COMPANY et al., Petitioners, v. NATIONAL BISCUIT COMPANY. [No. 382.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 62 C. C. A. 116, 127 Fed. 116.

Messrs. Ephraim Banning and *Thos. A. Banning* for petitioners.

Messrs. Charles K. Offield and *Earl D. Babst* for respondent.

October 17, 1904. *Denied.*

BUFFALO TIN CAN COMPANY, Petitioner, v. E. W. BLISS COMPANY. [No. 385.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 131 Fed. 51.

Mr. Herbert P. Bissell for petitioner.

Mr. Thomas Thacher for respondent.

October 17, 1904. *Denied.*

**UNITED STATES, Petitioner, v. R. F. DOWNING & Co.* [No. 380.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

The Attorney General, Solicitor General Hoyt, and Assistant Attorney General McReynolds for petitioner.

Mr. Albert Comstock for respondent.

October 24, 1904. *Granted.*

F. AUGUSTUS HEINZE *et al.*, *Petitioners, v. BUTTE & BOSTON CONSOLIDATED MINING COMPANY.* [No. 223.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 61 C. C. A. 63, 126 Fed. 1.

Mr. John J. McHatton for petitioners.

Messrs. John A. Garver and James M. Beck for respondent.

October 24, 1904. *Denied.*

EUREKA COUNTY BANK, *Petitioner, v. IDA K. CLARKE.* [No. 326.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 64 C. C. A. 571, 130 Fed. 325.

Messrs. J. C. Campbell, Oscar J. Smith, and A. E. Cheney for petitioner.

Mr. Alfred Chartz for respondent.

October 24, 1904. *Denied.*

MOBILE TRANSPORTATION COMPANY, *Petitioner, v. CITY OF MOBILE et al.* [No. 373.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 60 C. C. A. 689, 125 Fed. 1003.

Messrs. Frederick G. Bromberg and Eugene H. Lewis for petitioner.

Mr. Harry T. Smith for respondents.

October 24, 1904. *Denied.*

STUART R. KNOTT *et al.*, *Petitioners, v. LOUISVILLE TRUST COMPANY, Receiver.* [No. 387.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 130 Fed. 820.

[632] *Messrs. Alex. Pope *Humphrey, J. P. Helm, Helm Bruce, and W. D. Hines* for petitioners.

Messrs. John L. Dodd, Aaron Kohn, J. C. Dodd, and D. W. Baird for respondent.

October 24, 1904. *Denied.*

CHESLEY C. MOSES, *Petitioner, v. UNITED STATES.* [No. 381.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 60 C. C. A. 600, 126 Fed. 58.

Mr. Frederic D. McKenney for petitioner.

The Attorney General, Solicitor General Hoyt, Assistant Attorney General Pradt, and Felix Brannigan for respondent.

October 31, 1904. *Denied.*

195 U. S. U. S., Book 49.

A. F. KENNEY, Claimant, etc., *Petitioner, v. ALBERT LOUJE.* [No. 386.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 63 C. C. A. 584, 128 Fed. 856.

Messrs. Frederic D. McKenney and James M. Ashton for petitioner.

Mr. Albert W. Buddress for respondent.

October 31, 1904. *Denied.*

PHYLLIS E. DODGE, Claimant, etc., *Petitioner, v. UNITED STATES.* [No. 397.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below on first writ of error, 56 L. R. A. 130, 49 C. C. A. 287, 111 Fed. 164, on second writ of error, 65 C. C. A. 603, 131 Fed. 849.

Mr. W. Wickham Smith for petitioner.

The Attorney General and Solicitor General Hoyt for respondent.

November 7, 1904. *Denied.*

PACIFIC MAIL STEAMSHIP COMPANY, ETC., *Petitioner, v. SARAH GUYON, Administratrix, etc., et al.* [No. 399.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 64 C. C. A. 410, 130 Fed. 76.

Messrs. Maxwell Evarts and Charles Page for petitioner.

Mr. Wm. Denman for respondents.

November 7, 1904. *Denied.*

*THOMAS J. SPARKS, Presiding Judge, etc., [633] *et al., Petitioners, v. FRANK C. GUTHRIE.* [No. 417.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 65 C. C. A. 427, 131 Fed. 443.

Mr. Henry Burnett for petitioners.

Mr. D. M. Rodman for respondent.

November 14, 1904. *Denied.*

UNITED STATES, *Petitioner, v. MORRIS WHITRIDGE et al., etc.* [No. 413.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

The Attorney General, Solicitor General Hoyt, and Assistant Attorney General McReynolds for petitioner.

Messrs. Albert Comstock, William R. Sears, and A. B. Browne for respondents.

November 28, 1904. *Granted.*

FREDERICK H. SHELTON, *Petitioner*, v. AMERICAN SURETY COMPANY OF NEW YORK. [No. 403.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 131 Fed. 210.

Mr. C. Berkeley Taylor for petitioner.

Mr. H. Gordon McCouch for respondent. November 28, 1904. *Denied*.

IDEAL STOPPER COMPANY OF BALTIMORE CITY *et al.*, *Petitioners*, v. CROWN CORK & SEAL COMPANY OF BALTIMORE CITY. [No. 405.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 65 C. C. A. 436, 131 Fed. 244.

Messrs. Philip Mauro and *Reeve Lewis* for petitioners.

Messrs. Robert H. Parkinson and *John C. Rose* for respondent.

November 28, 1904. *Denied*.

STANLEY INSTRUMENT COMPANY, *Petitioner*, v. WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY. [No. 409.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

See same case below, 133 Fed. 167.

Messrs. Charles E. Mitchell, *Wm. Hous-* [634] *ton Kenyon*, *and *Henry B. Brownell* for petitioner.

Messrs. W. K. Richardson and *Thos. B. Kerr* for respondent.

November 28, 1904. *Denied*.

ATLANTA, KNOXVILLE, & NORTHERN RAILWAY COMPANY, *Petitioner*, v. SOUTHERN RAILWAY COMPANY. [No. 415.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Mr. Charles N. Burch for petitioner.

Messrs. Alex. Pope Humphrey, *W. A. Henderson*, and *L. Jourolmon* for respondent.

November 28, 1904. *Denied*.

GOLDENBERG BROTHERS & Co., *Petitioners*, v. UNITED STATES. [No. 418.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 64 C. C. A. 442, 130 Fed. 108.

Mr. Thomas H. Clark for petitioners.

The Attorney General and *Solicitor General Hoyt* for respondent.

November 28, 1904. *Denied*.

GEORGE W. SAMPLE, *Petitioner*, v. AMERICAN SODA FOUNTAIN COMPANY *et al.* [No. 422.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 64 C. C. A. 497, 130 Fed. 145.

Mr. Wm. G. Henderson for petitioner.

Mr. Joshua Pusey for respondents.

November 28, 1904. *Denied*.

ARMOUR PACKING COMPANY, *Petitioner*, v. METROPOLITAN WATER COMPANY. [No. 426.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 65 C. C. A. 335, 130 Fed. 851.

Messrs. James Russell Soley and *Frank Hagerman* for petitioner.

Mr. Joseph Coult for respondent.

November 28, 1904. *Denied*.

BALTIMORE & OHIO COAL COMPANY, *Petitioner*, v. *COLONIAL TRUST COMPANY, [635] *Trustee, etc., et al.* [No. 400.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Mr. Harry B. Arnold for petitioner.

Messrs. Louis Marshall and *John H. Doyle* for respondents.

December 5, 1904. *Denied*.

JOSEPH B. BARTRAM *et al.*, *Petitioners*, v. UNITED STATES [No. 428]; BENJAMIN H. HOWELL *et al.*, *Petitioners*, v. UNITED STATES [No. 429]; AMERICAN SUGAR REFINING COMPANY, *Petitioner*, v. UNITED STATES [No. 430].

Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 65 C. C. A. 557, 131 Fed. 833.

Messrs. John E. Parsons and *H. B. Closson* for petitioners.

The Attorney General and *Solicitor General Hoyt* for respondent.

December 5, 1904. *Denied*.

NEW YORK BAKING POWDER COMPANY *et al.*, *Petitioners*, v. RUMFORD CHEMICAL WORKS. [No. 432.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 134 Fed. 385.

Messrs. Arthur V. Briesen and *Paul Bakewell* for petitioners.

Mr. Philip Mauro for respondent.

December 5, 1904. *Denied*.

UNITED STATES, *Petitioner*, v. GEORGE E. CADARR *et al.* [No. 438.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

The Attorney General and *Solicitor General Hoyt* for petitioner.

No one opposing.

December 5, 1904. *Granted.*

W. J. McCahan SUGAR REFINING COMPANY, *Petitioner*, v. STEAMSHIP "WILD-CROFT," *etc.* [No. 441.]

[636] United States *Circuit Court of Appeals for the Third Circuit.

Messrs. H. L. Cheyney and *John F. Lewis* for petitioner.

Mr. J. Parker Kirlin for respondent.

December 5, 1904. *Granted.*

BLUE MOUNTAIN IRON & STEEL COMPANY OF BALTIMORE CITY, *Petitioner*, v. FRANK PORTNER *et al.* [No. 339.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 65 C. C. A. 295, 131 Fed. 57.

Messrs. Henry C. Terry and *Abraham Sharp* for petitioner.

Messrs. Bernard Carter, J. Kemp Bartlett, and *C. Andrade, Jr.*, for respondents.

December 12, 1904. *Denied.*

WESTERN TRANSIT COMPANY, *Petitioner*, v. MINNESOTA STEAMSHIP COMPANY *et al.* [No. 414.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 129 Fed. 22.

Messrs. Harvey D. Goulder, S. H. Holding, and *F. S. Masten* for petitioner.

Messrs. James H. Hoyt, John C. Shaw, Martin Carey, Chas. B. Warren, and *Wm. B. Cady* for respondents.

December 12, 1904. *Denied.*

EDGAR A. DAVIS *et al.*, *Petitioners*, v. A. BOOTH & Co. [No. 436.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 65 C. C. A. 269, 131 Fed. 31.

Mr. Fred A. Baker for petitioners.

Messrs. Henry M. Duffield and *Charles S. Thornton* for respondent.

December 12, 1904. *Denied.*

195 U. S.

UNITED STATES, *Plaintiff in Error*, v. S. P. SHOTTER COMPANY. [No. 28.]

In Error to the Circuit Court of the *United States for the Southern District of [637] Alabama.

The Attorney General for plaintiff in error.

Mr. John Ridout for defendant in error.

October 11, 1904. *Dismissed* on motion of *Mr. Solicitor General Hoyt* for the plaintiff in error.

GIOVANNI ZARCONE, *Appellant*, v. WILLIAM WILLIAMS, Commissioner of Immigration, *etc.* [No. 101.]

Appeal from the Circuit Court of the United States for the Southern District of New York.

Mr. Alex. Rosenthal for appellant.

The Attorney General for appellee.

October 11, 1904. *Dismissed*, with costs, on motion of *Mr. Solicitor General Hoyt* on behalf of counsel for appellant.

WILLIAM L. ELKINS, *Appellant*, v. CITY OF CHICAGO *et al.* [Nos. 11, 12.]

Appeals from the Circuit Court of the United States for the Northern District of Illinois.

Messrs. Henry Crawford and *John S. Miller* for appellant.

Mr. John C. Mathis for appellees.

October 11, 1904. *Stricken from the docket, per stipulation.*

BARBARA WARNER, as Administratrix, *etc.*, *Plaintiff in Error*, v. CHICAGO & NORTH-WESTERN RAILWAY COMPANY *et al.* [No. 161.]

In Error to the Circuit Court of the United States for the District of Nebraska.

Mr. Wm. D. McHugh for plaintiff in error.

Mr. H. C. Brome for defendants in error.

October 11, 1904. *Dismissed*, at cost of defendants in error, *per stipulation* of counsel.

WESTERN UNION TELEGRAPH COMPANY, *Appellant*, v. CITY OF TOLEDO *et al.* [No. 163.]

Appeal from the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. H. D. Estabrook and *Jno. W. Warrington* for appellant.

Mr. N. G. Denman for appellees.

October 11, 1904. *Dismissed*, with costs, on authority of *appellant. [638]

WALTER C. PEACOCK, *Appellant*, v. UNITED STATES. [No. 177.]

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

Mr. Oliver Dibble for appellant.

The Attorney General for appellee.

October 11, 1904. *Dismissed, per stipulation.*

HOUGHTON E. JAMES *et al.*, *Appellants*, v. GERMANIA IRON COMPANY [No. 1]; JAMES BELDEN, *Appellant*, v. MIDWAY COMPANY [No. 2].

Appeals from the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 46 C. C. A. 476, 107 Fed. 597.

Messrs. Frank B. Kellogg and C. A. Severance for appellants.

Mr. Walter Ayers for appellees.

October 11, 1904. *Dismissed*, with costs, on authority of appellants.

WILLIAM A. PAULSEN, *Plaintiff in Error*, v. PEOPLE OF THE STATE OF ILLINOIS. [No. 9.]

In Error to the Supreme Court of the State of Illinois.

Mr. S. S. Gregory for plaintiff in error.

No appearance for defendants in error.

October 12, 1904. *Dismissed*, with costs, pursuant to the Tenth Rule.

FARMERS LOAN & TRUST COMPANY, Trustee, *Petitioner*, v. LAKE STREET ELEVATED RAILROAD COMPANY. [No. 31.]

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 122 Fed. 914.

Mr. I. K. Boyesen for petitioner.

Messrs. Charles H. Aldrich and Clarence A. Knight for respondent.

October 26, 1904. *Dismissed* with costs, pursuant to the Nineteenth Rule.

INTERSTATE COMMERCE COMMISSION, *Appellant*, v. NASHVILLE, CHATTANOOGA, & ST. LOUIS RAILWAY COMPANY *et al.* [No. 46.]

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 57 C. C. A. 224, 120 Fed. 934.

The Attorney General for appellant.

Mr. Ed. Baxter for appellees.

October 31, 1904. *Dismissed*, with costs, per stipulation, on motion of *Mr. Solicitor General Hoyt* for the appellant.

INTERSTATE COMMERCE COMMISSION, *Appellant*, v. SOUTHERN RAILWAY COMPANY. [No. 83.]

Appeal from the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 122 Fed. 800.

The Attorney General for appellant.

Mr. Ed. Baxter for appellee.

October 31, 1904. *Dismissed*, with costs, per stipulation, on motion of *Mr. Solicitor General Hoyt* for the appellant.

EDWARD W. ANDERSON *et al.*, *Plaintiffs in Error*, v. BAXTER MORTON. [No. 35.]

In Error to the Court of Appeals of the District of Columbia.

Mr. West Steever for plaintiffs in error.

Mr. James S. McDonogh for defendant in error.

November 1, 1904. *Dismissed*, with costs, pursuant to the Tenth Rule.

DOMINGO FELICI *et al.*, *Plaintiffs in Error*, v. GEORGE W. WHITEHEAD. [No. 91.]

In Error to the Circuit Court of the United States for the Southern District of New York.

Mr. Henry M. Ward for plaintiffs in error.

The Attorney General for defendant in error.

December 5, 1904. *Dismissed*, per stipulation, on motion of *Mr. Solicitor General Hoyt* for the defendant in error.

SALT RIVER VALLEY CANAL COMPANY, *Appellant*, v. HENRY E. SLOSSER [No. 447]; MARICOPA CANAL COMPANY, *Appellant*, v. MARTIN GOULD [No. 448]; GRAND CANAL COMPANY, *Appellant*, v. TOM BROCKMAN [No. 449].

*Appeals from the Supreme Court of the Territory of Arizona.

Mr. Charles J. Kappler for appellees.

No counsel opposed.

December 5, 1904. Docketed and *dismissed*, with costs, on motion of *Mr. C. J. Kappler* for the appellees.

ISAAC HUNSAKER, SR., *et al.*, *Plaintiffs in Error*, v. TOLTEC RANCH COMPANY. [No. 295.]

In Error to the Circuit Court of the United States for the District of Utah.

Mr. Wm. T. S. Curtis for defendant in error.

No one opposing.

June 9, 1904. Docketed and *dismissed* on motion of *Mr. Wm. T. S. Curtis* for defendant in error.

CASES

ARGUED AND DECIDED

IN THE

S U P R E M E C O U R T

OF THE

UNITED STATES,

AT

OCTOBER TERM, 1904.

Vol. 196.

REFERENCE TABLE
 OF SUCH CASES
 DECIDED IN U. S. SUPREME COURT,
 OCTOBER TERM, 1904,
 AND REPORTED HEREIN,

VOLUME 196,

 AS ALSO APPEAR IN
OFFICIAL REPORTER'S EDITION.

Off. Rep. 196 U. S.	Title.	Here In.	Off. Rep. 196 U. S.	Title.	Here In.
1	Johnson v. Southern P. Co.	363	86-88	Harding v. Illinois	397
2	" "	364	88	" "	398
13	" "	367	89-90	Courtney v. Pradt	398
13-16	" "	368	90-93	" "	399
16-18	" "	369	93	" "	400
18-20	" "	370	93-94	Smalley v. Laugenour	400
20-22	" "	371	94-97	" "	401
23	{ Missouri v. Nebraska		97-98	" "	402
	{ Nebraska v. Missouri	372	99	Comstock v. Eagleton	402
23-26	" "	373	99-100	" "	403
26-27	" "	374	100-102	Scott v. Carew	403
33-34	" "	374	102-104	" "	404
34-36	" "	375	104-105	" "	405
36-38	" "	376	108-109	" "	405
38-39	Keely v. Moore	376	109-112	" "	406
39	" "	377	112-114	" "	407
40-41	" "	378	114	" "	408
41-43	" "	379	115-116	First Nat. Bank v. Lasater	408
43-46	" "	380	117-119	" "	409
46-47	" "	381	119	Butte City Water Co. v.	
47-48	Hunt v. Springfield Fire & M.			Baker	409
	Ins. Co.	381	122	" "	410
48-50	" "	382	122-124	" "	411
51	Texas & P. R. Co. v. Swearin-		124-127	" "	412
	gen	382	127-128	" "	413
53-54	" "	384	128-129	Chicago I. & L. R. Co. v. Mc-	
54-57	" "	385		Guire	413
57-59	" "	386	129	" "	414
59-62	" "	387	129-131	" "	415
62-64	" "	388	131	" "	416
64	Lee v. Robinson	388	131-133	" "	417
64-66	" "	389	133	American Express Co. v. Iowa	417
66-67	" "	390	134	" "	417
68-69	Wetmore v. Markoe	390	140-142	" "	421
69	" "	391	142-144	" "	422
71-72	" "	391	144-146	" "	423
72-74	" "	392	147	Adams Express Co. v. Iowa	424
74-76	" "	393	147-148	" "	425
76-77	" "	394	149	Lucius v. Cawthon-Coleman	
78	Harding v. Illinois	394		Co.	425
82-84	" "	395	149-152	" "	426
84-86	" "	396	152	Wolf v. District of Columbia	426
196 U. S.					359

REFERENCE TABLE.

Off. Rep. 196 U. S.	Title.	Here In.	Off. Rep. 196 U. S.	Title.	Here In.
153	Wolf v. District of Columbia	427	268-270	Cook v. Marshall County	474
155	" "	427	270-273	" "	475
155-157	" "	428	273-275	" "	476
157	Moore v. United States	428	275	" "	477
162-163	" "	431	276	Hodge v. Muscatine County	477
163-165	" "	432	277-279	" "	480
165-168	" "	433	279-281	" "	481
168	" "	434	281-282	" "	482
169	Hartigan v. United States	434	283	Burton v. United States	482
171	" "	434	284-286	" "	483
171-174	" "	435	286-287	" "	484
174	" "	436	294-295	" "	485
175	Sixto v. Sarria	436	295-298	" "	486
175-178	" "	437	298-300	" "	487
178-180	" "	438	300-303	" "	488
180-183	" "	439	303-305	" "	489
183-186	" "	440	305-307	" "	490
186-188	" "	441	307-310	" "	491
188-191	" "	442	310	" "	492
191-192	" "	443	310	United States v. Harvey Steel	
192-193	Fullerton v. Texas	443		Co.	492
193-194	" "	444	313-314	" "	492
194	Central of Ga. R. Co. v. Mur-		314-317	" "	493
	phy	444	317-319	" "	494
195-197	" "	445	319	Rooney v. North Dakota	494
197-198	" "	446	319-320	" "	495
202	" "	447	320-322	" "	496
202-205	" "	448	324-325	" "	496
205-206	" "	449	325-327	" "	497
207	United States v. United Verde		327	United States v. Crosley	497
	Copper Co.	449	327-329	" "	498
210	" "	450	331-334	" "	499
210-213	" "	451	334-336	" "	500
213-215	" "	452	336-337	" "	501
215-217	" "	453	337	Creede & C. Creek Min. & M.	
217	Union Stock Yards Co. v.			Co. v. Uinta Tunnel Min. &	
	Chicago, B. & Q. R. Co.	453		Transp. Co.	501
218-219	" "	454	338-340	" "	504
221-224	" "	455	340-342	" "	505
224-226	" "	456	342-344	" "	506
226-228	" "	457	344-347	" "	507
229	Slavens v. United States	457	347-349	" "	508
229-231	" "	458	349-352	" "	509
231-234	" "	459	352-354	" "	510
234-236	" "	460	354-357	" "	511
236-238	" "	461	357-359	" "	512
239	Travis v. United States	461	359-360	" "	513
239	Madisonville Traction Co. v.		360-361	Ramsey v. Tacoma Land Co.	513
	Saint Bernard Min. Co.	462	361-364	" "	514
241-242	" "	463	364	" "	515
242-245	" "	464	364	Munsey v. Clough	515
245-247	" "	465	368-369	" "	515
247-250	" "	466	369-372	" "	516
250-252	" "	467	372-374	" "	517
252-255	" "	468	374-375	" "	518
255-257	" "	469	375	Swift & Co. v. United States	518
257-259	" "	470	390-392	" "	522
259-261	" "	471	392-395	" "	523
261	Cook v. Marshall County	471	395-397	" "	524
261-262	" "	472	397-399	" "	525
268	" "	473	399-401	" "	526

REFERENCE TABLE.

Off. Rep. 196 U. S.	Title.	Here In.	Off. Rep. 196 U. S.	Title.	Here In.
401-402	Swift & Co. v. United States	527	517-518	Thompson v. Fairbanks	579
403	Small v. Rakestraw	527	518-520	" "	580
404-406	" "	529	520	" "	581
407	Hamburg American S. S. Co. v. Grube	529	520-522	" "	584
407-408	" "	530	522-525	" "	585
408-409	" "	531	525-527	" "	586
413	" "	532	527-528	" "	587
413-415	" "	533	529	Oklahoma City v. McMaster	587
415	McDaniel v. Traylor	533	531-532	" "	588
416-418	" "	533	532-535	" "	589
418-420	" "	535	535-537	" "	590
422-425	" "	536	537-538	" "	591
425-427	" "	537	539	Worcester v. Worcester Consol. St. R. Co.	591
427-430	" "	538	539-542	" "	592
430-431	" "	540	542-543	" "	593
432	Caledonian Coal Co. v. Baker ("New Mexico ex rel. Caledonian Coal Co. v. Baker")	540	547-550	" "	595
432-434	" "	542	550-552	" "	596
434-436	" "	543	552-553	" "	597
439-440	" "	543	553	Flanigan v. Sierra County	597
440-443	" "	543	557-558	" "	597
443-445	" "	544	558-560	" "	598
445-446	" "	544	560-562	" "	599
447	Smiley v. Kansas	545	562	Wheeler v. Plumas County	599
447-448	" "	546	563	" "	600
448-449	" "	546	563-565	McCaffrey v. Manogue	600
453-455	" "	547	565-566	" "	601
455-457	" "	548	568-570	" "	602
458	Allen v. Alleghany Co.	550	570-573	" "	603
458-459	" "	551	573	" "	604
459-460	" "	551	573-575	United States v. Montana Lumber & Mfg. Co.	604
462-464	" "	553	575-578	" "	605
464-466	" "	554	579-581	Doctor v. Harrington	606
466	Corry v. Baltimore	555	581-582	" "	607
467	" "	556	585-587	" "	609
471-474	" "	557	587-589	" "	610
474-476	" "	560	589	The Germanic ("Oceanic Steam Nav. Co. v. Aitken")	610
476-478	" "	561	594-596	" "	613
478-480	" "	562	596-599	" "	614
480	Vanderbilt v. Eidman	563	599	" "	615
480-483	" "	564	599	Coulter v. Louisville & N. R. Co.	615
483-484	" "	565	604-605	" "	616
488	" "	565	605-608	" "	617
488-490	" "	566	608-610	" "	618
491-494	" "	567	610	" "	619
494-496	" "	568	611-612	Scottish Union & Nat. Ins. Co. v. Bowland	619
496-498	" "	569	612-614	Bowland v. Scottish Union & Nat. Ins. Co.	620
498-500	" "	570	614	" "	621
500-502	" "	571	619-621	" "	623
502	Western Tie & Timber Co. v. Brown	571	621-623	" "	624
503-504	" "	572	623-626	" "	625
506-507	" "	573	626-628	" "	626
507-510	" "	574	628-631	" "	627
510-511	" "	575	631-633	" "	628
511-512	United States v. Engard	575	635-644	Memorandum Cases	629-632
512-515	" "	576			
515-516	" "	577			
516	Thompson v. Fairbanks	577			
516-517	" "	578			
196 U. S.					361

THE DECISIONS

OF THE

Supreme Court of the United States

AT
OCTOBER TERM, 1904.

[1] *W. O. JOHNSON, *Petitioner*,
v.
SOUTHERN PACIFIC COMPANY. (No.
32.)
W. O. JOHNSON, *Plff. in Err.*,
v.
SOUTHERN PACIFIC COMPANY. (No.
87.)

(See S. C. Reporter's ed. 1-22.)

Railroads — automatic couplers — construction of statute in derogation of common law — construction of penal statute.

1. Locomotives are embraced by the words "any car" in the act of March 2, 1893 (27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174), § 2, prohibiting common carriers from using any car in moving interstate commerce not equipped with automatic couplers, although locomotives were, elsewhere in the statute, in terms required to be equipped with power driving-wheel brakes.
2. The doctrine that statutes in derogation of the common law are to be construed strictly does not demand that the act of March 2, 1893 (27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174), compelling interstate carriers to adopt automatic couplers, in which there is an undoubted intention to make some change in the existing law, should be so construed as to defeat the obvious object of Congress.
3. The rule that penal statutes are to be construed strictly does not permit such a construction as defeats the obvious intention of the legislature.

4. The equipment of a locomotive and a dining car with automatic couplers, but of such different types as not to couple with each other automatically, does not satisfy the provision of the act of March 2, 1893 (27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174), § 2, prohibiting common carriers from using any car in moving interstate commerce not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.
5. Automatic couplers which will both couple and can be uncoupled without the necessity of men going between the cars are meant by the provision of the act of March 2, 1893 (27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174), § 2, prohibiting common carriers from using any car in moving interstate commerce not equipped with "couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."
6. A dining car in constant use is, while waiting for the train to be made up for its next interstate trip, "used in moving interstate traffic" within the meaning of the act of March 2, 1893 (27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174), § 2, requiring common carriers to equip with automatic couplers any car so used.

[Nos. 32, 87.]

Argued October 31, 1904. Decided December 19, 1904.

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the District of Utah, entered on a directed verdict in favor of defendant in an action to recover damages for personal injuries. Also

IN ERROR to the United States Circuit Court of Appeals for the Eighth Cir-

NOTE.—On the construction of statutes in derogation of common law—see note to *Beeson v. Buseubark*, 10 L. R. A. 839.

As to construction of penal statutes—see note to *Western U. Teleg. Co. v. Yopst*, 3 L. R. A. 224.

cuit to review the same judgment. Judgments of both courts *reversed* and the cause remanded to the Circuit Court, with instructions to set aside the verdict, and award a new trial.

See same case below, 54 C. C. A. 508, 117 Fed. 462.

Statement by Mr. Chief Justice **Fuller**:

[2] *Johnson brought this action in the district court of the first judicial district of Utah against the Southern Pacific Company to recover damages for injuries received while employed by that company as a brakeman. The case was removed to the circuit court of the United States for the district of Utah by defendant on the ground of diversity of citizenship.

The facts were briefly these: August 5, 1900, Johnson was acting as head brakeman on a freight train of the Southern Pacific Company, which was making its regular trip between San Francisco, California, and Ogden, Utah. On reaching the town of Promontory, Utah, Johnson was directed to uncouple the engine from the train and couple it to a dining car, belonging to the company, which was standing on a side track, for the purpose of turning the car around preparatory to its being picked up and put on the next west-bound passenger train. The engine and the dining car were equipped, respectively, with the Janney coupler and the Miller hook, so called, which would not couple together automatically by impact, and it was, therefore, necessary for Johnson, and he was ordered, to go between the engine and the dining car, to accomplish the coupling. In so doing Johnson's hand was caught between the engine bumper and the dining car bumper, and crushed, which necessitated amputation of the hand above the wrist.

On the trial of the case, defendant, after plaintiff had rested, moved the court to instruct the jury to find in its favor, which motion was granted, and the jury found a verdict accordingly, on which judgment was entered. Plaintiff carried the case to the circuit court of appeals for the eighth circuit, and the judgment was affirmed. 54 C. C. A. 508, 117 Fed. 462.

Mr. W. L. Maginnis argued the cause, and, with Messrs. L. A. Shaver and John M. Gitterman, filed a brief for petitioner and plaintiff in error:

In expounding remedial laws the courts will extend the remedy so far as the words will admit.

Potter's Dwarr. Stat. p. 234, note p. 231; *Heydon's Case*, 3 Coke, 7; *Pierce v. Hopper*, 1 Strange, 253.

And it makes no difference that the statute has a penal, as well as a remedial, side.

Dwarris, Stat. 653, 655; Sedgw. Stat. & Const. Law, 2d ed. p. 309; *Hyde v. Cogan*, 2 Dougl. K. B. 705; *Brady v. Daly*, 175 U. S. 156, 44 L. ed. 113, 20 Sup. Ct. Rep. 62; *Huntington v. Attrill*, 146 U. S. 665, 36 L. ed. 1127, 13 Sup. Ct. Rep. 224; *Church of Holy Trinity v. United States*, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511.

Johnson was dealing with a tender, which is a car.

Philadelphia & R. R. Co. v. Winkler, 4 Penn. (Del.) 387, 56 Atl. 112.

The tender is no part of the locomotive.

See cuts in Webster, 1903; Knight, New American Mechanical Dictionary; *Encyclopedia Americana*; Spohn, Dictionary of Engineering; American Educational Chart, No. 2, Railway and Locomotive Engineering.

Railroads have well-defined rules of interchange, which have existed for nearly a generation, and no road will haul a car of any other road unless it is acceptable to them in the matter of equipment. If the equipment or the application of appliances on any car did not comply with the rules of interchange, a railroad company would or could decline to accept the car from the connecting carrier.

Oregon Short Line & U. N. R. Co. v. Northern P. R. Co. 4 Inters. Com. Rep. 249, 51 Fed. 465; *Michigan Congress Water Co. v. Chicago & G. T. R. Co.* 2 Inters. Com. Rep. 428; *Chicago, B. & Q. R. Co. v. Curtis*, 51 Neb. 442, 66 Am. St. Rep. 456, 71 N. W. 42; *Pennsylvania R. Co. v. Snyder*, 55 Ohio St. 342, 60 Am. St. Rep. 700, 45 N. E. 559; *Wilson v. Atlantic Coast Line R. Co.* 129 Fed. 774; *Chicago, M. & St. P. R. Co. v. Wallace*, 30 L. R. A. 161, 14 C. C. A. 257, 24 U. S. App. 589, 66 Fed. 506; *Baltimore & P. R. Co. v. Mackey*, 157 U. S. 72, 91, 39 L. ed. 624, 631, 15 Sup. Ct. Rep. 491.

It is no excuse on the part of the railroad company, that the car with which passengers or employees are killed or injured is owned by another carrier, where they have accepted and hauled it.

Felton v. Bullard, 37 C. C. A. 1, 94 Fed. 781; *Baltimore & P. R. Co. v. Mackey*, 157 U. S. 72, 39 L. ed. 624, 15 Sup. Ct. Rep. 491.

The dining car "Del Monte" was used in moving interstate commerce.

Voelker v. Chicago, M. & St. P. R. Co. 116 Fed. 867; *Crawford v. New York C. & H. R. R. Co.* 10 Am. Neg. Rep. 166.

No temporary stoppage of interstate traffic will deprive the goods or vehicle of its interstate character.

Delaware & H. Canal Co. v. Com. 1 Monag-

han (Pa.) 36, 1 L. R. A. 232, 2 Inters. Com. Rep. 222, 17 Atl. 175.

Mr. W. L. Maginnis also filed a separate brief for petitioner:

This act of Congress is remedial in its nature, as far, at least, as protecting employees upon the train is concerned, by rendering it unnecessary for them to go between the cars.

Johnson v. Southern P. Co. 54 C. C. A. 519, 117 Fed. 462; *Fleming v. Southern R. Co.* 131 N. C. 476, 42 S. E. 905; *Chicago, M. & St. P. R. Co. v. Voelker*, 129 Fed. 522.

A section of a statute may be penal as to some of its provisions, and not penal as to others.

Smith v. Townsend, 148 U. S. 497, 37 L. ed. 535, 13 Sup. Ct. Rep. 634; *Taylor v. Gilman*, 23 Blatchf. 327, 24 Fed. 632; *Wall v. Platt*, 169 Mass. 398, 48 N. E. 270; *Stewart v. Baltimore & O. R. Co.* 168 U. S. 445, 42 L. ed. 537, 18 Sup. Ct. Rep. 105; *Sutherland*, Stat. Constr. §§ 208, 360; *Taylor v. United States*, 3 How. 197, 11 L. ed. 559.

The test laid down by this court as to the termination of the interstate character of the article in question by stoppage seems to be indefinite delay.

Kelley v. Rhoads, 188 U. S. 1, 47 L. ed. 359, 23 Sup. Ct. Rep. 259.

If this dining car were to be regarded as an empty car, that fact alone would not affect its interstate character.

Malott v. Hood, 201 Ill. 203, 66 N. E. 247.

Mr. Maxwell Evarts argued the cause, and, with Messrs. Martin L. Clardy and Henry G. Herbel, filed a brief for respondent and defendant in error:

The dining car was not an interstate car.

Norfolk & W. R. Co. v. Com. 93 Va. 749, 34 L. R. A. 105, 57 Am. St. Rep. 827, 24 S. E. 837; *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475.

The principle enunciated in the *Coe-Errol Case* has been repeatedly approved by this court in the following cases:

Turpin v. Burgess, 117 U. S. 504, 507, 29 L. ed. 988, 989, 6 Sup. Ct. Rep. 835; *Morgan's L. & T. R. & S. S. Co. v. Board of Health*, 118 U. S. 455, 465, 30 L. ed. 237, 242, 6 Sup. Ct. Rep. 1114; *Smith v. Alabama*, 124 U. S. 465, 482, 31 L. ed. 508, 513, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; *Kidd v. Pearson*, 128 U. S. 1, 20, 32 L. ed. 346, 350, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 25, 35 L. ed. 613, 617, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; *Postal Teleg. Cable Co. v. Adams*, 155 U. S. 688, 698, 39 L. ed. 311, 316, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360; *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305; *American Refrigerator Transit Co. v.* 196 U. S.

Hall, 174 U. S. 70, 43 L. ed. 899, 19 Sup. Ct. Rep. 599; *Diamond Glue Co. v. United States Glue Co.* 187 U. S. 611, 616, 47 L. ed. 328, 332, 23 Sup. Ct. Rep. 206; *Diamond Match Co. v. Ontonagon*, 188 U. S. 82, 47 L. ed. 394, 23 Sup. Ct. Rep. 266.

—and followed in these:

United States v. Boyer, 85 Fed. 432; *Cotting v. Kansas City Stock-Yards Co.* 82 Fed. 839, 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; *Chicago, St. P. M. & O. R. Co. v. Becker*, 35 Fed. 883; *Union Refrigerator Transit Co. v. Lynch*, 18 Utah, 378, 48 L. R. A. 790, 55 Pac. 639; *Winkley v. Newton*, 67 N. H. 80, 35 L. R. A. 756, 36 Atl. 610.

The mere intention to make a commodity a subject of interstate commerce does not of itself impress the article with that character.

Turpin v. Burgess, 117 U. S. 504, 507, 29 L. ed. 988, 989, 6 Sup. Ct. Rep. 835.

The true distinction between commerce itself and the instrumentalities which produce or transport it was clearly stated by this court in *Kidd v. Pearson*, 128 U. S. 1, 20, 32 L. ed. 346, 350, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6.

The distinction between the vehicle and commodity of commerce was noticed by Justice Strong in *State Tax on Railway Gross Receipts (Philadelphia & R. R. Co. v. Pennsylvania)*, 15 Wall. 284, 294, 21 L. ed. 164, 168. See also *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365, 374, 27 L. ed. 419, 423, 2 Sup. Ct. Rep. 257.

The only logical deduction from these authorities is that the character of the vehicle under consideration must be determined by the destination of the commodity with which it is burdened; or, if empty, the purpose for which the train of which it forms a part is being moved at the time of the alleged injury. In other words, it must either be loaded with interstate freight, or actually be a part of a train which is moving on an interstate mission.

There is no inherent quality in the car itself that indicates its character; but, chameleon like, it changes its hue according to the use to which it is put at any particular time.

See *Munn v. Illinois*, 94 U. S. 113, 135, 24 L. ed. 77, 87.

Where a statute creates a liability where none existed before, it must be strictly and literally construed.

Sutherland, Stat. Constr. § 371.

When language is clear, it needs no construction.

Yerke v. United States, 173 U. S. 439, 43 L. ed. 760, 19 Sup. Ct. Rep. 441; *Thornley v. United States*, 113 U. S. 310, 28 L. ed. 999, 5 Sup. Ct. Rep. 491; *Lake County v.*

Rollins, 130 U. S. 662, 670, 32 L. ed. 1060, 1063, 9 Sup. Ct. Rep. 651.

Words are to be construed according to their popular sense.

Mailliard v. Lawrence, 16 How. 251, 14 L. ed. 925; *Lake County v. Rollins*, 130 U. S. 662, 670, 32 L. ed. 1060, 1063, 9 Sup. Ct. Rep. 651.

There might be a slight semblance of plausibility in the argument that Congress intended to include engines in the word "car," used in this act, if it were not for the fact that it employed both the expressions, "engine" and "cars," in prescribing the equipment of each.

Bryce v. Burlington, C. R. & N. R. Co. 119 Iowa, 274, 93 N. W. 275.

The injustice that the adoption of the construction of this act claimed by plaintiff would work was recognized by this court in the similar case of *United States v. Reese*, 92 U. S. 214, 220, 221, 23 L. ed. 563, 565, 566.

The argument that engines are as much within the mischief which this statute was intended to correct as cars, and that it should, therefore, apply to them as well, is equally fallacious.

United States v. Harris, 177 U. S. 309, 44 L. ed. 781, 20 Sup. Ct. Rep. 609; *Sarlls v. United States*, 152 U. S. 575, 38 L. ed. 558, 14 Sup. Ct. Rep. 720; *United States v. Sheldon*, 2 Wheat. 119, 122, 4 L. ed. 199, 200.

The plea that the policy of the government calls for a liberal construction of this act does not aid the plaintiff in his contention.

Hadden v. The Collector (Hadden v. Barney), 5 Wall. 107, 111, 18 L. ed. 518, 519; *St. Paul, M. & M. R. Co. v. Phelps*, 137 U. S. 528, 536, 34 L. ed. 767, 769, 11 Sup. Ct. Rep. 168.

Neither the engine nor the dining car at the time of the injury to the plaintiff below was an instrument of interstate commerce.

The Daniel Ball (The Daniel Ball v. United States) 10 Wall. 557, 19 L. ed. 999.

As this is a penal statute it must be strictly construed.

United States v. Harris, 177 U. S. 305, 309, 44 L. ed. 780, 781, 20 Sup. Ct. Rep. 609; *Sarlls v. United States*, 152 U. S. 570, 575, 38 L. ed. 556, 558, 14 Sup. Ct. Rep. 728.

Solicitor General Hoyt by leave of court argued the cause, and, with *Attorney General Moody*, filed a brief for the United States:

This is not a case for the application of the rule that the expression of one is the exclusion of the other. In the interpretation of this act we must look to the intention of Congress (*United States v. Wiltsberger*, 5 Wheat. 76, 5 L. ed. 37; *Wilkinson v. Leland*, 2 Pet. 627, 7 L. ed. 542); and the

meaning of Congress may be extended beyond the precise words used in the law, according to the end in view or the purpose which was designed (*United States v. Freeman*, 3 How. 556, 11 L. ed. 724).

The failure to equip a locomotive with an automatic coupler is negligence as much as a failure so to equip a car.

Fleming v. Southern R. Co. 131 N. C. 476, 42 S. E. 905.

The tender of a locomotive engine engaged in interstate commerce is a car within the scope of the safety-appliance act.

Winkler v. Philadelphia & R. R. Co. 4 Penn. (Del.) 80, 53 Atl. 90, 4 Penn. (Del.) 387, 56 Atl. 112.

In *East St. Louis Connecting R. Co. v. O'Hara*, 150 Ill. 580, 37 N. E. 917, it was held that a city ordinance providing that no railroad company shall run any passenger train or cars within the city limits at a greater rate of speed than 10 miles an hour, nor any freight train or cars at a greater rate of speed than 6 miles an hour, was broad enough to include locomotive engines.

In *Kansas City, M. & B. R. Co. v. Crocker*, 95 Ala. 412, 11 So. 262, it was held that a hand car was within the spirit and terms of a statute giving an action against the employer for injuries suffered by an employee by reason of the negligence of any person in the service who had charge of any signal points, locomotive engine, switch, car, or train upon a railway.

See also *Thomas v. Georgia R. & Bkg. Co.* 38 Ga. 222.

Neither the word "coach," "stage," nor "car" can be said to have any legal or fixed meaning distinguishing one from the other, or any one of them from several other terms implying a vehicle or conveyance.

New York v. Third Ave. R. Co. 117 N. Y. 404, 22 N. E. 755.

Whatever the kind or condition of the couplers on the tender and car, respectively, the necessary use of the link and pin destroyed their value, and was a violation of the law.

Philadelphia & R. R. Co. v. Winkler, 4 Penn. (Del.) 387, 56 Atl. 112.

The words, "without the necessity of men going between the ends of the cars," are the test of compliance with the statute.

Chicago, M. & St. P. R. Co. v. Voelker, 129 Fed. 522.

It has been frequently held that, as bearing upon the construction of an act of Congress, the courts are not at liberty to recur to the views expressed by individual members in debate.

Aldridge v. Williams, 3 How. 9, 24, 11 L. ed. 469, 475; *United States v. Union P. R. Co.* 91 U. S. 72, 79, 23 L. ed. 224, 228; *Maxwell v. Dow*, 176 U. S. 581, 601, 44 L. ed.

597, 604, 20 Sup. Ct. Rep. 448, 494; *Knowlton v. Moore*, 178 U. S. 41, 72, 44 L. ed. 969, 982, 20 Sup. Ct. Rep. 747.

But the courts will take judicial notice of contemporaneous events and the history of the times when the act was passed, in order to be informed of the situation as it existed and was pressed upon the attention of Congress.

Smith v. Townsend, 148 U. S. 494, 37 L. ed. 534, 13 Sup. Ct. Rep. 634; *United States v. Laws*, 163 U. S. 258, 262, 41 L. ed. 151, 153, 16 Sup. Ct. Rep. 998; *United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 318, 41 L. ed. 1007, 1019, 17 Sup. Ct. Rep. 540.

And for the purpose, it is clearly allowable to refer to the report of committees, and even to the debates in Congress.

American Net & Twine Co. v. Worthington, 141 U. S. 468, 473, 474, 35 L. ed. 821, 823, 824, 12 Sup. Ct. Rep. 55; *Church of Holy Trinity v. United States*, 143 U. S. 457, 463, 36 L. ed. 226, 229, 12 Sup. Ct. Rep. 511; *Dunlap v. United States*, 173 U. S. 65, 75, 43 L. ed. 616, 619, 19 Sup. Ct. Rep. 319; *Downes v. Bidwell*, 182 U. S. 244, 253, 255, 45 L. ed. 1089, 1093, 1094, 21 Sup. Ct. Rep. 770.

It is legitimate to refer to changes made in a bill on the course of its passage through Congress.

Dunlap v. United States, 173 U. S. 65, 75, 43 L. ed. 616, 619, 19 Sup. Ct. Rep. 319.

The amendment of 1903 did not change or enlarge the law, but merely declared plainly what the original law means. It was a legislative construction of a prior enactment.

United States v. Freeman, 3 How. 556, 11 L. ed. 724; *Stockdale v. Atlantic Ins. Co.* 20 Wall. 323, 22 L. ed. 348; *Koshkonong v. Burton*, 104 U. S. 668, 679, 26 L. ed. 886, 890; *Cope v. Cope*, 137 U. S. 682, 34 L. ed. 832, 11 Sup. Ct. Rep. 222; *Bailey v. Clark*, 21 Wall. 284, 22 L. ed. 651.

The fact that a penalty is imposed for violation of its provisions does not make it a penal law; for while, in one sense, every act imposing a penalty or forfeiture may be called a penal law, yet, as in the present case, such laws are often deemed, and truly deserve to be called, remedial.

Taylor v. United States, 3 How. 197, 11 L. ed. 559; *Cliquot's Champagne (125 Baskets of Champagne v. United States)* 3 Wall. 114, 18 L. ed. 116; *United States v. Hodson*, 10 Wall. 395, 19 L. ed. 937; *Smythe v. Fiske*, 23 Wall. 374, 23 L. ed. 47; *United States v. Stowell*, 133 U. S. 12, 33 L. ed. 558, 10 Sup. Ct. Rep. 244.

But even if the act should be conceded to be penal in a strict sense, inquiry into the

intention of Congress is still proper and necessary.

The Enterprise, 1 Paine, 32, Fed. Cas. No. 4,499.

The act should be interpreted according to the manifest import of the words, and the most restricted sense should not be adopted as the true sense of the statute, unless it harmonizes with the legislative intent, and accords with the mischiefs to be remedied.

United States v. Lacher, 134 U. S. 624, 33 L. ed. 1080, 10 Sup. Ct. Rep. 625; *United States v. Winn*, 3 Sumn. 209, Fed. Cas. No. 16,740; *United States v. Mattock*, 2 Sawy. 148, Fed. Cas. No. 15,744. See also, to the same effect, *United States v. Wiltberger*, 5 Wheat. 76, 5 L. ed. 37; *American Fur Co. v. United States*, 2 Pet. 358, 7 L. ed. 450; *United States v. Morris*, 14 Pet. 464, 10 L. ed. 543; *United States v. Reese*, 92 U. S. 214, 23 L. ed. 563; *United States v. Hartwell*, 6 Wall. 385, 18 L. ed. 830.

The law applies to coupling as well as uncoupling.

Chicago, M. & St. P. R. Co. v. Voelker, 129 Fed. 522; *Carson v. Southern R. Co.* 68 S. C. 55, 46 S. E. 525.

The car was used in moving interstate traffic.

Malott v. Hood, 99 Ill. App. 360; *Winkler v. Philadelphia & R. R. Co.* 4 Penn. (Del.) 80, 53 Atl. 90; *Voelker v. Chicago, M. & St. P. R. Co.* 116 Fed. 867; *Crawford v. New York C. & H. R. R. Co.* 10 Am. Neg. Rep. 166.

*Mr. Chief Justice **Fuller** delivered the [13] opinion of the court:

This case was brought here on certiorari, and also on writ of error, and will be determined on the merits, without discussing the question of jurisdiction as between the one writ and the other. *Pullman's Palace Car Co. v. Central Transp. Co.* 171 U. S. 138, 145, 43 L. ed. 108, 111, 18 Sup. Ct. Rep. 808.

The plaintiff claimed that he was relieved of assumption of risk under common-law rules by the act of Congress of March 2, 1893 (27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174), entitled "An Act to Promote the Safety of Employees and Travelers upon Railroads by Compelling Common Carriers Engaged in Interstate Commerce to Equip their Cars with Automatic Couplers and Continuous Brakes and their Locomotives with Driving-Wheel Brakes, and for Other Purposes."

The issues involved questions deemed of such general importance that the government was permitted to file brief and be heard at the bar.

The act of 1893 provided:

"That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system. . . .

"Sec. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

"Sec. 6. That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the *provisions of this act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States District Attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed, and it shall be the duty of such district attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred."

"Sec. 8. That any employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provision of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge."

The circuit court of appeals held, in substance, Sanborn, J., delivering the opinion and Lochren, J., concurring, that the locomotive and car were both equipped as required by the act, as the one had a power driving-wheel brake and the other a coupler; that § 2 did not apply to locomotives; that at the time of the accident the dining car was not "used in moving interstate traffic;" and, moreover, that the locomotive, as well as the dining car, was furnished with an automatic coupler, so that each was equipped as the statute required if § 2 applied to both. Thayer, J., concurred in the judgment on the latter ground, but was of opinion that locomotives were included by the words "any

car" in the 2d section, and that the dining car was being "used in moving interstate traffic."

We are unable to accept these conclusions, notwithstanding the able opinion of the majority, as they appear to us to be inconsistent with the plain intention of Congress, to defeat the object of the legislation, and to be arrived at by an inadmissible narrowness of construction.

The intention of Congress, declared in the preamble and in * §§ 1 and 2 of the [15] act, was "to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes," those brakes to be accompanied with "appliances for operating the train-brake system;" and every car to be "equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars," whereby the danger and risk consequent on the existing system was averted as far as possible.

The present case is that of an injured employee, and involves the application of the act in respect of automatic couplers, the preliminary question being whether locomotives are required to be equipped with such couplers. And it is not to be successfully denied that they are so required if the words "any car" of the 2d section were intended to embrace, and do embrace, locomotives. But it is said that this cannot be so because locomotives were elsewhere, in terms, required to be equipped with power driving-wheel brakes, and that the rule that the expression of one thing excludes another applies. That, however, is a question of intention, and as there was special reason for requiring locomotives to be equipped with power driving-wheel brakes, if it were also necessary that locomotives should be equipped with automatic couplers, and the word "car" would cover locomotives, then the intention to limit the equipment of locomotives to power driving-wheel brakes, because they were separately mentioned, could not be imputed. Now it was as necessary for the safety of employees in coupling and uncoupling that locomotives should be equipped with automatic couplers as it was that freight and passenger and dining cars should be; perhaps more so, as Judge Thayer suggests, "since engines have occasion to make couplings more frequently."

And manifestly the word "car" was used in its generic sense. There is nothing to indicate that any particular kind *of car [16]

was meant. Tested by context, subject-matter, and object, "any car" meant all kinds of cars running on the rails, including locomotives. And this view is supported by the dictionary definitions and by many judicial decisions, some of them having been rendered in construction of this act. *Winkler v. Philadelphia & R. R. Co.* 4 Penn. (Del.) 387, 53 Atl. 90; *Fleming v. Southern R. Co.* 131 N. C. 476, 42 S. E. 905; *East St. Louis Connecting R. Co. v. O'Hara*, 150 Ill. 580, 37 N. E. 917; *Kansas City, M. & B. R. Co. v. Crocker*, 95 Ala. 412, 11 So. 262; *Thomas v. Georgia R. & Bkg. Co.* 38 Ga. 222; *New York v. Third Ave. R. Co.* 117 N. Y. 404, 22 N. E. 755; *Benson v. Chicago, St. P. M. & O. R. Co.* 75 Minn. 163, 74 Am. St. Rep. 444, 77 N. W. 798.

The result is that if the locomotive in question was not equipped with automatic couplers, the company failed to comply with the provisions of the act. It appears, however, that this locomotive was in fact equipped with automatic couplers, as well as the dining car; but that the couplers on each, which were of different types, would not couple with each other automatically, by impact, so as to render it unnecessary for men to go between the cars to couple and uncouple.

Nevertheless, the circuit court of appeals was of opinion that it would be an unwarrantable extension of the terms of the law to hold that where the couplers would couple automatically with couplers of their own kind, the couplers must so couple with couplers of different kinds. But we think that what the act plainly forbade was the use of cars which could not be coupled together automatically by impact, by means of the couplers actually used on the cars to be coupled. The object was to protect the lives and limbs of railroad employees by rendering it unnecessary for a man operating the couplers to go between the ends of the cars; and that object would be defeated, not necessarily by the use of automatic couplers of different kinds, but if those different kinds would not automatically couple with each other. The point was that the *railroad companies should be compelled, respectively, to adopt devices, whatever they were, which would act, so far uniformly as to eliminate the danger consequent on men going between the cars.

If the language used were open to construction, we are constrained to say that the construction put upon the act by the circuit court of appeals was altogether too narrow.

196 U. S.

This strictness was thought to be required because the common-law rule as to the assumption of risk was changed by the act, and because the act was penal.

The dogma as to the strict construction of statutes in derogation of the common law only amounts to the recognition of a presumption against an intention to change existing law; and as there is no doubt of that intention here, the extent of the application of the change demands at least no more rigorous construction than would be applied to penal laws. And, as Chief Justice Parker remarked, conceding that statutes in derogation of the common law are to be construed strictly, "They are also to be construed sensibly, and with a view to the object aimed at by the legislature." *Gibson v. Jenney*, 15 Mass. 205.

The primary object of the act was to promote the public welfare by securing the safety of employees and travelers; and it was in that aspect remedial; while for violations a penalty of \$100, recoverable in a civil action, was provided for, and in that aspect it was penal. But the design to give relief was more dominant than to inflict punishment, and the act might well be held to fall within the rule applicable to statutes to prevent fraud upon the revenue, and for the collection of customs,—that rule not requiring absolute strictness of construction. *Taylor v. United States*, 3 How. 197, 11 L. ed. 559; *United States v. Stowell*, 133 U. S. 1, 12, 33 L. ed. 555, 558, 10 Sup. Ct. Rep. 244, and cases cited. And see *Farmers' & M. Nat. Bank v. Dearing*, 91 U. S. 29, 35, 23 L. ed. 196, 199; *Gray v. Bennett*, 3 Met. 529.

Moreover, it is settled that "though penal laws are to be construed strictly, yet the intention of the legislature must *gov-[18] ern in the construction of penal as well as other statutes; and they are not to be construed so strictly as to defeat the obvious intention of the legislature." *United States v. Lacher*, 134 U. S. 624, 33 L. ed. 1080, 10 Sup. Ct. Rep. 625. In that case we cited and quoted from *United States v. Winn*, 3 Sumn. 209, Fed. Cas. No. 16,740, in which Mr. Justice Story, referring to the rule that penal statutes are to be construed strictly, said:

"I agree to that rule in its true and sober sense; and that is, that penal statutes are not to be enlarged by implication, or extended to cases not obviously within their words and purport. But where the words are general, and include various classes of persons, I know of no authority which would justify the court in restricting them to one class, or in giv-

ing them the narrowest interpretation, where the mischief to be redressed by the statute is equally applicable to all of them. And where a word is used in a statute which has various known significations, I know of no rule that requires the court to adopt one in preference to another, simply because it is more restrained, if the objects of the statute equally apply to the largest and broadest sense of the word. In short, it appears to me that the proper course in all these cases is to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature."

Tested by these principles, we think the view of the circuit court of appeals, which limits the 2d section to merely providing automatic couplers, does not give due effect to the words "coupling automatically by impact, and which can be uncoupled without the necessity of men going between the cars," and cannot be sustained.

We dismiss, as without merit, the suggestion which has been made, that the words "without the necessity of men going between the ends of the cars," which are the test of compliance with § 2, apply only to the act of uncoupling. The phrase literally covers both coupling and uncoupling; and if *read, as it should be, with a comma after the word "uncoupled," this becomes entirely clear. *Chicago, M. & St. P. R. Co. v. Voelker*, 129 Fed. 522; *United States v. Lacher*, 134 U. S. 624, 33 L. ed. 1080, 10 Sup. Ct. Rep. 625.

The risk in coupling and uncoupling was the evil sought to be remedied, and that risk was to be obviated by the use of couplers actually coupling automatically. True, no particular design was required, but, whatever the devices used, they were to be effectively interchangeable. Congress was not paltering in a double sense. And its intention is found "in the language actually used, interpreted according to its fair and obvious meaning." *United States v. Harris*, 177 U. S. 309, 44 L. ed. 782, 20 Sup. Ct. Rep. 609.

That this was the scope of the statute is confirmed by the circumstances surrounding its enactment, as exhibited in public documents to which we are at liberty to refer. *Binns v. United States*, 194 U. S. 486, 495, 48 L. ed. 1087, 1091, 24 Sup. Ct. Rep. 816; *Church of Holy Trinity v. United States*, 143 U. S. 457, 463, 36 L. ed. 226, 229, 12 Sup. Ct. Rep. 511.

President Harrison, in his annual mes-

sages of 1889, 1890, 1891, and 1892, earnestly urged upon Congress the necessity of legislation to obviate and reduce the loss of life and the injuries due to the prevailing method of coupling and braking. In his first message he said: "It is competent, I think, for Congress to require uniformity in the construction of cars used in interstate commerce, and the use of improved safety appliances upon such trains. Time will be necessary to make the needed changes, but an earnest and intelligent beginning should be made at once. It is a reproach to our civilization that any class of American workmen should, in the pursuit of a necessary and useful vocation, be subjected to a peril of life and limb as great as that of a soldier in time of war."

And he reiterated his recommendation in succeeding messages, saying in that for 1892: "Statistics furnished by the Interstate Commerce Commission show that during the year ending June 30, 1891, there were forty-seven different styles of car couplers reported to be in use, and that during the same period there were 2,560 employees killed and 26,140 injured. *Near-^[20]ly 16 per cent of the deaths occurred in the coupling and uncoupling of cars, and over 36 per cent of the injuries had the same origin."

The Senate report of the first session of the Fifty-second Congress (No. 1049) and the House report of the same session (No. 1678) set out the numerous and increasing casualties due to coupling, the demand for protection, and the necessity of automatic couplers, coupling interchangeably. The difficulties in the case were fully expounded and the result reached to require an automatic coupling by impact so as to render it unnecessary for men to go between the cars; while no particular device or type was adopted, the railroad companies being left free to work out the details for themselves, ample time being given for that purpose. The law gave five years, and that was enlarged, by the Interstate Commerce Commission, as authorized by law, two years, and subsequently seven months, making seven years and seven months in all.

The diligence of counsel has called our attention to changes made in the bill in the course of its passage, and to the debates in the Senate on the report of its committee. 24 Cong. Rec., pt. 2, pp. 1246, 1273 *et seq.* These demonstrate that the difficulty as to interchangeability was fully in the mind of Congress, and was assumed to be met by the language which was used. The essential degree of uni-

formity was secured by providing that the couplings must couple automatically by impact without the necessity of men going between the ends of the cars.

In the present case the couplings would not work together; Johnson was obliged to go between the cars; and the law was not complied with.

March 2, 1903 (32 Stat. at L. 943, chap. 976, U. S. Comp. Stat. Supp. 1903, p. 367), an act in amendment of the act of 1893 was approved, which provided, among other things, that the provisions and requirements of the former act "shall be held to apply to common carriers by railroads in the territories and the District of Columbia, and shall apply in all cases, whether or not the couplers brought together are [21] of the *same kind, make, or type;" and "shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce."

This act was to take effect September 1st, 1903, and nothing in it was to be held or construed to relieve any common carrier "from any of the provisions, powers, duties, liabilities, or requirements" of the act of 1893, all of which should apply except as specifically amended.

As we have no doubt of the meaning of the prior law, the subsequent legislation cannot be regarded as intended to operate to destroy it. Indeed, the latter act is affirmative and declaratory; and, in effect, only construed and applied the former act. *Bailey v. Clark*, 21 Wall. 284, 22 L. ed. 651; *United States v. Freeman*, 3 How. 556, 11 L. ed. 724; *Cope v. Cope*, 137 U. S. 682, 34 L. ed. 832, 11 Sup. Ct. Rep. 222; *Wetmore v. Markoe*, 196 U. S. 68, post, 390, 25 Sup. Ct. Rep. 172. This legislative recognition of the scope of the prior law fortifies, and does not weaken, the conclusion at which we have arrived.

Another ground on which the decision of the circuit court of appeals was rested remains to be noticed. That court held by a majority that, as the dining car was empty and had not actually entered upon its trip, it was not used in moving interstate traffic, and hence was not within the act. The dining car had been constantly used for several years to furnish meals to passengers between San Francisco and Ogden, and for no other purpose. On the day of the accident the eastbound train was so late that it was found that the car could not reach Ogden in time to return on the next westbound train according to intention, and it was therefore dropped off at Promontory, to be picked up by that train as it came along that evening.

The presumption is that it was stocked

for the return; and as it was not a new car, or a car just from the repair shop, on its way to its field of labor, it was not "an empty," as that term is sometimes used. Besides, whether cars are empty or loaded, the danger to employees is practically the same, and we agree with the observation of District Judge Shiras, in *Voelker v. Chicago, M. & St. P. R. Co.* 116 Fed. 867, that "it cannot *be true that on the eastern trip [22] the provisions of the act of Congress would be binding upon the company, because the cars were loaded, but would not be binding upon the return trip, because the cars are empty."

Counsel urges that the character of the dining car at the time and place of the injury was local only, and could not be changed until the car was actually engaged in interstate movement, or being put into a train for such use, and *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475, is cited as supporting that contention. In *Coe v. Errol* it was held that certain logs cut in New Hampshire, and hauled to a river in order that they might be transported to Maine, were subject to taxation in the former state before transportation had begun.

The distinction between merchandise which may become an article of interstate commerce, or may not, and an instrument regularly used in moving interstate commerce, which has stopped temporarily in making its trip between two points in different states, renders this and like cases inapplicable.

Confessedly this dining car was under the control of Congress while in the act of making its interstate journey, and in our judgment it was equally so when waiting for the train to be made up for the next trip. It was being regularly used in the movement of interstate traffic, and so within the law.

Finally, it is argued that Johnson was guilty of such contributory negligence as to defeat recovery, and that, therefore, the judgment should be affirmed. But the circuit court of appeals did not consider this question, nor apparently did the circuit court, and we do not feel constrained to inquire whether it could have been open under § 8, or, if so, whether it should have been left to the jury, under proper instructions.

The judgment of the Circuit Court of Appeals is reversed; the judgment of the Circuit Court is also reversed, and the cause remanded to that court with instructions to set aside the verdict, and award a new trial.

[23]

*STATE OF MISSOURI
v.
STATE OF NEBRASKA.
—
STATE OF NEBRASKA
v.
STATE OF MISSOURI.

(See S. C. Reporter's ed. 23-38.)

Boundaries between states—effect of avulsion.

Avulsion by the Missouri river, the middle of whose channel forms the boundary line between the states of Missouri and Nebraska, works no change in such boundary, but leaves it in the center of the old channel.

[No. 5, Original.]

Submitted February 24, 1904. Decided December 19, 1904.

ORIGINAL suit between the states of Missouri and Nebraska to settle a disputed boundary line. Such line adjudged to be the middle of the channel of the Missouri river according to its course as it was prior to the avulsion of July 5, 1867.

For final decree see *post*, 881.

The facts are stated in the opinion.

Messrs. Edward C. Crow and Sam B. Jeffries submitted the cause for the state of Missouri:

There can be no question but that the Missouri river was designated as a natural monument by both the act of annexation and the memorial requesting the same. Being a natural monument, it must stand as ordained, for natural monuments are objects permanent in character, if they are found upon land as they were placed by nature, such as streams, lakes, and ponds.

3 Washb. Real Prop. 5th ed. p. 435; Tiedeman, Real Prop. 2d ed. § 831.

Where a river is made the boundary between jurisdictions, the middle of the river is considered the point or line of demarcation; or, in other words, the term "river," when used to designate a boundary between two jurisdictions, means in law the middle of the river.

Stanford v. Mangin, 30 Ga. 355; *Hicks v. Coleman*, 25 Cal. 122, 85 Am. Dec. 103; *Lowell v. Robinson*, 16 Me. 357, 33 Am. Dec. 673; *Hardin v. Jordan*, 140 U. S. 380, 35 L. ed. 432, 11 Sup. Ct. Rep. 808, 838.

It is not the meander line formed by what may be termed the waters' margin, but the

waters themselves, which constitute the real boundary.

St. Paul & P. R. Co. v. Schurmeir, 7 Wall. 272, 19 L. ed. 74; *Hardin v. Jordan*, 140 U. S. 380, 35 L. ed. 432, 11 Sup. Ct. Rep. 808, 838; *Jefferis v. East Omaha Land Co.* 134 U. S. 178, 33 L. ed. 872, 10 Sup. Ct. Rep. 518; *Houck v. Yates*, 82 Ill. 179; *Fuller v. Dauphin*, 124 Ill. 542, 7 Am. St. Rep. 388, 16 N. E. 917; *St. Louis Bridge Co. v. People*, 125 Ill. 228, 17 N. E. 468; *Buttenuith v. St. Louis Bridge Co.* 123 Ill. 535, 5 Am. St. Rep. 545, 17 N. E. 439.

The channel is the passageway between the banks through which the water of the stream flows.

Benjamin v. Manistee River Improv. Co. 42 Mich. 628, 4 N. W. 483.

The term "natural channel" includes not only all channels through which, in the existing conditions of the country, water naturally flows, but new channels through which it may afterwards flow.

Larrabee v. Cloverdale, 131 Cal. 96, 63 Pac. 143.

The rule is settled that meander lines are not intended as boundaries, but that the body of the water will be regarded as the true boundary.

Jefferis v. East Omaha Land Co. 134 U. S. 178, 33 L. ed. 872, 10 Sup. Ct. Rep. 518; *Mitchell v. Smale*, 140 U. S. 406, 35 L. ed. 442, 11 Sup. Ct. Rep. 819, 840; *Hardin v. Jordan*, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838; *Clute v. Fisher*, 65 Mich. 48, 31 N. W. 614.

The right and duties with respect to waters depends primarily upon the relations which the opposing parties bear towards each other.

Farnham, Waters & Water Rights, p. 3.

Mr. Frank N. Prout submitted the cause for the state of Nebraska. *Mr. W. H. Kelligar* was on his brief:

Where the course of a river forming the boundary between states is suddenly changed by avulsion, the boundary remains unchanged.

Nebraska v. Iowa, 143 U. S. 361, 36 L. ed. 187, 12 Sup. Ct. Rep. 396; *Holbrook v. Moore*, 4 Neb. 437; *Collins v. State*, 3 Tex. App. 325, 30 Am. Rep. 142; *Willey v. Lewis*, 11 Ohio Dec. Reprint, 607.

Had Nebraska never been admitted into the Union, the state of Missouri would not now have jurisdiction of a crime committed on the land in dispute, known as Island Precinct.

Collins v. State, 3 Tex. App. 323, 30 Am. Rep. 142.

Mr. Justice Harlan delivered the opinion of the court:

This is a case of disputed boundary between two states of the Union.

NOTE.—On rivers and lakes as state boundaries—see note to *Buck v. Ellenbolt*, 15 L. R. A. 187.

As to jurisdiction over boundary rivers—see note to *Roberts v. Fullerton*, 65 L. R. A. 953.

The suit was commenced by an original bill filed in this court by the state of Missouri against the state of Nebraska. The relief sought by the former state is a decree declaring its right of possession of, and its jurisdiction and sovereignty over, certain territory east and north of the center of the main channel of the Missouri river as it runs between the two states at the present time; that Missouri be quieted in its title thereto; and that the state of Nebraska be forever enjoined and restrained from disturbing Missouri in the full enjoyment and possession of said territory.

[24] The state of Nebraska, after answering, filed a cross bill asking a decree confirming the possession, jurisdiction, and sovereignty of Nebraska over said territory; that the boundary line between that part of Missouri known as Atchison county and that part of Nebraska known as Nemaha county be ascertained and established, and permanent monuments erected to indicate the location of such line; and that the state of Missouri be enjoined and restrained from disturbing the state of Nebraska in the full enjoyment and possession of said territory.

The commissioners heretofore appointed to take the evidence have filed their report, and it is agreed that their finding of facts is correct. The case is before us upon questions of law arising out of the pleadings, the report of the commissioners, and the stipulation of the parties.

By an act of Congress of March 6th, 1820, provision was made for the admission of Missouri into the Union with the following boundary: "Beginning in the middle of the Mississippi river, on the parallel of thirty-six degrees of north latitude; thence west, along that parallel of latitude, to the San Francois river; thence up and following the course of that river, in the middle of the main channel thereof, to the parallel of latitude of thirty-six degrees and thirty minutes; thence west along the same to a point where the said parallel is intersected by a meridian line passing through the middle of the mouth of the Kansas river, where the same empties into the Missouri river; thence from the point aforesaid, north, along the said meridian line, to the intersection of the parallel of latitude which passes through the rapids of the river Des Moines, making the said line to correspond with the Indian boundary line; thence east from the point of intersection last aforesaid, along the said parallel of latitude, to the middle of the channel of the main fork of the said river Des Moines; thence down and along the middle of the main channel of the said river Des Moines to the mouth of the same, where it empties into the Mississippi river; thence due east to the middle of

the main channel of the Mississippi river; thence down and following the course *of the [25] Mississippi river, in the middle of the main channel thereof, to the place of beginning: *Provided*, That said state shall ratify the boundaries aforesaid: (a) *And provided also*, That the said state shall have concurrent jurisdiction on the river Mississippi, and every other river bordering on the said state, so far as the said river shall form a common boundary to the said state and any other state or states, now or hereafter to be formed and bounded by the same, such rivers to be common to both; and that the river Mississippi, and the navigable rivers and waters leading into the same, shall be common highways, and forever free, as well to the inhabitants of the said state as to other citizens of the United States, without any tax, duty, impost, or toll therefor imposed by the said state." 3 Stat. at L. 545, chap. 22.

On the 15th day of January, 1831, the state of Missouri, speaking by its legislature, memorialized Congress to make more certain and definite its northwest boundary. That memorial, among other things, stated: "When this state government was formed, the whole country on the west and north was one continued wilderness, inhabited by none but savages, and but little known to the people or to the government of the United States. Its geography was unwritten, and none of our citizens possessed an accurate knowledge of its localities, except a few adventurous hunters and Indian traders. The western boundary of the state, as indicated by the act of Congress of the 6th of March, 1820, and adopted by the Constitution of Missouri, is a 'meridian line passing through the middle of the mouth of the Kansas river, where the same empties into the Missouri river,' and extends from the parallel of latitude of 36 degrees and 30 minutes north, 'to the intersection of the parallel of latitude which passes through the rapids of the river Des Moines.' The part of this line which lies north of the Missouri river has never been surveyed and established, and consequently its precise position and extent are unknown. It is believed, however, that it extends about 100 miles north from the Missouri *river, [26] and almost parallel with the course of the stream, so as to leave between the line and the river a narrow strip of land, varying in breadth from 15 to 30 miles. This small strip of land was acquired by the United States from the Kansas Indians, by the treaty of the 3d of June, 1825 [7 Stat. at L. 244], and is now unappropriated and at the free disposal of the general government. . . . These considerations seem to us sufficiently obvious to impress upon the public

mind the necessity of interposing, whenever it is possible, some visible boundary and natural barrier between the Indians and the whites. The Missouri river, bending as it does, beyond our northern line, will afford the barrier against all the Indians on the southwest side of that river, by extending the north boundary of this state in a straight line westward, *until it strikes the Missouri, so as to include within this state the small district of country between that line and the river*, which we suppose is not more than sufficient to make two, or at the most three, respectable counties. . . . In every view, then, we consider it expedient that the district of country in question should be annexed to and incorporated with the state of Missouri; and to that end we respectfully ask the consent of Congress. . . . With these views of the present condition and future importance of that little section of country, and seeing the impossibility of conveniently attaching it now or hereafter to any other state, your memorialists consider it highly desirable, and indeed necessary, that it should be annexed to and form a part of the state of Missouri. And to the accomplishment of that desirable end we respectfully request the assent of Congress."

A subsequent act, entitled "An Act to Extend the Western Boundary of the State of Missouri to the Missouri River," approved June 7th, 1836, provided: "That when the Indian title to all the lands lying between the state of Missouri and the Missouri river shall be extinguished, the jurisdiction over said lands shall be hereby ceded to the state of Missouri, and the western boundary of said state shall be then extended to the *Missouri river, reserving to the United States the original right of soil in said lands, and disposing of the same: *Provided*, That this act shall not take effect until the President shall, by proclamation, declare that the Indian title to said lands has been extinguished; nor shall it take effect until the state of Missouri shall have assented to the provisions of this act." 5 Stat. at L. 34, chap. 86.

It is alleged in the bill that Congress intended by the act of 1836 to meet the wishes of Missouri as expressed in its memorial; that after the passage of that act the President, by proclamation [5 Stat. at L. 802], declared that the Indian title to the lands covered by that act had been extinguished; and that Missouri duly assented to its provisions.

By an act of Congress approved February 9th, 1867 [14 Stat. at L. 391, chap. 36], Nebraska was admitted into the Union, with the following boundary: "Commencing at a point formed by the intersection of the western boundary of the state of Mis-

souri with the fortieth degree of north latitude; extending thence due west along said fortieth degree of north latitude to a point formed by its intersection with the twenty-fifth degree of longitude west from Washington; thence north along said twenty-fifth degree of longitude to a point formed by its intersection with the forty-first degree of north latitude; thence west along said forty-first degree of north latitude to a point formed by its intersection with the twenty-seventh degree of longitude west from Washington; thence north along said twenty-seventh degree of west longitude to a point formed by its intersection with the forty-third degree of north latitude; thence east along said forty-third degree of north latitude to the Reya Paha river; thence down the middle of the channel of said river, with its meanderings to its junction with the Niobrara river; thence down the middle of the channel of said Niobrara river, and following the meanderings thereof, to its junction with the Missouri river; thence down the middle of the channel of said Missouri river, and following the meanderings thereof to the place of beginning." 13 Stat. at L. 47, chap. 59.

It is undisputed in the case that prior to July 5th, 1867, the bed and channel of the Missouri river were substantially as they had been continuously from the date of the admission of the *respective states [34] into the Union, only such variations occurring during that entire period as naturally followed in the course of time from one side of the river to the other. But on the day just named, July 5th, 1867 (which was after the admission of Nebraska into the Union), within twenty-four hours, and during a time of very high water, the river, which had for years passed around what is called McKissick's island, cut a new channel across and through the narrow neck of land at the west end of Island Precinct (of which McKissick's island formed a part), about a half mile wide, making for itself a new channel, and passing through what was admittedly, at that time, territory of Nebraska. After that change the river ceased to run around McKissick's island. In the course of a few years, after the new channel was thus made, the old channel dried up and became tillable land, valuable for agricultural purposes, whereby the old bed of the river was vacated about 15 miles in length. This change in the bed or channel of the river became fixed and permanent; for, at the commencement of this suit it was the same as it was immediately after the change that occurred on the 5th day of July, 1867. The result was that the land

between the channel of the river as it was prior to July 5th, 1867, and the channel as it was after that date and is now, was thrown on the east side of the Missouri river; whereas, prior to that date it had been on the west side.

The fundamental question in the case is whether the sudden and permanent change in the course and channel of the river, occurring on the 5th day of July, 1867, worked a change in the boundary line between the two states.

The former decisions of this court relating to boundary lines between states seem to make this case easy of solution.

In *New Orleans v. United States*, 10 Pet. 662, 717, 9 L. ed. 573, 594, argued elaborately by eminent lawyers, Mr. Webster among the number, this court said: "The question is well settled at common law, that the person whose land is bounded by a stream of water, which changes its course gradually by alluvial formations, [35] *shall still hold by the same boundary, including the accumulated soil. No other rule can be applied on just principles. Every proprietor whose land is thus bounded is subject to loss by the same means which may add to his territory; and as he is without remedy for his loss, in this way, he cannot be held accountable for his gain." It was added—what is pertinent to the present case—that "this rule is no less just when applied to public than to private rights." The subject was under consideration in *Missouri v. Kentucky*, 11 Wall. 395, 20 L. ed. 116, and *Indiana v. Kentucky*, 136 U. S. 479, 34 L. ed. 329, 10 Sup. Ct. Rep. 1051. But it again came under consideration in *Nebraska v. Iowa*, 143 U. S. 359, 361, 367, 370, 36 L. ed. 186, 187, 190, 191, 12 Sup. Ct. Rep. 396, 398, 400. In the latter case, the court, after referring to the rule announced in *New Orleans v. United States*, and citing prior cases in which that rule had been recognized, said: "It is equally well settled that where a stream which is a boundary, from any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary; and that the boundary remains as it was, in the center of the old channel, although no water may be flowing therein. This sudden and rapid change of channel is termed, in the law, avulsion. In *Gould, Waters*, § 159, it is said: 'But if the change is violent and visible, and arises from a known cause, such as a freshet, or a cut through which a new channel is formed, the original thread of the stream continues to mark the limits of the two estates.' 2 Bl. Com. 262; *Angell, Watercourses*, § 60; *Hopkins Academy v. Dickinson*, 9 196 U. S.

Cush. 544; *Buttenuth v. St. Louis Bridge Co.* 123 Ill. 535, 5 Am. St. Rep. 545, 17 N. E. 439; *Hagan v. Campbell*, 8 Port. (Ala.) 9, 33 Am. Dec. 267; *Den ex dem. Murry v. Sermon*, 8 N. C. (1 Hawks) 56. These propositions, which are universally recognized as correct where the boundaries of private property touch on streams, are in like manner recognized where the boundaries between states or nations are, by prescription or treaty, found in running water. Accretion, no matter to which side it adds ground, leaves the boundary still the center of the channel. Avulsion has no effect on boundary, but leaves it in the center *of the old channel." Again, in the [36] same case, the court, referring to the very full examination of the authorities to be found in one of the opinions of Attorney General Cushing (8 Ops. Atty. Gen. 175), said: "The result of these authorities puts it beyond doubt that accretion on an ordinary river would leave the boundary between two states the varying center of the channel, and that avulsion would establish a fixed boundary; to wit, the center of the abandoned channel. It is contended, however, that the doctrine of accretion has no application to the Missouri river, on account of the rapid and great changes constantly going on in respect to its banks; but the contrary has already been decided by this court in *Jeffries v. East Omaha Land Co.* 134 U. S. 178, 189, 33 L. ed. 872, 876, 10 Sup. Ct. Rep. 518." In *Nebraska v. Iowa*, it appeared that the Missouri river near the land there in dispute had pursued a course in the nature of an ox-bow, but it suddenly cut through the neck of the bow and made for itself a new channel. The court said: "This does not come within the law of accretion, but that of avulsion. By this selection of a new channel the boundary was not changed, and it remained as it was prior to the avulsion,—the center line of the old channel; and that, unless the waters of the river returned to their former bed, became a fixed and unvarying boundary, no matter what might be the changes of the river in its new channel."

Manifestly, these observations cover the present case and make it clear that the boundary line between Missouri and Nebraska in the vicinity of Island Precinct cannot be taken to be the middle of the channel of the Missouri river, as it has been since the avulsion of 1867 and now is, but must be taken to be the middle of the channel of the river as it was prior to such avulsion. We cannot see that there are any facts or circumstances that withdraw the present case from the rule established in former adjudications.

Counsel for Missouri contend that the act admitting Missouri into the Union, the memorial sent by the legislature of that state to Congress in 1831, and the [37] act of June 7, 1836, with the *proclamation of the President as to the extinguishment of Indian titles to lands between Missouri, as originally bounded, and the Missouri river, show that Congress intended that, so far as the boundary of the state of Missouri was concerned, the middle of the channel of the Missouri river, wherever it may be at any particular time,—and regardless of any changes, however caused or however extended, or permanent, suddenly occurring in its course or channel,—was to be taken as a perpetual, natural monument, fixing the boundary line. We cannot accept this view. We perceive no reason to believe that Congress intended, either by the acts of 1820 and 1836 relating to Missouri, or the act admitting Nebraska into the Union, to alter the recognized rules of law which fix the rights of parties where a river changes its course by gradual, insensible accretions, or the rules that obtain in cases where, by what is called avulsion, the course of a river is materially and permanently changed. Missouri does not dispute the fact that when Nebraska was admitted into the Union the body of land described in the present record as Island Precinct was in Nebraska. It is equally clear that those lands did not cease to be within the limits of Nebraska by reason of the avulsion of July 5th, 1867.

For the reasons stated we adjudge, in respect of the matters involved in this suit, that the middle of the channel of the Missouri river, according to its course as it was prior to the avulsion of July 5th, 1867, is the true boundary line between Missouri and Nebraska. Accordingly, the original bill must be dismissed, and a decree entered in favor of the state of Nebraska on its cross bill.

It appears from the record that about the year 1895 the county surveyors of Nemaha county, Nebraska, and Atchison county, Missouri, made surveys of the abandoned bed of the Missouri river, in the locality here in question, ascertained the location of the original banks of the river on either side, and, to some extent, marked the middle of the old channel. If the two states agree upon these surveys and loca- [38] tions as correctly *marking the original banks of the river and the middle of the old channel, the court will, by decree, give effect to that agreement; or, if either state desires a new survey the court will order one to be made, and cause monuments to be placed so as to permanently mark the

boundary line between the two states. The disposition of the case by final decree is postponed for forty days, in order that the court may be advised as to the wishes of the parties in respect of these details.

ANDREW C. KEELY, Trustee, *et al.*,
Plffs. in Err.,

v.

JOSEPH H. MOORE *et al.*

(See S. C. Reporter's ed. 38-47.)

Wills — attestation — testamentary capacity—evidence—instructions.

1. The wholly unofficial certificate of a vice consul, appearing at the foot of a will executed abroad, if otherwise sufficient as an attestation, may be treated as such by disregarding the superfluous words, "Vice Consul, United States of America," appended to his signature.
2. An application for the admission of a testator to an insane asylum, and the certificate of two physicians, upon which the commitment was made, are inadmissible in evidence on the issue of his testamentary capacity, not only because they were unsworn testimony, but because they were given in a different proceeding and upon a different issue.
3. The issue of the testamentary capacity of a person who had once been insane was properly submitted to the jury by instructions that, if they found his insanity to be permanent in its nature and character, the presumption was that it would continue, and that the burden was upon the defendant to satisfy the jury, by a preponderance of testimony, that he was, at the time of executing the will, of sound mind.

[No. 55.]

Argued November '8, 9, 1904. Decided December 19, 1904.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of that District, entered upon a verdict for defendants in an action of ejectment. *Affirmed.*

See same case below, 22 App. D. C. 9.

Statement by Mr. Justice **Brown**:

This was an action of ejectment brought in the supreme court of the District by grantees of the heirs at law of William Thomson against Joseph H. Moore and the

NOTE.—On burden of proof of testamentary capacity—see note to *Prentiss v. Bates*, 17 L. R. A. 494.

As to presumption and burden of proof of sanity—see note to *State v. Scott*, 36 L. R. A. 721.

firm of Thomas J. Fisher & Company, agents of Mary Cecelia and Georgiana Hawkes Thomson, of the county of Kent, England, devisees under the will of William Thomson, to recover possession of an undivided ninety-one one hundredths of certain real estate in the city of Washington. Upon the trial it was admitted that William Thomson died in Southampton, England, in 1887, seised of the lot in question; that he was born in, and was a citizen of, the United States, leaving no issue or descendants. Plaintiffs had acquired the title of the heirs at law, and the defendants were in possession of the lot as life tenants under his alleged will.

The validity of the will and the due execution thereof were contested by the plaintiffs for reasons hereinafter indicated in the opinion. The trial resulted in a verdict for the defendants, upon which judgment was entered, and affirmed by the court of appeals. 22 App. D. C. 9.

Messrs. C. C. Cole and Hugh T. Taggart argued the cause, and, with **Mr. Leo Simmons**, filed a brief for plaintiffs in error:

The alleged will is not attested by three witnesses.

Clarke v. Turton, 11 Ves. Jr. 240.

Facts cannot be inferred because a party is unable to prove them.

Fulkerson v. Holmes, 117 U. S. 401, 29 L. ed. 919, 6 Sup. Ct. Rep. 780.

There is no room for presumption in this case.

Fresh v. Gilson, 16 Pet. 327, 10 L. ed. 982; *Starkie*, Ev. 80; *United States v. Ross*, 92 U. S. 281, 23 L. ed. 707; *Chase v. Kittedge*, 11 Allen, 49, 87 Am. Dec. 687; *Pennel v. Weyant*, 2 Harr. (Del.) 506; *Schouler*, Wills, § 348; *Jarman*, Wills, § 86; *Boone v. Lewis*, 103 N. C. 40, 14 Am. St. Rep. 783, 9 S. E. 644; *Peake v. Jenkins*, 80 Va. 293.

The attestation clause, with the signature of the witnesses, is prima facie evidence of the facts stated in it. It may be overcome by the witnesses themselves, or by other witnesses, or by facts and circumstances irreconcilable with it.

Mundy v. Mundy, 15 N. J. Eq. 293.

Although the witness was present at the execution, if he did not subscribe the instrument at the time, but did afterward, without the request of the parties, he is not a good attesting witness.

Hollenback v. Fleming, 6 Hill, 304.

When a testator has signed his name in the presence of two witnesses, and at his request they attest his signature, the execution is complete; and if a third person afterward adds his name, the court will

not come to the conclusion, without cogent evidence, that that third person signed as an attesting witness.

Sharman's Goods, L. R. 1 Prob. & Div. 662.

A testamentary paper is not entitled to probate unless the court is satisfied that the names of the alleged witnesses were subscribed on it for the purpose of attesting the testator's signature.

Wilson's Goods, L. R. 1 Prob. & Div. 269.

In *Ex parte Leroy*, 3 Bradf. 227, where a person signed, intending to sign for another person, which person afterward signed himself, though there were two names, viz., father and son, appearing as witnesses to the will, the court refused to probate, holding that the will had only one witness.

And in *Eynon's Goods*, L. R. 3 Prob. & Div. 92, the deceased executed his will in the presence of the witnesses, one of whom also made a mark in attestation of the signature of the deceased. The second witness then wrote the names of the deceased and the witness opposite their respective marks, and also the word "witness," but he did not sign his own name. Held, that he did not, by any word he wrote, attest the signature of the deceased, and that the execution was invalid.

See also *Hindmarsh v. Carlton*, 8 H. L. Cas. 160; *Patterson v. Ransom*, 55 Ind. 402; *Dunn v. Dunn*, L. R. 1 Prob. & Div. 277.

An officer taking an acknowledgment is not a subscribing witness.

McDaniel v. Needham, 61 Tex. 269. See also *Chaffee v. Baptist Missionary Convention*, 10 Paige, 91, 40 Am. Dec. 225.

The evidence in this case shows that Thomson had only been out of the insane asylum a short time when it is alleged this paper was made. Under such circumstances the rule as to execution of wills should be adhered to more rigidly; otherwise the requirements of the law may as well be obliterated.

Re O'Dea, 84 Hun, 591, 33 N. Y. Supp. 463.

The action of the court below in excluding Cunningham's application for admission of Thomson to the asylum, and the medical certificate sent by him with it, finds no support in—

Ormsby v. Webb, 134 U. S. 65, 33 L. ed. 812, 10 Sup. Ct. Rep. 478; *Davis v. Calvert*, 5 Gill & J. 269, 25 Am. Dec. 282; *Shailer v. Bumstead*, 99 Mass. 112; *Atkins v. Sanger*, 1 Pick. 192; *Lewis v. Mason*, 109 Mass. 169.

Messrs. D. W. Baker and Wilton J. Lambert argued the cause and filed a brief for defendants in error:

No attestation clause is necessary in or-

der to establish the fact that the witnesses signed in the presence of each other.

Roberts v. Phillips, 4 El. & Bl. 451; *Welty v. Welty*, 8 Md. 15; *Porter's Will*, 9 Mackey, 493.

The court properly permitted the will to go in evidence as prima facie proof of its due execution.

Chaffee v. Baptist Missionary Convention, 10 Paige, 91, 40 Am. Dec. 225; *Collins v. Nicols*, 1 Harr. & J. 399; *Collins v. Elliott*, 1 Harr. & J. 1; *Welty v. Welty*, 8 Md. 20; *Croft v. Pawlet*, 2 Strange, 1109; *Dean v. Dean*, 27 Vt. 749; *Bennett v. Taylor*, 9 Ves. Jr. 381; *Carrington v. Payne*, 5 Ves. Jr. 404; *Sears v. Dillingham*, 12 Mass. 358; *Robinson v. Brewster*, 140 Ill. 649, 33 Am. St. Rep. 265, 30 N. E. 683; *Woodruff v. Hundley*, 127 Ala. 640, 85 Am. St. Rep. 145, 29 So. 98; *Adams v. Norris*, 23 How. 353, 16 L. ed. 539; *Fry's Will*, 2 R. I. 88.

A will without an attestation clause passes real estate, where all of the witnesses are dead.

Throckmorton v. Holt, 12 App. D. C. 552.

When a subscribing witness is dead, or cannot be produced, proof of his handwriting is the next best secondary evidence.

Clarke v. Courtney, 5 Pet. 319, 8 L. ed. 140; *Stebbins v. Duncan*, 108 U. S. 32, 27 L. ed. 641, 2 Sup. Ct. Rep. 313; *Hanrick v. Patrick*, 119 U. S. 156, 30 L. ed. 396, 7 Sup. Ct. Rep. 147.

The mere fact that a witness to a will places a certificate thereon, instead of the attestation clause, or instead of merely signing it without an attestation clause, can in no way affect the efficacy of his signing the same; and he will be considered a witness, although he signed it in his official capacity and placed his certificate thereto.

Adams v. Norris, 23 How. 367, 16 L. ed. 544. See also *Murray v. Murphy*, 39 Miss. 214; *Franks v. Chapman*, 64 Tex. 159; *Payne v. Payne*, 54 Ark. 415, 16 S. W. 1.

Certificates of a character like the one here offered are not admissible in evidence.

Leggate v. Clark, 111 Mass. 308; *Coyner v. Boyd*, 55 Ind. 166; *Erickson v. Smith*, 38 How. Pr. 455; *Shumway v. Leakey*, 67 Cal. 458, 8 Pac. 12; *Com. v. Heffron*, 102 Mass. 148; *Sewall v. Sewall*, 122 Mass. 156, 23 Am. Rep. 299; *Prigg v. Lansburgh*, 5 App. D. C. 30; *National Union v. Thomas*, 10 App. D. C. 277; *Snell v. United States*, 16 App. D. C. 517; *Greenl. Ev.* §§ 493-498; *State use of Grice v. Cecil County*, 54 Md. 426; *Germania L. Ins. Co. v. Ross Lewin*, 24 Colo. 43, 65 Am. St. Rep. 215, 51 Pac. 488.

[40] *Mr. Justice **Brown** delivered the opinion of the court:

The validity of the will was attacked

upon three grounds: 1st, that it has not the requisite number of witnesses to pass real estate in this District; 2d, that the testator was of unsound mind; 3d, that undue influence had been exercised by one of the designated executors, and others.

Thomson was a resident of Washington, but, at the time of and for some years prior to his death was the American consul at Southampton, England. One John H. Cooksey, a resident merchant at Southampton, was his vice consul. The will was prepared by Walter R. Lomer, a resident solicitor, and was executed at his office February 24, 1866. By this will he devised the property in controversy to the appellees Mary Cecelia Thomson and Georgiana Hawkes Thomson, his cousins, of Kent county, England, jointly for their joint lives, and to the survivor of them, with remainder to Mary Cunningham Roberts, of London, for life, and remainder in fee to her only son. The will, which was executed in duplicate, was written upon two sheets of paper, to each of which the testator affixed his name. It was witnessed in the usual form by Lomer and by one Linthorne, a clerk in his office, who attached their signatures in the presence of and at the request of the testator, and in the presence of each other. On the day after the execution of the will Thomson again went to the office of his solicitor, Lomer, who wrote a certificate of acknowledgment in the margin of the second and last page of the will, which was signed by Cooksey, the vice consul.

The original will, being of record in the Probate and Admiralty Division of the High Court of Justice in London, could not be produced, but was proved by a certificate and examined copy. The attestation clause and the certificate were as follows:

Signed and acknowledged by the said William Thomson, *the testator, as and for[41] his last will and testament in the presence of us, both being present at the same time, who at his request in his presence, and in the presence of each other have hereunto subscribed our names as witnesses.

Walter R. Lomer,

Solicitor, Southampton, Eng.

R. Roupe Linthorne,

His Articled Clerk.

I hereby certify that William Thomson, consul at Southampton for the United States of America, attended before me this 25th day of February, 1886, and acknowledged the foregoing paper-writing contained in two sheets of paper as his last will and testament and that the signature "Wm. Thomson" at the foot thereof is in

the proper handwriting of the said William Thomson.

[Seal U. S. Consul.] John H. Cooksey,
Vice Consul United States of America.

The execution of the will was proved by the two subscribing witnesses, Lomer and Linthorne, and the certificate by proof of the death of Cooksey, and the genuineness of his signature. This was proper. *Clarke v. Courtney*, 5 Pet. 319, 8 L. ed. 140; *Stebbins v. Duncan*, 108 U. S. 32, 27 L. ed. 641, 2 Sup. Ct. Rep. 313. At this time there was in force in this District the 5th section of the act of 29 Charles II., chapter 3, which had been adopted in Maryland in 1798, and carried into this District as § 4, chapter 70, of the Compiled Statutes of 1894. It provided as follows: "All devises and bequests of any lands or tenements, devisable by law, shall be in writing, and signed by the party so devising the same, or by some other person in his presence, and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of none effect."

[42] The object of the certificate in question is not entirely clear, though from the fact that Thomson took the will away with *him after its execution, and stated that he would attend before the consul general at London and obtain the requisite certificate, it would seem that he thought the certificate was necessary to the proof of the will in another country. He did not go to London, however, but called again at Mr. Lomer's office, with the request that he prepare the requisite certificate, which he afterwards procured Mr. Cooksey to sign. The certificate was not offered as proof that the will was a copy of the original, since it was annexed to the original, and we can consider it only as proof as to what it contains. It certifies, in substance, that the testator attended before Cooksey upon the day following the date of the will, acknowledged it to be his last will and testament, and that the signature is genuine. Whether he intended to certify that Thomson acknowledged his signature to be genuine, or that he, Cooksey, certified that it was genuine, is somewhat uncertain; but if the words "Vice Consul of the United States of America," which are merely superfluous, were omitted, there would be no failure to comply with the statute, unless in the omission to certify that Cooksey, the certifying officer, "attested and subscribed in the presence of the said devisor." But as it appears that Thomson, not knowing when he would be

in London, took the certificate to the vice consul, and that the latter signed it, the jury might properly draw the conclusion that it was signed in the testator's presence. This would be the usual course of business, and the presumption is that Cooksey conformed to it and to his duty as a certifying officer.

The certificate was probably prepared under the belief that wills, like deeds, made in a foreign country, must be executed and acknowledged before some foreign official, or "before any (some) secretary of legation or consular officer of the United States" (Rev. Stat. § 1750; U. S. Comp. Stat. 1901, p. 1196; D. C. Comp. Stat. chap. 58, § 6); but as such certificate was unofficial, and contributes nothing, as such, to the validity of the will, it can only be looked upon as the affirmation of an ordinary witness to the facts therein stated. No particular form of attestation was *nec-[43] essary, as appears to be the case in England and in several of the United States; and if the certificate of Cooksey had been written at the foot of the will and signed by himself and by the two witnesses, Lomer and Linthorne, it would have been a sufficient attestation. How, then, can it be regarded as insufficient when an attestation in one form is signed by two witnesses and an attestation in another form by a third? Bearing in mind that the certificate, if given any force at all, must be considered an attestation, we do not think that the fact that it may have been written and signed under a mistaken impression as to its necessity and purpose vitiates it as an attestation. What use was intended to be made of it is immaterial, if it were useless for any purpose as an official certificate. The facts certified are appropriate to the attestation of the instrument, and, if true, we see no reason for holding it to be invalid as an attestation because it was signed under the impression that it was necessary for some possible purpose as a certificate.

The case of *Adams v. Norris*, 23 How. 353, 16 L. ed. 539, is much in point. This was an action of ejectment for a parcel of land in California. Plaintiffs claimed through the heirs at law of one Grimes; defendants through the devisees in his will. The law required three witnesses to the validity of the will. Two of the witnesses signed in the usual manner, but above their signatures and beneath that of the testator was written: "Before me, in the absence of the two alcaldes, Roberto T. Ridley, Sindico." The sindico was counted among the witnesses, the court saying: "We comprise among the witnesses to the will, Ridley, the sindico. It does not ap-

pear that a *sindico* was charged with any function in the preparation or execution of testaments by the law or custom of California. Nor is it clear that the *sindico* in the present instance expected to give any sanction to the instrument by his official character. He attests the execution of the will, and we cannot perceive why the description of himself, which he affixes to his signature, should detract from the efficacy [44] of that attestation." As it did not *appear that the *sindico* or the two *alcaldes* were charged with any special duties, it was practically held that the certificate of acknowledgment, and the official character of the *sindico*, might be disregarded, and the signature treated as an attestation.

In the case of *Clarke v. Turton*, 11 Ves. Jr. 240, the will was executed abroad. It appears that three witnesses were required, apparently under the same act of Charles II. as in this case. The third signature was, as in this case, that of the vice consul, whose attestation was considered necessary to the validity of the act. The case is insufficiently reported, but the court held that the attestation was a memorandum of the vice consul, to operate as a certificate, "a separate act in his public character, and sealed with his official seal; and therefore it could not be said he subscribed as a witness." The question upon that point was sent to law, but it does not appear what disposition was made of it. It appears that the certificate was an official act, and treated as necessary, but the report fails to show what it contained, and, in the absence of such showing, the case is of little value.

The applicability, and, to some extent, the authority, of this case, is somewhat weakened by that of *Griffiths v. Griffiths*, L. R. 2 Prob. & Div. 300. The will was signed by the testator in the presence of two witnesses, who signed their names in his presence,—one opposite the word "Executors" and the other opposite the word "Witness." There was no attestation clause to the will. The deceased intended one of the witnesses to be his executor, and asked him to sign his name *in that character*. Lord Penzance held that such person did not sign the will exclusively as executor, but that he also intended by his signature to affirm that the deceased executed the will in his presence, and that consequently the will was valid. Somewhat to the same effect is *Pollock v. Glassell*, 2 Gratt. 439.

Conceding the 'general rule' to be that witnesses must intend to attest the will as witnesses, the inference is strong that Cooksey did so in this case, as he certifies to the genuineness of the signature of [45] Thomson and to the acknowledgment *of

the will in his presence; and these are what would have been required by the law of this District had the instrument been a deed. It is argued that Cooksey did not intend to attest the will, but merely to sign the certificate; but the certificate of what? Only the fact that the will was acknowledged in his presence and that the signature was genuine. This is precisely the object of an attestation, and as an attestation we think it must be regarded. He may have supposed his official certificate of acknowledgment necessary to the execution of a will in a foreign country, but as he did certify personally to such acknowledgment the addition of his official title adds nothing to, and takes nothing from, the weight of his attestation. We must conclude that he intended to certify exactly what he did certify, and we are giving it exactly the effect he intended to give it.

If the certificate were an official act and material as a separate acknowledgment of the execution of the will, as in the acknowledgment of a deed, the case would be different, since it has never been supposed that a notary, who takes an acknowledgment of a deed, could be counted as a witness to the deed without a separate signature. But here the certificate was a wholly unofficial act, and we see no objection to disregarding the words "Vice Consul of the United States," and treating it as an acknowledgment of the execution before a competent witness. The acknowledgment of a will is really a feature of the attestation. The statute did not require that the deviser should sign the will in the presence of the witness, but that the witness should sign in the presence of the testator.

2. The evidence of Thomson's insanity was quite unsatisfactory. It appears that during the autumn or early winter of 1885 he was seized with an acute mania, and on December 15 was committed to a private insane asylum as a lunatic, upon the certificate of two physicians, and at the request of a cousin, named James E. Cunningham, a merchant of London, who appears to have taken temporary management of his affairs. He remained in the asylum about six weeks, and *on February [46] 1, 1886, somewhat more than three weeks before he executed his will, was discharged as probably cured,—in reality granted a leave of absence on probation. The belief in his cure being justified by his subsequent conduct, a formal order of discharge was entered on the record of the asylum on June 26, 1886. Lomer and Linthorne, the witnesses who were present at the execution of the will, and Septimus Cooksey, the

son of the vice consul, all testified to the mental capacity of the testator at that time.

In this connection exception was taken to the exclusion of the application of James E. Cunningham for the admission of Thomson to the insane asylum, and of the certificate of the two physicians as to his insanity. These were properly excluded, not only because they were unsworn testimony, but because they were given in a different proceeding and upon a different issue. Thomson may have been insane to the extent of being dangerous if set at liberty, and yet may have had sufficient mental capacity to make a will, to enter into contracts, transact business, and be a witness. In the case of *Leggate v. Clark*, 111 Mass. 308, the admission of similar testimony was treated as error. In addition to this, however, these certificates were both dated December 14, 1885, more than two months before the will was made, and are by no means inconsistent with the other testimony that he was released from the asylum as cured February 1, 1886, and that three weeks after that, when he executed the will, he appeared to be of sound and disposing mind and memory.

In addition to the proof of his commitment to the asylum, and of his undoubted insanity prior and for some time subsequent thereto, there was slight evidence of insane acts during the month of February, though there was no opinion expressed by anyone that he was incapable of making a valid deed or contract. The whole testimony regarding his insanity was duly submitted to the jury, who were instructed that if they found his insanity to be permanent in its nature and character, the presumptions were that it would continue, [47] and the *burden was upon the defendant to satisfy the jury by a preponderance of testimony that he was, at the time of executing the will, of sound mind. There was no error in this instruction.

There were also a large number of exceptions taken to the admission or exclusion of testimony and to the charge of the court, but to consider them in detail would subserve no useful purpose. We have examined them carefully, and have come to the conclusion that there was no ruling of the court of which the plaintiffs were entitled to complain. The evidence of insanity was very slight, and there was no legal testimony to show that the will was executed under the pressure of an undue influence.

The judgment of the Court of Appeals is, therefore, affirmed.

196 U. S.

MARTHA I. HUNT, *Plff. in Err.*,
v.

SPRINGFIELD FIRE & MARINE INSURANCE COMPANY.

(See S. C. Reporter's ed. 47-50.)

Insurance—condition against chattel mortgage.

A condition in a policy of fire insurance for the unconditional and sole ownership of the property by the insured, and for the nonexistence of any chattel mortgage thereon, was broken where certain trust deeds of the property had been executed to secure payment of money, whose legal effect is practically the same as that of a chattel mortgage with power of sale.

[No. 65.]

Argued December 1, 2, 1904. Decided December 19, 1904.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District in favor of defendant in an action on a policy of insurance. *Affirmed.*

See same case below, 20 App. D. C. 48.

Statement by Mr. Justice **Brown**:

This was an action to recover on a policy of insurance upon household furniture and ornaments.

Defense: That it was provided that the policy should be *void if the interest of [48] the insured was other than the unconditional and sole ownership of the property insured, or if the "said property should be or become encumbered by a chattel mortgage," when in fact it was subject, at the time the policy was written, to three trust deeds to secure the payment of various sums of money. Plaintiff demurred to the pleas setting up this defense. The court overruled the demurrer, entered judgment for the defendant, which was affirmed by the court of appeals. 20 App. D. C. 48.

Messrs. John C. Gittings and D. W. Baker argued the cause and filed a brief for plaintiff in error.

Mr. Andrew B. Duvall argued the cause and filed a brief for defendant in error.

Mr. Justice **Brown** delivered the opinion of the court:

The sole question presented by the rec-

NOTE.—On conditions in insurance policy against encumbrance—see notes to *German Ins. Co. v. Gray*, 8 L. R. A. 73, and *Russell v. Cedar Rapids Ins. Co.* 4 L. R. A. 539.

As to mortgage as affecting change of title or interest in insured property—see note to *Sun Fire Office v. Clark*, 38 L. R. A. 562.

ord in this case is whether the provision in the policy for the unconditional ownership of the property by the plaintiff, and for the nonexistence of any chattel mortgage thereon, was broken by certain trust deeds to secure the payment of money in each case.

Plaintiff relies upon the familiar principle of law that the *conditions of a policy of insurance, prepared, as they are, by the company, and virtually thrust upon the insured, frequently without his knowledge, must be construed strictly, and, while the legal effect of a chattel mortgage and of a deed of trust to secure the payment of money may be practically the same, they are in law different instruments; and that a condition against one is not broken by the existence of the other. We recognize the rule laid down by this court in *Thompson v. Phenix Ins. Co.* 136 U. S. 287, 34 L. ed. 408, 10 Sup. Ct. Rep. 1019, that in case of attempted forfeiture, if the policy be fairly susceptible of two constructions, the one will be adopted which is more favorable to the insured. This rule was reiterated in *McMaster v. New York L. Ins. Co.* 183 U. S. 25, 46 L. ed. 64, 22 Sup. Ct. Rep. 10, but we cannot recognize it as applicable to this case.

A deed of trust and chattel mortgage with power of sale are practically one and the same instrument as understood in this District. In the language of Mr. Justice Morris, in speaking of mortgages of real estate in *Middleton v. Parke*, 3 App. D. C. 149:

"The deed of trust is the only form of mortgage that has been in general use in the District of Columbia for many years. The common-law mortgage is practically unknown with us; and everyone understands that, when a mortgage of real estate here is spoken of, the deed of trust is what is intended. . . . The deed of trust is here used as the equivalent of a mortgage; and so the term is universally used by the community. Indeed, while a mortgage is not necessarily, perhaps, a deed of trust, a deed of trust to secure the loan of money is necessarily a mortgage."

It was said by this court in *Skullaber v. Robinson*, 97 U. S. 68-78, 24 L. ed. 967-970, that, "if there is a power of sale, whether in the creditor or in some third person to whom the conveyance is made for that purpose, it is still in effect a mortgage, though in form a deed of trust; and may be foreclosed by sale in pursuance of the terms in which the power is conferred, or by suit in chancery."

[50] *The legal effect of the two instruments has been recognized as practically the same in several cases in this and other courts.

Platt v. Union P. R. Co. 99 U. S. 48-57, 25 L. ed. 424-427; *Palmer v. Gurnsey*, 7 Wend. 248; *Eaton v. Whiting*, 3 Pick. 484; *Wheeler & W. Mfg. Co. v. Howard*, 28 Fed. 741; *Bartlett v. Teah*, 1 McCrary, 176, 1 Fed. 768; *Southern P. R. Co. v. Doyle*, 8 Sawy. 60, 11 Fed. 253; *McLane v. Paschal*, 47 Tex. 365.

There may be cases under particular statutes recognizing a difference between them in reference to the application of the recording laws, as appears to be the case in Maryland (*Charles v. Clagett*, 3 Md. 82), but in their essential features and in their methods of enforcement they are practically identical. Both are transfers conditioned upon the payment of a sum of money; both are enforceable in the same manner, and the difference between them is one of name rather than substance. The provision in the policy is one for the protection of the insurer, who is entitled, if he insists upon it in his questions, to be apprised of any fact which qualifies or limits the interest of the insured in the property, and would naturally tend to diminish the precautions he might take against its destruction by fire.

In passing upon the identity of the two instruments in this case we may properly refer to the further provision of the policy that the interest of the insured must be an unconditional and sole ownership. While the breach of this condition is not specifically urged in the briefs, we may treat it as explanatory of the other condition against the existence of a chattel mortgage. The company evidently intended by this provision to protect itself against conditional transfers of every kind. The contract of the company is a personal one with the insured, and it is not bound to accept any other person to whom the latter may transfer the property.

The conditions of the policy in this case were broken by the trust deeds, and the judgment of the court below is, therefore, affirmed.

*TEXAS & PACIFIC RAILWAY COM-[51]
PANY, Plff. in Err.,
v.

W. W. SWEARINGEN.

(See S. C. Reporter's ed. 51-64.)

Evidence of assumption of risk — master and servant—duty to provide safe place for employees — employee's imputed knowledge.

1. Excerpts from an application for employ-

NOTE.—On the liability of railroad company for injuries to an employee from projections

196 U. S.

ment as a railway brakeman tending to show the applicant's knowledge of the generally hazardous nature of the employment, and of the necessity of the exercise of care in working in and about the instrumentalities used by the railway company, and his agreement to acquaint himself with the location of bridges and other structures on the line, are inadmissible in evidence on the issue whether he had assumed the risk, when subsequently employed as a switchman, incident to the location of a scale box in dangerous proximity to the rails.

2. A railway company cannot be said, as a matter of law, to have performed its duty to use due care to provide a reasonably safe place for the use of switchmen in its employ when it has located scales where the tracks were only the standard distance apart, leaving a space of less than 2 feet for the movements of a switchman between the side of a freight car and the scale box, when encumbered with a lantern employed for signal purposes,—especially if the necessity of the situation did not require the scales to be constructed in that way.
3. Knowledge of the increased hazard resulting from the dangerous proximity to the rails of a railway scale box cannot be imputed to a switchman simply because he was aware of the existence and general location of the box.

[No. 48.]

Submitted November 3, 1904. Decided December 19, 1904.

IN ERROR to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Western District of Texas in favor of plaintiff in an action to recover damages for personal injuries, which had been removed to that court from the District Court of El Paso County, in that state. *Affirmed.*

See same case below, 59 C. C. A. 31, 122 Fed. 193.

The facts are stated in the opinion.

Messrs. **John F. Dillon** and **D. D. Duncan** submitted the cause for plaintiff in error. Mr. **T. J. Freeman** was on their brief:

In every case, before the evidence is left to the jury there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any evidence upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.

Schuylkill & D. Improv. & R. Co. v. Munson, 14 Wall. 448, 20 L. ed. 867; *Marion County v. Clark*, 94 U. S. 278, 284, 24 L. ed. 59, 61; *Pleasants v. Fant*, 22 Wall. 120,

22 L. ed. 782; *Randall v. Baltimore & O. R. Co.* 109 U. S. 482, 27 L. ed. 1005, 3 Sup. Ct. Rep. 322; *Delaware, L. & W. R. Co. v. Converse*, 139 U. S. 469–472, 35 L. ed. 213–215, 11 Sup. Ct. Rep. 569; *Schoefield v. Chicago, M. & St. P. R. Co.* 114 U. S. 615–619, 29 L. ed. 224, 225, 5 Sup. Ct. Rep. 1125; *Quebec S. S. Co. v. Merchant*, 133 U. S. 375, 33 L. ed. 656, 10 Sup. Ct. Rep. 397.

(a) When a servant enters into the employment of another he assumes all the risks ordinarily incident to the business. He is presumed to have contracted in reference to all the hazards and risks ordinarily incident to the employment; consequently he cannot recover for injuries resulting to him therefrom.

(b) The servant takes the risks of the master's mode of conducting his business, though a safer one might be followed, if the servant fully knows the risk and continues to work.

(c) There are risks and dangers incident to most employments. Those risks the parties have in view when engagements for services are made, and in consideration of which the rate of compensation is fixed. In all engagements of this character the servant assumes those risks that are incident to the service, and, as between himself and the master, he is supposed to have contracted on those terms, and if an injury is sustained by the servant in that service it is regarded as an accident, and the misfortune must rest on him.

Wood, Mast. & S. 2d ed. § 326; 3 Wood, Railway Law, § 370, p. 1452; 14 Am. & Eng. Enc. Law, *Master & Servant*, p. 843, *Master's Business Methods*, p. 845; *Texas & P. R. Co. v. Minnick*, 6 C. C. A. 387, 13 U. S. App. 520, 57 Fed. 362; *Tuttle v. Detroit, G. H. & M. R. Co.* 122 U. S. 189, 30 L. ed. 1114, 7 Sup. Ct. Rep. 1166; *Randall v. Baltimore & O. R. Co.* 109 U. S. 478, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322; *Houston & T. C. R. Co. v. Conrad*, 62 Tex. 627; *Woodworth v. St. Paul, M. & M. R. Co.* 5 McCrary, 574, 18 Fed. 282; *Missouri P. R. Co. v. Somers*, 71 Tex. 700, 9 S. W. 741; *Green v. Cross*, 79 Tex. 130, 15 S. W. 220; *Naylor v. Chicago & N. W. R. Co.* 53 Wis. 661, 11 N. W. 24; *Wonder v. Baltimore & O. R. Co.* 32 Md. 411, 3 Am. Rep. 143; *Tillotson v. Texas & P. R. Co.* 44 La. Ann. 95, 10 So. 400; *Kohn v. McNulta*, 147 U. S. 238, 37 L. ed. 150, 13 Sup. Ct. Rep. 298; *St. Louis S. W. R. Co. v. Spivey* (Tex. Civ. App.) 73 S. W. 973.

When the proof establishes a usage or cus-

or structures dangerously near the track—see note to *Union P. R. Co. v. James*, 41 L. ed. U. S. 236.

On employee's assumption of risk—see notes 196 U. S.

to *O'Maley v. South Boston Gaslight Co.* 47 L. R. A. 161; *Southern P. Co. v. Seley*, 38 L. ed. U. S. 391, and *Chesapeake & O. R. Co. v. Hennessey*, 38 C. C. A. 314.

tom, the presumption is that the employee contracted with regard to said usage or custom; and if he seeks to avoid its force and effect, the burden is upon him to show that its existence had been concealed from him by the company, and that he did not know of the same, and could not have known of the same by the use of ordinary diligence.

Watson v. Houston & T. C. R. Co. 58 Tex. 437.

Mr. Leigh Clark submitted the cause for defendant in error:

Clauses and provisions in applications for employment like the one in question are held void under the laws of Texas, as an effort to limit or avoid liability for one's own negligence, and therefore against public policy; and the courts will not give effect to them indirectly when refusing so to do directly.

Gulf, C. & S. F. R. Co. v. Darby, 28 Tex. Civ. App. 413, 67 S. W. 446.

There was no assumption of risk.

Central Trust Co. v. East Tennessee, V. & G. R. Co. 73 Fed. 661; *Texas & P. R. Co. v. Archibald*, 170 U. S. 674, 42 L. ed. 1192, 13 Sup. Ct. Rep. 777; *George v. Clark*, 29 C. C. A. 374, 56 U. S. App. 505, 85 Fed. 608; *Gulf, C. & S. F. R. Co. v. Darby*, 28 Tex. Civ. App. 413, 67 S. W. 446.

It is only where the facts are such that reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the court.

Grand Trunk R. Co. v. Ives, 144 U. S. 408, 417, 36 L. ed. 485, 489, 12 Sup. Ct. Rep. 679; *Gardner v. Michigan C. R. Co.* 150 U. S. 349, 361, 37 L. ed. 1107, 1110, 14 Sup. Ct. Rep. 140; *Richmond & D. R. Co. v. Powers*, 149 U. S. 44, 37 L. ed. 642, 13 Sup. Ct. Rep. 748; *Union P. R. Co. v. O'Brien*, 161 U. S. 451, 40 L. ed. 766, 16 Sup. Ct. Rep. 618.

Mr. Justice White delivered the opinion of the court:

This suit was commenced in a state court by W. W. Swearingen, the defendant in error, and, on the application of the defendant, the Texas & Pacific Railway Company, was removed to the circuit court of the United States as one arising under the laws of the United States, because the railway company was chartered under an act of Congress.

The action was to recover damages for personal injuries sustained by reason of the alleged negligence of the defendant company, in whose service at the time of the injury the plaintiff was employed as a switchman. The negligence alleged on the part of the company was the existence, in close proximity to a switch track, of a scale box, by striking against which the

plaintiff was injured whilst doing duty as a switchman. In addition to a general denial the railway company specially pleaded that the scale box in question was at a safe distance from the track on which the plaintiff was hurt when working, and, moreover, that the plaintiff had assumed the risk, if any, arising from the situation of the scale box, and had, in any event, been guilty of contributory negligence. There was a verdict and judgment for the plaintiff, and an affirmance of such judgment by the court of appeals. 59 C. C. A. 31, 122 Fed. 193.

The assignments of error are based, first, on a ruling of the trial court in rejecting evidence; second, on the refusal to direct a verdict; and, third, on an exception taken to the charge *given to the[54] jury. To pass upon them requires an appreciation of the proof, and therefore, before coming to consider the assignments, we summarize the testimony.

The accident occurred after dark on the evening of February 7, 1902, in the switch yards at El Paso. It was shown that in that yard there were several tracks. One track, No. 1, ran over the bed of the scales in question. On the right of this scale there was what was called a scale box, which rose to about the height of 6 feet, and was about 5 feet wide and 18 inches deep. On the other side of this structure there was a track described as track No. 2, and beyond this, to the right, were two other tracks, known respectively as track No. 3 and track No. 4. The space between a ladder on the side of a freight car when moving on track No. 2 and the scale box in question was shown by the evidence to be only 19½ inches.

The plaintiff testified concerning the accident as follows:

"I was hurt on the evening of the 7th of February, 1902, while working as a switchman after dark, at about 6 o'clock and 45 minutes.

"I was a day switchman, but we worked until after dark.

"My duties as a switchman was to assist in the moving, placing, and switching of cars, coupling and uncoupling them, and making up trains, and generally to obey the order of Yardmaster Moore, under whom we were working, and my duties also required me to ride on the cars while they were being moved.

"On this night we were making up a transfer to take to the Southern Pacific Railway, and the cars we had to get were on No. 2 track. My station was with the engine, called 'following the engine.' I worked up near the engine.

"The engine was at the west end of the

yards, west of track No. 2, with me with it, and it backed down east into No. 2 track, with me riding on the footboard at the east end of the engine, to get these cars, and we passed the scale box, although I did not see it, and reaching the cars I coupled the engine to them, and not getting a signal from the yardmaster, who [55] was still *farther east of me, as was also the other switchman, Williams, I walked east down the string of cars about two car lengths, and getting the signal I passed the same to the engineer, and the engine and cars started up again going west so as to go out on another track, and as the cars started I got up on a box car to ride down past the switch at the west end of track No. 2, so as to throw the switch and let the train on another track.

"There is a ladder on the side of a box car, and a step called a stirrup under the ladder under the bottom of the car, and I was holding on to the ladder with my hands [illustrating by holding his hands above his head, as if climbing a ladder], and my lantern was hanging on my right arm, and I was looking back east for a signal from the yardmaster, as it is my duty to do. I do not know whether he wanted to give one or not, but it is my duty to be on the lookout, although I do not have to look in his direction all the time, when my right shoulder struck the scale box, and I fell down between the scale box and the cars, and I was dragged and badly injured. We had probably eight or ten cars at the time, and I was riding properly and hanging out a little from the car, which is proper, and I was on the north side of the car, which is also proper, so as to signal the engineer."

The employee who built the scales testified as follows:

"It is my business to know how much a car passing on a side track will clear the scale box, and these tracks at this place are standard gauge apart, and the scale box is standard, and as I had to put the scale box there to facilitate business and for convenience, I had no more room because the lever of the scale is a certain length to get the fulcrum. The tracks are standard, and are not further apart because there is no more room to put them farther apart.

"The distance that I put this scale box from track No. 2 is standard, and is considered a safe and proper distance in putting in scales where the tracks are standard gauge apart.

[56] *"I am bound to put my scales in according to the length of the lever, and if

196 U. S.

tracks are already there and are standard distance apart I have a uniform and standard distance from the tracks.

"We have side tracks at most places on each side of the scales. The tracks in this yard are standard gauge apart, and where ground is scarce we have to economize in space; but where ground is plenty the tracks can be further apart."

The evidence for the company also showed that the scales in question had been erected a number of years prior to the happening of the accident and after tracks Nos. 1 and 2 were built. The superintendent of terminals of the defendant company testified that "south of track No. 4 there is a space left for four or five more tracks." The same witness also stated that the customary position of a switchman while riding on a car and ladder "is to swing out from the car with his body," and that "a well-developed man cannot safely pass by the scale box on track No. 2, while riding on a side of a car on the ladder, if he hangs out from the car."

There was evidence that at other yards than the one in question the distances from the side of a standard box car to adjoining scale boxes varied from 16 inches to 168 inches.

Testimony was introduced tending to show that the plaintiff, before he was hurt, knew of the proximity of the scale box to track No. 2. Concerning his employment and knowledge of the location of the scales, plaintiff testified that he had made one trip as extra brakeman in the service of the railway company in January, 1900; that in December, 1901, as brakeman, he made about one trip between El Paso and Toyah; that he had worked in the El Paso yards as extra switchman two nights and three days in January, 1902, and went to work there regularly as switchman on February 1, 1902. He denied any recollection of ever having worked on track No. 2 during his employment in January, 1902, and, referring to his employment in the early days of February, 1902, plaintiff says:

*"During the seven days I worked for defendant we never used this No. 2 track at the west end, or near the scales, and I never saw a car on track No. 2, opposite the scales, and never had my attention called to the distance between the track and scale box. I never measured or approximated the distance to it. Nothing ever occurred to attract my attention to it.

"I knew we had to pass the scale box at the time I was hurt, so as to get to the switch beyond, but I was not thinking about it, and I did not see it when we passed it going in after these cars.

"The switch engine had a headlight lighted at both ends, and I was on the footboard at the rear of the engine, which put me in front while we were backing into track No. 2 after the cars, but the headlights were not very clean or bright.

"There was nothing to hide the scale box from my view; it was perfectly open and apparent."

Plaintiff further testified:

"I knew the location of the scale before I was hurt. I knew it was between tracks Nos. 1 and 2, but I did not know anything with reference to its proximity to track No. 2, and did not know it was dangerously close to track No. 2.

"At the time I was hurt, I had no knowledge of the distance between the scale box and No. 2 track.

"I set cars on the scale on track No. 1 to be weighed, but I would be on the north side of the cars on track No. 1, and as the scale box is on the south side I could not see it. I had nothing to do with the scale box and had no business around it.

"I first learned the exact distance between the scale box and the nearest rail of track No. 2 a few days ago, when I went down and measured it at your (referring to plaintiff's attorney) recommendation.

"I was never warned about the danger of getting knocked off of cars by this scale [58]box, and at the time I was hurt I *was attending to my work, and thinking about my duties, and looking for a signal from the yardmaster, and was not thinking about the box. I did not see it immediately prior to the time I struck it.

"The scale box was at the same place, when I struck it, as it was when I first went to work for defendant."

The evidence was closed by the offer on behalf of the company of portions of a written application by plaintiff for employment as brakeman, dated February 22, 1900. After stating that the plaintiff identified the application, the bill of exceptions recites as follows:

"Defendant then offered in evidence the following portions of said application, consisting of questions and the answers thereto written by the plaintiff, for the purpose of showing that plaintiff had notice of the location of said track scale box, and that he was in danger of being knocked off of a car when passing the same:

"Q. 'Do you make this application for employment in train service, realizing the hazardous nature of such employment, understanding that it is necessary in operating this railway for the company to have overhead and truss bridges at certain points on the line; also coal chutes, track scale boxes, water tanks, coal houses, plat-

forms, sheds, roofs, and other overhead and side structures, and that in performance of the duties for which you are employed you are liable to receive injuries by being knocked off the side or top of cars unless you use due care to avoid injury thereby?"

"A. 'Yes.'

"Q. 'Do you agree to acquaint yourself with the location of all overhead and truss bridges, as well as the location of all other structures along the line of the road?"

"A. 'Yes.'

"Q. 'Do you understand that no officer or employee of this company is authorized to request or require you to use defective tracks, cars, machinery, or appliances of any kind, and that when you do so you assume all risk of injury therefrom?"

"A. 'Yes.'

[59]

"Q. 'Do you understand that this company desires to employ only experienced men in the service, and does not undertake to educate inexperienced men?"

"A. 'Yes.'

"Counsel for plaintiff objected to the said testimony for the reason that it was irrelevant and immaterial, and that plaintiff had made this application and entered the employ of defendant, and afterwards resigned, and again entered the employ of the defendant some two years later, without making another application, and also because it was an effort on the part of defendant to limit its liability for its own negligence, and void, as against public policy, and because the particular location of this track scale box is not given; and the court having sustained plaintiff's objections, and excluded said testimony, the defendant then and there excepted to the action of the court in excluding said evidence, and tenders this, its bill of exceptions, which is allowed, signed, and sealed by the court."

The first assignment of error assails the affirmance by the court of appeals of the action of the trial court in refusing to receive in evidence the matter just referred to.

These excerpts were offered in evidence, as stated in the bill of exceptions, "for the purpose of showing that plaintiff had notice of the location of said track scale box, and that he was in danger of being knocked off a car when passing the same."

The application was made in February, 1900, and was for employment, not as switchman, but as brakeman. The employment of the plaintiff with the defendant company following the application was in December, 1901, when the plaintiff, as a brakeman, made about a dozen trips between El Paso and a place called Toyah.

His subsequent employment as switchman commenced but a short time before the happening, in February, 1902, of the accident complained of.

We think the trial court rightly excluded the offered evidence. In the first place, [60] the plaintiff had testified that *before the accident he had knowledge of the existence of the scale box. In the next place, while undoubtedly the statements in the application tended to show that the plaintiff was aware of the generally hazardous nature of the employment, and the necessity of the exercise of care in working with and about the instrumentalities employed by the company in the operation of its railroad, the recognition of these facts by the plaintiff, and his agreement to acquaint himself with the location of bridges and other structures on the line of the road, did not tend to establish notice, communicated to the plaintiff, that the defendant company had not exercised due care in placing scales or scale boxes on its tracks, or that the company had, by its negligence, increased the ordinary hazards to be expected from the use of such structures, and that, by the exercise of ordinary care on his part, plaintiff could not escape injury. The evidence was therefore immaterial in the light of the issue upon which the jury had to pass.

At the close of all the evidence the defendant company requested the court to charge the jury to return a verdict for the defendant, and to the overruling of such motion the defendant company duly excepted. The second assignment alleges error in the affirmance by the court of appeals of the action of the trial court denying this motion.

The right to have the jury instructed to find for the company was based upon the following contention:

"a. Because the undisputed evidence established that said track scale box was erected in the defendant's yard, and, under the circumstances, in a reasonably safe place, and at a reasonably safe distance and location from track No. 2, on which track plaintiff was riding at the time he was injured.

"b. Because plaintiff testified he knew of the location of the track scale box and the location of track No. 2 with reference to said track scale box, on which track No. 2 he was riding at the time he was hurt, and because the undisputed evidence shows that the track scale box and the danger of the same was open and obvious to the [61] view of plaintiff, and that neither *the track scale box nor the dangers thereof were hidden or latent, and plaintiff was

presumed to know the danger, and assumed the risks thereof.

"c. Because the uncontroverted testimony established the fact that plaintiff knew of the location of the track scale box, and location of said track No. 2 with reference to said track scale box, on which track he was riding at the time he was hurt, and that the track scale box and the dangers of the same were open and obvious to the view of plaintiff, and not hidden or latent, and plaintiff was presumed to know the danger, and assumed the risk."

The motion was properly overruled. So far from it being the fact, as asserted, that the evidence established indisputably the existence of the grounds upon which the motion was based, the record shows that there was evidence tending to establish that the track scale box was not erected in a reasonably safe place, and that, although the plaintiff knew that the scale box was situated adjacent to track No. 2, he did not know that it was so near that it could not be passed, in the performance of his duties as a switchman, without danger. This is apparent when it is borne in mind that the plaintiff testified, in substance, that prior to the accident he had not closely inspected the scale box or taken measurements of the distance from the box to the north rail of track No. 2, and that he did not do more than cursorily observe the structure from a distance, and that he was unaware of the nearness of the scale box to the north rail of track No. 2.

Prima facie, the location of scales where the tracks were only the standard distance apart, and where a space of less than 2 feet was left for the movements of a switchman between the side of a freight car and the scale box, encumbered, as he would be in the nighttime, with a lantern employed for the purpose of signaling, did not incontestably establish the performance by the defendant company of the duty imposed upon it to use due care to provide a reasonably safe place for the use of the switchmen in its employ. And so far from the *proof making it certain [62] that the necessity of the situation required the erection of the structure between tracks Nos. 1 and 2 as existing, there was proof that the railway company owned unoccupied ground, intended for other tracks, to the south of track No. 4, justifying the inference that the distance between tracks Nos. 1 and 2 might have been increased, and the employment of the scales thus rendered less hazardous to switchmen, or that the scales might have been removed to a safer location.

It was, therefore, properly a question for the determination of the jury whether or not the scales were maintained in a reasonably safe place, and if not, whether the plaintiff had notice thereof. The court of appeals was of opinion, and rightly we think, that the dangerous contiguity of the scale box to track No. 2, and the extra hazard to switchmen resulting therefrom, was not so open and obvious on other than a close inspection, as to justify taking from the jury the determination of the question whether there had been an assumption of the risk. The plaintiff was entitled to assume that the defendant company had used due care to provide a reasonably safe place for the doing by him of the work for which he had been employed, and as the fact that the defendant company might not have performed such duty in respect to the scale box in question was not so patent as to be readily observable, the court could not declare, in view of the testimony of the plaintiff as to his actual want of knowledge of the danger, that he had assumed the hazard incident to the actual situation. *Choctaw, O. & G. R. Co. v. McDade*, 191 U. S. 64, 68, 48 L. ed. 96, 100, 24 Sup. Ct. Rep. 24.

The remaining assignment of error questions the correctness of the following portion of the charge to the jury:

"The defendant claims that the plaintiff knew of the existence and location of the scale box with which he came in contact, and that, by continuing in the work, with such knowledge, he assumed all risks incident to and arising out of his employment. Upon this point you are instructed [63] that, if you believe *from the testimony that prior to the plaintiff's injuries he knew of the existence and location of the scale box, and of the danger incident to the discharge of his duties while passing the same on a moving train, if danger there was; or if, knowing of the location of the structure, the danger to the employees while in the usual discharge of their duties was apparent, that is, open to observation,—then you are instructed that the plaintiff, by continuing in the employment of the defendant without complaint, assumed such risks, and he would not, therefore, be entitled to recover. In this connection you are further instructed that the mere fact that the plaintiff knew of the existence and location of the scale box would not, as a matter of law, charge him with knowledge of the danger, if such danger there was, due to its proximity to the north rail of track No. 2, and whether he knew of the danger is a question of fact for you to determine from a consideration

of all the facts and circumstances in evidence."

The grounds of the objection to the charge being thus stated:

"Because the proof showed that plaintiff knew of the location of the track scale box, and of track No. 2, on which he was riding at the time he was hurt, in reference to a scale box, and that the same and the location thereof was open and obvious to plaintiff's view, and, being an experienced brakeman, he was charged with notice that riding on the cars as he did was dangerous, and he assumed the risks thereof, and the court should have so charged the jury."

This assignment but reiterates contentions made in connection with the assignment based on the alleged error in overruling the motion for judgment. As we have already decided that knowledge of the increased hazard resulting from the dangerous proximity of the scale box to the north rail of track No. 2 could not be imputed to the plaintiff simply because he was aware of the existence and general location of the scale box, it was for the jury to determine, from a consideration of all the facts and circumstances in evidence, whether plaintiff had actual knowledge of the danger.

**We find no error in the judgment of the [64] Circuit Court of Appeals, and it is affirmed.*

T. B. LEE, Jr., *Plff. in Err*
v.

H. S. ROBINSON.

(See S. C. Reporter's ed. 64-67.)

Revenue bond scrip—validity of, under state Constitution.

The issue of revenue bond scrip under S. C. act of March 2, 1872, to relieve the state of South Carolina of all liability on its guaranty indorsed upon railway bonds by authority of the act of September 15, 1868, when, as this statute shows on its face, there was no outstanding liability represented by the guaranty, comes within the prohibition of art. 9, § 10 of the state Constitution of April 16, 1868, against issuing scrip except for the redemption of an "evidence of indebtedness previously issued," where neither statute purported to be an adjustment of a claim against the state, permitted by art. 14, § 4, of that Constitution.

[No. 81.]

Argued December 6, 7, 1904. Decided December 19, 1904.

IN ERROR to the Circuit Court of the United States for the District of South Carolina to review a judgment in favor of plaintiff in an action to recover land bought by the purchaser at a tax sale, in which the defense was set up of a tender which included revenue bond scrip of that state. *Affirmed.*

See same case below, 122 Fed. 1012.

The facts are stated in the opinion.

Mr. William H. Lyles argued the cause and filed a brief for plaintiff in error.

Mr. D. W. Robinson argued the cause and filed a brief for defendant in error.

Mr. William Elliott, Jr., by leave of court filed a brief as *amicus curiæ*.

Mr. Justice Holmes delivered the opinion of the court:

This is an action to recover land, brought by Robinson, the defendant in error, a citizen and resident of North Carolina, against Lee, a citizen and resident of South Carolina, on the ground that Robinson had purchased the land at a tax sale.

[65] *The value of the land is alleged and found to be more than \$2,000. The defense is that a tender was made of the amount of the taxes before the sale. This tender included, as a part of it, revenue bond scrip of the state of South Carolina for \$5, purporting on its face to be receivable in payment of taxes, and the question is whether the tender was good; or, more precisely, whether the bond scrip was receivable for taxes under the Constitution of the United States and the Constitution and laws of South Carolina. The circuit court held the tender bad, on the double ground that the issue of the scrip was in contravention of the Constitution of the state and that the scrip was a bill of credit within the prohibition of article 1, § 10, of the Constitution of the United States. 122 Fed. 1012. Judgment was given for the plaintiff, Robinson, and this writ of error was brought, setting up that the contract rights of the defendant under the Constitution of the United States were impaired by the laws hereafter mentioned which excluded the reception of the scrip for the tax.

Counsel other than those representing the parties was permitted to file a brief as *amicus curiæ*, and urged that this was a collusive suit. But the circuit court held that it was not (122 Fed. 1010), and we accept the finding for the purposes of disposing of the case.

The revenue bond scrip was issued under an act of March 2, 1872, entitled "An Act to Relieve the State of South Carolina of All Liability for Its Guaranty of the Bonds of the Blue Ridge Railroad Company, by

Providing for the Securing and Destruction of the Same." This act purported to authorize the issue to the amount of \$1,800,000, "which revenue bond scrip shall be signed by the state treasurer, and shall express that the sum mentioned therein is due by the state of South Carolina to the bearer thereof, and that the same will be received in payment of taxes and all other dues to the state, except special tax levied to pay interest on the public debt." But the supreme court of the state held that the scrip constituted bills of credit within the prohibition of the Constitution of the *United States, article 1, § 10. *State ex* [66] *rel. Shiver v. Comptroller General*, 4 S. C. N. S. 185. The pledge of the state's credit and the provisions for the redemption of the scrip were repealed by the legislature, and, under the fiscal laws of the state, the scrip had not been receivable for taxes since 1873.

We are of opinion that the issue of the scrip was forbidden by the Constitution of the state. When the scrip was issued, the Constitution of South Carolina, ratified on April 16, 1868, in article 9, § 10, provided as follows: "No scrip, certificate, or other evidence of state indebtedness shall be issued except for the redemption of stock, bonds, or other evidence of indebtedness previously issued, or for such debts as are expressly authorized in this Constitution." There was also a further provision that "any debt contracted by the state shall be by loan on state bonds, of amounts not less than \$50 each, on interest payable within twenty years after the final passage of the law authorizing such debt."

The guaranty from which the scrip was to relieve the state was a guaranty of bonds of the Blue Ridge Railroad Company, which was indorsed upon them by authority of an act approved September 15, 1868. The state long had favored this road, and had held its stock. It had authorized the guaranty of bonds in 1852, and again in 1854, repealing the former act. But the act of 1868 recited that the comptroller general of the state had not indorsed any of the bonds issued under the act of 1854, and that the conditions imposed upon such indorsement had become impossible and injudicious. So it might be assumed from the face of the statute of 1868 that there was no outstanding liability represented by the guaranty under that statute, and we see no ground for doubt that the guaranty must be considered as a new contract, made for the first time, in substance as well as form, after the Constitution of 1868 went into effect.

The guaranty under the act of 1868 cannot be put under the head of "such debts

as are expressly authorized in this Constitution," since it was not in the form required for debts *contracted under the Constitution of 1868. We are of opinion that it equally little satisfies the other exception in article 9, § 10, quoted above, of a contract made for the redemption of an "evidence of indebtedness previously issued." Whether the word "previously" refers to the date of the Constitution or to the date of issuing the guaranty, the guaranty of 1868 is not and does not purport to be made for the redemption of a previous evidence of debt.

It is argued that, whether there was a liability or not, the acts before 1868 having purported to pledge the credit of the state to secure the bonds of the railroad company, as they did, there was color of liability, and the act of 1868, or, at any rate, the act of 1872, authorizing the bond scrip, was the adjustment of a claim against the state under article 14, § 4, of the state Constitution. But the act of 1868 did not purport to be an adjustment. On the contrary, it purported, as we have said, to give new aid to the railroad, and to authorize an original issue. The act of 1872, again, dealt only with the supposed liability under the act of 1868, and provided for the satisfaction of that. If that liability did not exist, the statute no more could ratify it than it could call it into being. The liability for which scrip could be issued was required by the Constitution to be one existing before the issue was made. Moreover, the act of 1872 did not purport to be an adjustment of a matter in dispute, or an adjustment in any sense. It simply assumed that there was an outstanding liability, and provided for the satisfaction of it. The question is not whether payment of the bond scrip would be valid, but whether the bond scrip was issued under the conditions which the state Constitution imposed.

Judgment affirmed.

[68]*WILLIAM B. WETMORE, *Plff. in Err.*,
v.

ANNETTE B. MARKOE (formerly Annette B. Wetmore).

(See S. C. Reporter's ed. 68-77.)

Bankruptcy — effect of discharge upon alimony and allowance to minor children.

A discharge in bankruptcy does not bar the collection of arrears in alimony and allowance for the support of minor children, due under a decree in an action for divorce, since such liability, although fixed by a decree

which is beyond the power of the court to alter or amend, because it did not reserve any right of subsequent modification or amendment, is not a "debt" within the meaning of the bankruptcy act of July 1, 1898 (30 Stat. at L. 562, chap. 541, U. S. Comp. Stat. 1901, p. 3447), § 63, providing for the proving of debts which are a fixed liability as evidenced by a judgment.

[No. 56.]

Argued November 9, 10, 1904. Decided December 19, 1904.

IN ERROR to the Supreme Court of the State of New York to review a judgment of the Appellate Division, First Department of that court, which affirmed an order entered at a Special Term held in and for the County of New York, denying an application for an order restraining the collection of arrears of alimony and allowance for the support of minor children, such application being based on the theory that the liability therefor was discharged by proceedings in bankruptcy. *Affirmed.*

Statement by Mr. Justice **Day**:

On June 12, 1890, an action for divorce and alimony was begun by Annette B. W. Wetmore, wife of the plaintiff in error, in the supreme court of the state of New York, and on April 1, 1892, at special term, the plaintiff in error was found guilty of adultery as charged in the complaint, and a divorce was granted upon that ground to the defendant in error. The divorce was absolute, and awarded to the wife the custody and care of the three minor children of the marriage, and also, as alimony, the sum of \$3,000 per annum so long as she should live, to be paid in quarterly instalments of \$750 each on the first day of the months of July, October, January, and April of each year. There was also granted to the wife the sum of \$3,000 annually, being \$1,000 for the education and maintenance of each of the three minor children, to be paid in quarterly instalments, until such children should arrive at the age of twenty-one years respectively. Plaintiff in error was also required *to give security for the payment of the alimony awarded. The decree did not reserve any right of subsequent modification or amendment. On January 13, 1899, there was due to the wife from the plaintiff in error, for arrears in alimony and allowance under the decree, the sum of \$19,221.60. Upon that day, upon application to the district court of the United States for the eastern district of Pennsylvania, the plaintiff in error was

adjudicated a bankrupt. The defendant in error made no proof of her claim for alimony in the bankrupt proceedings. On June 21, 1900, the plaintiff in error was granted a discharge from all debts and claims provable under the bankruptcy act. On December 12, 1901, plaintiff in error sued out a writ in the supreme court of the state of New York for an order enjoining and restraining all proceedings on behalf of the defendant in error for the collection of the arrears of alimony and allowance aforesaid. This application was denied, upon the ground, as it appears from the memorandum of the judge who rendered the decision, that the arrears of alimony were not discharged in bankruptcy. From the order denying the application an appeal was taken by the plaintiff in error to the appellate division of the supreme court of the state of New York, where the order below was affirmed. The plaintiff in error thereupon appealed to the court of appeals of the state of New York, and on June 27, 1902, the appeal was dismissed for want of jurisdiction, without any judgment of affirmance or reversal upon the merits. A writ of error was sued out seeking in this court a reversal of the judgment of the supreme court of the state of New York.

Mr. William A. Keener argued the cause, and, with *Messrs. Hatch, Keener, & Clute*, filed a brief for plaintiff in error:

The decree of divorce, containing no provision by virtue of which it may be modified, altered, or amended, became an absolute obligation beyond the power or control of either the courts or the legislature to modify.

Walker v. Walker, 155 N. Y. 77, 49 N. E. 663; *Livingston v. Livingston*, 173 N. Y. 377, 61 L. R. A. 800, 93 Am. St. Rep. 600, 66 N. E. 123.

So absolute is this obligation that it is not affected by the marriage of the wife.

Shepherd v. Shepherd, 1 Hun, 240, 58 N. Y. 644.

It is an obligation collectible by the levying of an execution.

N. Y. Code Civ. Proc. § 1240; *Miller v. Miller*, 7 Hun, 208.

The defendant in error is regarded as a judgment creditor.

Wetmore v. Wetmore, 149 N. Y. 520, 33 L. R. A. 708, 52 Am. St. Rep. 752, 44 N. E. 169.

The arrears of alimony which accrued prior to January 13, 1899, were a provable debt within the provisions of the United States bankruptcy act, and were released by
196 U. S.

the discharge in bankruptcy granted to the plaintiff in error.

Re Houston, 94 Fed. 119; *Re Van Orden*, 96 Fed. 86; *Re Challoner*, 98 Fed. 82.

Mr. Flamen B. Candler argued the cause, and, with *Messrs. William Jay* and *Robert W. Candler*, filed a brief for defendant in error:

Neither the claim for alimony nor the claim for maintenance and education of the infant children was a debt provable in bankruptcy, and the discharge in bankruptcy did not relieve the plaintiff in error from payment of arrears of alimony, or arrears for the maintenance and education of the infant children.

Audubon v. Shufeldt, 181 U. S. 575, 45 L. ed. 1009, 21 Sup. Ct. Rep. 735; *Dunbar v. Dunbar*, 190 U. S. 340, 47 L. ed. 1084, 23 Sup. Ct. Rep. 757; *Re Nowell*, 99 Fed. 931; *Re Shepard*, 97 Fed. 187; *Re Anderson*, 97 Fed. 321; *Turner v. Turner*, 108 Fed. 785; *Re Lachemeyer*, 18 Nat. Bankr. Reg. 270, Fed. Cas. No. 7,966; *Re Garrett*, 2 Hughes, 235, 11 Nat. Bankr. Reg. 493, Fed. Cas. No. 5,252; *Re Smith*, 3 Am. Bankr. Rep. 68; *Maisner v. Maisner*, 62 App. Div. 286, 70 N. Y. Supp. 1107; *Young v. Young*, 35 Misc. 335, 71 N. Y. Supp. 944; *People ex rel. Buckel v. Grell*, 65 N. Y. Supp. 522; *Bishop, Marr. & Div. § 837*. And see *Tinker v. Colwell*, 193 U. S. 473, 48 L. ed. 754, 24 Sup. Ct. Rep. 505.

Under the law of New York, alimony provided for by a decree of divorce is not regarded as a debt, or a fixed liability, within the meaning of the bankrupt act, but as a legal determination of the duty owing from husband to wife.

Romaine v. Chauncey, 129 N. Y. 566, 14 L. R. A. 712, 26 Am. St. Rep. 544, 29 N. E. 826; *Wetmore v. Wetmore*, 79 Hun, 268, 29 N. Y. Supp. 440, Affirmed in 149 N. Y. 520, 33 L. R. A. 708, 52 Am. St. Rep. 752, 44 N. E. 169; *Maisner v. Maisner*, 62 App. Div. 286, 70 N. Y. Supp. 1107.

Mr. Justice Day delivered the opinion of the court:

It is conceded in argument by counsel for the plaintiff in error that this case would be within the decision of this court in *Audubon v. Shufeldt*, 181 U. S. 577, 45 L. ed. 1010, 21 Sup. Ct. Rep. 735, if the judgment for alimony had been rendered in a court having control over the decree with power to amend or alter the same. It is insisted, however, that, there being in this case no reservation of the right to change or modify the decree, it has become an absolute judgment, beyond the power of the court to alter or amend, and is therefore discharged by the bankruptcy proceedings. **Walker v. Walker*, 155 N. Y. 77, 49 [72].

N. E. 663; *Livingston v. Livingston*, 173 N. Y. 377, 61 L. R. A. 800, 93 Am. St. Rep. 600, 66 N. E. 123. It may be admitted to be the effect of these decisions of the New York court of appeals that, in the absence of any reservation of the right to modify or amend, the judgment for alimony becomes absolute. The question presented for decision, in view of this state of the law, is, Has the decree become a fixed liability evidenced by a judgment, and therefore provable against the estate of the bankrupt, within the protection of the discharge in bankruptcy? Section 63 of the act of 1898 provides:

"Sec. 63. Debts which may be proved:—

"Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date, or with a rebate of interest upon such as were not then payable and did not bear interest." [30 Stat. at L. 562, chap. 541, U. S. Comp. Stat. 1901, p. 3447.]

It is not contended that this section includes instalments of alimony becoming due after the adjudication, but the contention is that prior instalments have become an existing liability, evidenced by the judgment, and therefore a provable debt. While this section enumerates under separate paragraphs the kind and character of claims to be proved and allowed in bankruptcy, the classification is only a means of describing "debts" of the bankrupt which may be proved and allowed against his estate.

The precise question, therefore, is, Is such a judgment as the one here under consideration a *debt* within the meaning of the act? The mere fact that a judgment has been rendered does not prevent the court from looking into the proceedings with a view of determining the nature of the liability which has been reduced to judgment. *Boynton v. Ball*, 121 U. S. 457, 466, 30 L. ed. 985, 987, 7 Sup. Ct. Rep. 981. The question presented is not altogether new in this court. In the case of *Audubon v. Shufeldt*, 181 U. S. 577, 45 L. ed. 1010, 21 Sup. Ct. Rep. 736, Mr. Justice Gray, delivering the opinion of the court, said:

[73] "Alimony does not arise from any business transaction, but from the relation of marriage. It is not founded on contract, express or implied, but on the natural and legal duty of the husband to support the wife. The general obligation to support is

made specific by the decree of the court of appropriate jurisdiction. Generally speaking, alimony may be altered by that court at any time, as the circumstances of the parties may require. The decree of a court of one state, indeed, for the present payment of a definite sum of money as alimony, is a record which is entitled to full faith and credit in another state, and may, therefore, be there enforced by suit. *Barber v. Barber* (1858) 21 How. 582, 16 L. ed. 226; *Lynde v. Lynde* (1901) 181 U. S. 183, 45 L. ed. 810, 21 Sup. Ct. Rep. 555. But its obligation in that respect does not affect its nature. In other respects, alimony cannot ordinarily be enforced by action at law, but only by application to the court which granted it, and subject to the discretion of that court. Permanent alimony is regarded rather as a portion of the husband's estate to which the wife is equitably entitled than as strictly a debt; alimony from time to time may be regarded as a portion of his current income or earnings; and the considerations which affect either can be better weighed by the court having jurisdiction over the relation of husband and wife than by a court of a different jurisdiction."

In the same opinion Mr. Justice Gray quoted from *Barclay v. Barclay*, 184 Ill. 375, 51 L. R. A. 351, 56 N. E. 636, in which case it was adjudged that alimony could not be regarded as a debt owing from husband to wife, which might be discharged by an order in bankruptcy, whether the alimony accrued before or after the proceedings in bankruptcy:

"The liability to pay alimony is not founded upon a contract, but is a penalty imposed for a failure to perform a duty. It is not to be enforced by an action at law in the state where the decree is entered, but is to be enforced by such proceedings as the chancellor may determine and adopt for its enforcement. It may be enforced by imprisonment for contempt, without violating the constitutional provision prohibiting *imprisonment for [74] debt. The decree for alimony may be changed from time to time by the chancellor, and there may be such circumstances as would authorize the chancellor to even change the amount to be paid by the husband, where he is in arrears in payments required under the decree. Hence, such alimony cannot be regarded as a debt owing from husband to the wife, and, not being so, cannot be discharged by an order in the bankruptcy court."

It is true that, in the cases referred to, the decrees were rendered in courts having continuing control over them, with power to alter or amend them upon application;

but this fact does not change the essential character of the liability, nor determine whether a claim for alimony is, in its nature, contractual so as to make it a debt. The court having power to look behind the judgment, to determine the nature and extent of the liability, the obligation enforced is still of the same character notwithstanding the judgment. We think the reasoning of the *Audubon Case* recognizes the doctrine that a decree awarding alimony to the wife or children, or both, is not a debt which has been put in the form of a judgment, but is rather a legal means of enforcing the obligation of the husband and father to support and maintain his wife and children. He owes this duty, not because of any contractual obligation, or as a debt due from him to the wife, but because of the policy of the law which imposes the obligation upon the husband. The law interferes when the husband neglects or refuses to discharge this duty, and enforces it against him by means of legal proceedings.

It is true that in the state of New York at the time this decree was rendered there was no power to modify or alter the decree for alimony and allowance in the absence of special reservation. But this does not change the grounds upon which the courts of the state proceeded in awarding the alimony and allowances. In the case of *Romaine v. Chauncey*, 129 N. Y. 566, 14 L. R. A. 712, 26 Am. St. Rep. 544, 29 N. E. 826, it was held that alimony was awarded, not in the payment of a debt, but in the performance of the general duty of the [75]*husband to support the wife. This case was quoted with approval by Mr. Justice Gray in *Audubon v. Shufeldt*, 181 U. S. 575, 45 L. ed. 1009, 21 Sup. Ct. Rep. 735.

In *Walker v. Walker*, 155 N. Y. 77, 49 N. E. 663, and *Livingston v. Livingston*, 173 N. Y. 377, 61 L. R. A. 800, 93 Am. St. Rep. 600, 66 N. E. 123, the effect of the holdings is that a judgment for alimony, in the absence of reservation, is a fixed and unalterable determination of the amount to be contributed to the wife's support after the decree, and is beyond the power of the court to change even under the authority of subsequent legislation. These cases do not modify the grounds upon which alimony is awarded, and recognize that an alimony decree is a provision for the support of the wife, settled and determined by the judgment of the court.

In the case of *Dunbar v. Dunbar*, decided by this court at the October term, 1902 (190 U. S. 340, 47 L. ed. 1084, 23 Sup. Ct. Rep. 757), it was held that a contract made after divorce between husband and

wife, by which the former agreed to pay the latter a certain sum of money annually for her support during her life, or so long as she remained unmarried, and also to pay a certain sum of money to her annually for the support of the minor children of the marriage, whose custody was awarded to the mother, was not discharged by a subsequent proceeding and discharge in bankruptcy. It was further held that the sum agreed to be paid for the support of the minor children was but a recognition of the liability of the father for their support, and that the fact that the annual instalments were made payable to the wife made no difference in the character of the obligation. Of this feature of the contract the court, speaking by Mr. Justice Peckham, said:

"In relation to that part of the husband's contract to pay for the support of his minor children until they respectively become of age, we also think that it was not of a nature to be proved in bankruptcy. At common law, a father is bound to support his legitimate children, and the obligation continues during their minority. We may assume this obligation to exist in all the states. In this case the decree of the court provided that the children should remain in the custody of *the wife, [76] and the contract to contribute a certain sum yearly for the support of each child during his minority was simply a contract to do that which the law obliged him to do; that is, to support his minor children. . . . We think it was not the intention of Congress, in passing a bankruptcy act, to provide for the release of the father from his obligation to support his children by his discharge in bankruptcy, and if not, then we see no reason why his contract to do that which the law obliged him to do should be discharged in that way. As his discharge would not in any event terminate his obligation to support his children during their minority, we see no reason why his written contract acknowledging such obligation and agreeing to pay a certain sum (which may be presumed to have been a reasonable one) in fulfillment thereof should be so discharged. It is true his promise is to pay to the mother; but on this branch of the contract it is for the purpose of supporting his two minor children, and he simply makes her his agent for that purpose."

We think this language is equally applicable to the present case in that aspect of the decree which provides for the support of the minor children. The obligation continues after the discharge in bankruptcy as well as before, and is no more than the duty devolved by the law upon the hus-

band to support his children, and is not a debt in any just sense.

It is urged that the amendment of the law made by the act of February 5, 1903 [32 Stat. at L. 797, chap. 487], excepting from the operation of a discharge in bankruptcy a decree for alimony due or to become due, or for the maintenance and support of the wife and minor children, is a legislative recognition of the fact that, prior to the passage of the amendment, judgments for alimony would be discharged. In *Dunbar v. Dunbar*, 190 U. S. 340, 47 L. ed. 1084, 23 Sup. Ct. Rep. 757, it was said that this amendment, while it did not apply to prior cases, may be referred to for the purpose of showing the legislative trend in the direction of not discharging an obligation of the bankrupt for the support and maintenance of wife and children. The amendment may also [77] have been passed *with a view to settling the law upon this subject, and to put at rest the controversies which had arisen from the conflicting decisions of the courts, both state and Federal, upon this question. Indeed, in view of the construction of the act in this court in *Audubon v. Shufeldt*, 181 U. S. 575, 45 L. ed. 1009, 21 Sup. Ct. Rep. 735, it may be said to be merely declaratory of the true meaning and sense of the statute. *United States v. Freeman*, 3 How. 556, 11 L. ed. 724; *Bailey v. Clark*, 21 Wall. 284, 288, 22 L. ed. 651, 653; *Cope v. Cope*, 137 U. S. 682, 688, 34 L. ed. 832, 834, 11 Sup. Ct. Rep. 222. The bankruptcy law should receive such an interpretation as will effectuate its beneficent purposes, and not make it an instrument to deprive dependent wife and children of the support and maintenance due them from the husband and father, which it has ever been the purpose of the law to enforce. Systems of bankruptcy are designed to relieve the honest debtor from the weight of indebtedness which has become oppressive, and to permit him to have a fresh start in business or commercial life, freed from the obligation and responsibilities which may have resulted from business misfortunes. Unless positively required by direct enactment the courts should not presume a design upon the part of Congress, in relieving the unfortunate debtor, to make the law a means of avoiding enforcement of the obligation, moral and legal, devolved upon the husband to support his wife and to maintain and educate his children. While it is true in this case the obligation has become fixed by an unalterable decree so far as the amount to be contributed by the husband for the support is concerned, looking beneath the judgment for the foundation

upon which it rests, we find it was not decreed for any debt of the bankrupt, but was only a means designed by the law for carrying into effect, and making available to the wife and children, the right which the law gives them as against the husband and father.

We find no error in the judgment of the Supreme Court of the State of New York, and the same is affirmed.

*GEORGE F. HARDING, *Plff. in Err.*, [78]
v.

PEOPLE OF THE STATE OF ILLINOIS.

(See S. C. Reporter's ed. 78-88.)

Error to state court—Federal question.

1. Neither the petition for a rehearing, nor the petition for the writ of error, nor the assignments of error in the Federal Supreme Court, nor the certification of briefs by the clerk of the state court, can cure the failure of the record to show that a Federal question was raised and decided which would confer jurisdiction on the Federal Supreme Court of a writ of error to the state court.
2. The assertion, on a motion for new trial, that a state statute is contrary to the Federal Constitution, without pointing out the provision of that instrument which it is claimed to violate, does not present a Federal question which will confer jurisdiction on the Federal Supreme Court of a writ of error to a state court.
3. A Federal question, even if presented by the claim, on a motion for a new trial in a state court, that a state statute takes property without due process of law, which the highest state court expressly refrained from passing upon because it regarded the objection waived by failure to cite authorities or advance argument in support thereof, cannot be deemed necessarily to have been decided by that court, where the record does not show that the question was there raised.

[No. 61.]

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Kipley v. Illinois*, 42 L. ed. U. S. 998, and *Re Buchanan*, 39 L. ed. U. S. 884.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to *Apex Transp. Co. v. Garbade*, 62 L. R. A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to *Mutual L. Ins. Co. v. McGrew*, 63 L. R. A. 33.

On what the record must show respecting the presentation and decision of a Federal question in order to confer jurisdiction on the Supreme Court of the United States on a writ of error to a state court—see note to *Hooker v. Los Angeles*, 63 L. R. A. 471.

Submitted November 10, 1904. Decided December 19, 1904.

IN ERROR to the Supreme Court of the State of Illinois to review a judgment which affirmed a judgment of the Circuit Court of Cook County, of that State, in favor of plaintiff in an action to recover certain taxes. *Dismissed for want of jurisdiction.*

See same case below, 202 Ill. 122, 66 N. E. 962.

The facts are stated in the opinion.

Mr. William H. Barnum submitted the cause for plaintiff in error.

Mr. Robert S. Iles submitted the cause for defendant in error.

Mr. Justice Day delivered the opinion of the court:

This case was submitted on briefs, together with motion to dismiss or affirm. In support of the motion to dismiss, the position taken is that no Federal question was properly raised in the state court, and therefore none is reviewable here.

The case was commenced in the circuit court of Cook county, Illinois, to recover taxes for the years 1897, 1898, 1899, and 1900, on a block of land in the Elston addition to the city of Chicago. At the trial a jury was waived, and, upon hearing, a judgment was rendered in favor of the plaintiff for the sum of \$2,123.05. An inspection of the record shows that the principal controversy was over the effect of a deed made by Harding, the plaintiff in error, to the Chicago Real Estate Loan & Trust Company, dated June 10, 1896, and recorded July 2 of the same year, which conveyed, for the consideration of \$5, "all interest in the following described real estate, to wit: Any and all lands, of every kind and description, claimed or owned by me in the state of Illinois, and all lots and lands, of every description, in the city of Chicago, in which I have any right, title, or interest whatsoever, situated in the state of Illinois," etc. It was the contention of the state that this deed was too general in its terms to convey specific property, and was therefore insufficient notice to the taxing officer of Cook county that the ownership of the property had changed. The trial court admitted this deed in evidence, subject to this objection. Upon appeal to the supreme court of Illinois, of this deed and other evidence in the case that court said:

"Conceding that the deed, if it stood alone, would overcome the prima facie case made by the plaintiff, the tax records of Cook county for the year 1898, offered in evidence by the people, tended to prove
196 U. S.

ownership in the defendant. The items in the tax warrant for the year 1897 on this property were charged to him and merged into a judgment. He appeared *in the[83] county court and objected to the validity of the tax, but judgment was rendered against him as owner. This was subsequent to the date of the deed. His remedy as to that tax, if levied unjustly against him, was by appeal. *Biggins v. People*, 106 Ill. 270. As to that tax he clearly could not, in this proceeding, attack the validity of the former judgment. Moreover, after the date of the deed he received the rents accruing from the property and deposited the money so received to his personal account. Notwithstanding the attempted explanation of that transaction, we think the weight of the evidence is that he continued, after the pretended conveyance, to deal with the premises as his own.

"In the light of all the evidence in the case it is very clear that the conveyance of June 10, 1896, was merely colorable, and not executed with the honest purpose of conveying the absolute ownership of the property to the grantee." 202 Ill. 122, 66 N. E. 962.

Much of the elaborate brief of the counsel for plaintiff in error is devoted to a discussion of alleged errors of the supreme court of Illinois in deciding questions which, it is alleged, were not properly made, or in failing to give due weight to matters of evidence in the record. This court has no general power to review or correct the decisions of the highest state court, and in cases of this character exercises a statutory jurisdiction to protect alleged violations, in state decisions, of certain rights arising under Federal authority. *Central Land Co. v. Laidley*, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80; *Marchant v. Pennsylvania R. Co.* 153 U. S. 380, 38 L. ed. 751, 14 Sup. Ct. Rep. 894.

The proceeding was brought under § 230, chapter 120, 3 Starr & C. Anno. Stat. of Illinois, 3501. This section provides:

"In any such suit or trial for forfeited taxes, the fact that real estate or personal property is assessed to a person, firm, or corporation shall be prima facie evidence that such person, firm, or corporation was the owner thereof, and liable for the taxes for the year or years for which the assessment was made, and such fact may be proved by the introduction in evidence *of[84] the proper assessment book or roll, or other competent proof."

It is the contention of the plaintiff in error in this court that this statute is unconstitutional, permitting assessment of

those who may not be the owners of the property assessed, and consequently a violation of the protection guaranteed by the 14th Amendment to the Constitution of the United States. The adverse holding in the state court upon this proposition is the decision upon a Federal right which, it is asserted, gives jurisdiction to review the judgment in this court. The motion to dismiss raises the question whether this objection was properly reserved in the state court. Upon the constitutionality of this act the supreme court of Illinois said:

"It is also said that the foregoing section of the statute, under which the action is brought, is unconstitutional; but no authorities are cited or argument advanced in support of that assertion. The point, if it can be so considered, has therefore been waived."

In the petition for allowance of a writ of error, and the assignment of errors in this court, it is alleged that the supreme court of the state erred in holding that the constitutional objection had been waived. And the plaintiff in error appears to have put upon file here, without leave, the briefs and petition for rehearing below, in which it is insisted there is sufficient to show that the constitutional objection was not abandoned. But neither the petition for a rehearing nor petition for writ of error in the state court after judgment, nor assignments of error in this court, can supply deficiencies in the record of the state court, if any exist. *Simmerman v. Nebraska*, 116 U. S. 54, 29 L. ed. 535, 6 Sup. Ct. Rep. 333. Nor does the certification of the briefs by the clerk of the state supreme court, which are no part of the record, help the matter. *Zadig v. Baldwin*, 166 U. S. 485, 41 L. ed. 1087, 17 Sup. Ct. Rep. 639. We are to try the case upon the duly certified record, legally made in the state court, and upon which its decision rests. *Powell v. Brunswick County*, 150 U. S. 433, 439, 37 L. ed. 1134, 1136, 14 Sup. Ct. Rep. 166.

[85] An examination of the record discloses that the assignment *of errors in the supreme court of Illinois does not directly raise the point under consideration. It is referred to in the following language of the assignment of errors:

"The finding and judgment of the court were erroneous for the several reasons stated in the points filed in support of the motion to set aside the finding and grant a new trial."

If we may look to the motion filed in the trial court we find some thirty points assigned as grounds for a new trial. Those which may have application to Federal

constitutional questions are found in paragraphs 26 and 27, which are:

"26. The statute under which this action is prosecuted is contrary to the Constitution of the United States.

"27. This proceeding under said statute is a taking of property without due process of law, and otherwise unconstitutional."

The assertion that a judgment rests upon an unconstitutional state statute, the validity of which has been drawn in question and sustained, presents one of a class of cases which may be reviewed here. In the analysis of § 709 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 575) in *Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co.* 172 U. S. 475-488, 43 L. ed. 521-526, 19 Sup. Ct. Rep. 247-252, it was pointed out that cases of the character of the one now under consideration come within the second class of those provided for in the section: "Where is drawn in question the validity of a statute of, or an authority exercised under, any state on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity."

It has been frequently held that in cases coming within this class less particularity is required in asserting the Federal right than in cases in the third class, wherein a right, title, privilege, or immunity is claimed under the United States, and the decision is against such right, title, privilege, or immunity. In the latter class the statute requires such right or privilege to be "specially set up and claimed." Under the second class it may be said to be the result of the rulings in this court that if *the Federal question appears in the record [86] in the state court and was decided, or the decision thereof was necessarily involved in the case, the fact that it was not specially set up will not preclude the right of review here. *Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co.* 172 U. S. 475, 43 L. ed. 521, 19 Sup. Ct. Rep. 247, and cases cited on p. 488, L. ed. p. 526, Sup. Ct. Rep. p. 252. Nevertheless, it is equally well settled that the right of review dependent upon the adverse decision of a Federal question exists only in those cases wherein a decision of the question involved was brought, in some proper manner, to the attention of the court, and decided, or it appears that the judgment rendered could not have been given without deciding it. *Fowler v. Lamson*, 164 U. S. 252, 41 L. ed. 424, 17 Sup. Ct. Rep. 112; *Clarke v. McDade*, 165 U. S. 168-172, 41 L. ed. 673, 674, 17 Sup. Ct.

Rep. 284. In one of the latest utterances of this court upon the question under consideration (*Capital City Dairy Co. v. Ohio*, 183 U. S. 238-248, 46 L. ed. 171-176, 22 Sup. Ct. Rep. 120-124), Mr. Justice White, delivering the opinion of the court, said:

"It is settled that this court, on error to a state court, cannot consider an alleged Federal question when it appears that the Federal right thus relied upon had not been, by adequate specification, called to the attention of the state court, and had not been by it considered, not being necessarily involved in the determination of the cause. *Green Bay & M. Canal Co. v. Patten Paper Co.* 172 U. S. 58, 67, 43 L. ed. 364, 368, 19 Sup. Ct. Rep. 97; *F. G. Oxley Stave Co. v. Butler County*, 166 U. S. 648, 654, 655, 41 L. ed. 1149, 1151, 1152, 17 Sup. Ct. Rep. 709, and cases cited. Now, the only possible support to the claim that a Federal question on the subject under consideration was raised below was the general statement in the answer to which we have already adverted, that 'this proceeding is in violation of the Constitution of the United States.' Nowhere does it appear that at any time was any specification made as to the particular clause of the Constitution relied upon to establish that the granting of relief by quo warranto would be repugnant to that Constitution, nor is there anything in the record which could give rise even to a remote inference that the mind of the state court was directed to or considered this question. On the contrary, it is apparent from the record that such a contention was not *raised in the state court. Thus, although at the request of the defendant below (the plaintiff in error here) the state court certified as to the existence of the Federal questions which had been called to its attention and which it had decided, no reference was made in the certificate to the claim of Federal right we are now considering."

[87]

The only authority called to the attention of this court by counsel for plaintiff in error as supporting the view that a Federal question was properly raised in this case is *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 587, in which case it was contended that a statute of the state of Illinois, under which condemnation proceedings were had, was in violation of the 14th Amendment to the Constitution of the United States. In that case it was distinctly asserted, in the motion for a new trial in the trial court, that the statute and rulings of the court, and the verdict and judgment based thereon, were contrary to the 14th Amendment, declaring that no state should deprive any person of

196 U. S.

life, liberty, or property without due process of law nor deny to any person within its limits the equal protection of the laws. In the assignment of errors in the supreme court of the state it was distinctly reasserted that these Federal rights had been denied by the proceedings in the trial court, and it was held in this court that while the supreme court of Illinois did not, in its opinion, expressly refer to the Federal constitutional rights asserted, the same were necessarily included in the judgment of the court, and therefore the case was reviewable here. But how stands the present case? It is distinctly stated by the supreme court of Illinois (whose judgment is alone reviewable here) in the passage above quoted from its opinion, that no authorities were cited nor argument advanced in support of the assertion that the statute was unconstitutional, and that the point, if it could otherwise be considered, was deemed to be waived. If we look to the motion for a new trial, referred to in general terms in the assignment of errors when the case was taken to the supreme court of Illinois, we find the only *reference to a Federal constitutional question to be in paragraphs 26 and 27, above quoted, from the motion for new trial in the court of original jurisdiction. Paragraph 26 simply states that the statute is contrary to the Constitution of the United States, without calling attention to the provision of that instrument whose protection is denied to the plaintiff in error, and is clearly insufficient. *Farney v. Towle*, 1 Black, 350, 17 L. ed. 216. Paragraph 27 alleges that the statute takes the property without due process of law, and is therefore unconstitutional. If this vague objection (§ 27) may be taken as asserting a claim of right under the Federal Constitution, yet, in the supreme court of Illinois, so far as the record discloses, there was neither authority cited nor argument advanced in support of the constitutional objection. There is nothing to prevent a party from waiving a Federal right of this character if he chooses to do so, either in express terms or as a necessary implication from his manner of proceeding in the cause. It is clear from the opinion cited that the state court based its decision upon other than Federal grounds, and did not decide the constitutional question sought to be made here.

If the question was necessarily decided, notwithstanding the failure or refusal of the state court to expressly and in terms pass upon the matter, the case might be brought here. But in this case the state court expressly disclaims decision of the constitutional question, because it was not

presented by proper proceedings. Our view of this record is that, in so holding, the state court did not err to the prejudice of the plaintiff in error.

Writ of error dismissed.

[89] *M. H. COURTNEY, *Appt.*,

v.

LOUIS A. PRADT, Executor of Merrit B. Atwater, Deceased, and William C. Atwater.

(See S. C. Reporter's ed. 89-93.)

Direct appeal from circuit court—when jurisdiction is in issue.

1. The dismissal by a Federal circuit court of a suit against a foreign executor for the want of jurisdiction in the state court, from which it had been removed for diversity of citizenship, does not present a question of the jurisdiction of the circuit court as a Federal court, which will authorize a direct appeal under the act of March 3, 1891 (26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549), § 5, to the Federal Supreme Court.
2. The denial of a motion to remand a cause which has been removed from the state court to a Federal circuit court does not so present the question of that court's jurisdiction as to sustain a direct appeal to the Federal Supreme Court under the act of March 3, 1891 (26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549), § 5, where such motion did not, in terms, put in issue the power of the circuit court as a court of the United States to hear and determine the cause.
3. The objection that an attachment suit in aid of an action at law was not cognizable in a Federal circuit court, to which it had been removed from the state court for diversity of citizenship, because the proceeding was equitable in form, is not open to consideration by a direct appeal to the Federal Supreme Court, which is sought to be maintained under the act of March 3, 1891 (26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549), § 5, as a case in which the jurisdiction of the circuit court was in issue.

[No. 93.]

Argued December 9, 1904. Decided January 3, 1905.

APPEAL from the Circuit Court of the United States for the Eastern District of Kentucky to review a judgment dismissing, for want of jurisdiction in the state court, a cause which had been removed to the Circuit Court from the Circuit Court of

Powell County, in the state of Kentucky. *Dismissed* for want of jurisdiction.

Statement by Mr. Chief Justice **Fuller**:

Merrit B. Atwater, a citizen of Wisconsin, and William C. Atwater, a citizen of Illinois, were partners, and in 1898 Merrit B. died testate, having appointed Louis A. Pradt, likewise a citizen of Wisconsin, his executor. The will was duly admitted to probate in Wisconsin, and Pradt duly qualified as executor, and has been and is acting as such. William C. Atwater was one of the legatees under the will.

The Atwater Land & Lumber Company was a corporation of Wisconsin, engaged in buying, owning, holding, and selling real estate in Kentucky, and Merrit B. Atwater, at the time of his death, owned stock in that corporation, on which a dividend was declared August 30, 1901, which amounted to \$4,757.37. W. C. Atwater was not a stockholder at the time of the declaration of the dividend, and had not been since 1893.

*Courtney, a citizen of Kentucky, brought [90] suit in the circuit court of Powell county, Kentucky, against Pradt, executor, and William C. Atwater, and procured a general order of attachment, under which the sheriff summoned the company to answer as garnishee by delivery of a copy of the attachment to the person designated by the company as its agent upon whom process could be executed, as required by the statutes of Kentucky in that behalf. There was no personal service on Pradt, executor, or on William C. Atwater, but a warning order was entered pursuant to statute.

Pradt, as executor, and William C. Atwater, filed their petition and bond in the state court for the removal of the cause to the circuit court of the United States for the eastern district of Kentucky on the ground of diversity of citizenship, and it was removed accordingly. Pradt, executor, and William C. Atwater, entering their appearance in the circuit court for that purpose only, moved the court to dismiss the case "for want of jurisdiction to try same." On the same day, Pradt, executor, filed a special demurrer, assigning as causes, *inter alia*, that the court had no jurisdiction of the person or of the subject-matter. And on that day plaintiff moved to remand, no reasons being given. The circuit court overruled the motion to remand, sustained the motion to dismiss and the demurrer, and entered judgment dismissing the suit for want of jurisdiction. Two opinions were delivered, because further argument was permitted, and both are in the record. No certificate of the question of jurisdiction

NOTE.—On direct appeal to Federal Supreme Court from circuit or district courts—see note to Gwin v. United States, 46 L. ed. U. S. 741.

was applied for or granted; but an appeal was allowed to this court, which was argued in due course, together with a motion to dismiss.

Messrs. William Bullitt Dixon and Alexander Pope Humphrey argued the cause, and, with **Messrs. Breckinridge & Shelby**, filed a brief for appellant.

Messrs. Neal Brown and Louis A. Pradt argued the cause, and, with **Messrs. R. D. Hill and Edwin C. Brandenburg**, filed a brief for appellees.

[91] *Mr. Chief Justice **Fuller** delivered the opinion of the court:

It appears from the opinions of the circuit court, to which we properly may refer (*Loeb v. Columbia Twp.* 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174), that the court held that the state court had no jurisdiction so far as William C. Atwater was concerned unless it had jurisdiction as against the foreign executor of his deceased partner; that the suit must be treated as if against the foreign executor alone; and that it could not be maintained against the foreign executor in the state court, nor in the Federal court. And further, that the court was not bound to remand the case that the state court might determine that question.

The appeal was taken directly to this court, and cannot be maintained unless the case comes within the first of the classes named in § 5 of the judiciary act of March 3, 1891, which gives an appeal or writ of error direct "in any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision." [26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549.]

It is settled that the question of jurisdiction thus to be certified is the jurisdiction of the circuit court as a court of the United States, and not in respect of its general authority as a judicial tribunal. *Blythe v. Hinckley*, 173 U. S. 501, 43 L. ed. 783, 19 Sup. Ct. Rep. 497; *Mexican C. R. Co. v. Eckman*, 187 U. S. 429, 47 L. ed. 245, 23 Sup. Ct. Rep. 211; *Louisville Trust Co. v. Knott*, 191 U. S. 225, 48 L. ed. 159, 24 Sup. Ct. Rep. 119; *Bache v. Hunt*, 193 U. S. 523, 48 L. ed. 774, 24 Sup. Ct. Rep. 547.

And the general rule is that the certificate is an absolute prerequisite to the exercise of jurisdiction here. *Maynard v. Hecht*, 151 U. S. 324, 38 L. ed. 179, 14 Sup. Ct. Rep. 353. Although we have recognized exceptions to this rule when the explicit terms of the decree, or even of the or-

der allowing the appeal, might properly be considered as equivalent to the formal certificate. *Huntington v. Laidley*, 176 U. S. 668, 44 L. ed. 630, 20 Sup. Ct. Rep. 526; *Arkansas v. Schlierholz*, 179 U. S. 598, 45 L. ed. 335, 21 Sup. Ct. Rep. 229.

But, as said by Mr. Justice Gray in *Huntington v. Laidley*, *"**the record must**[92] distinctly and unequivocally show that the court below sends up for consideration a single and definite question of jurisdiction;" that is, of the jurisdiction of the court as a court of the United States.

No such state of case is exhibited by this record. There is no certificate nor any equivalent therefor. No single and definite issue as to the jurisdiction of the circuit court as a Federal court is presented.

The case was dismissed for want of jurisdiction over it, as a suit against a foreign executor, in the courts of Kentucky. The court had power to so adjudicate. When a case has been removed into the circuit court on the ground of diversity of citizenship, that court is entitled to pass on all questions arising, including the question of jurisdiction over the subject-matter in the state courts; or the sufficiency of the service of mesne process to authorize the recovery of personal judgment. *Goldney v. Morning News*, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559; *Wabash Western R. Co. v. Brown*, 164 U. S. 271, 41 L. ed. 431, 17 Sup. Ct. Rep. 126; *De Lima v. Bidwell*, 182 U. S. 1, 45 L. ed. 1041, 21 Sup. Ct. Rep. 743; *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 47 L. ed. 1113, 23 Sup. Ct. Rep. 728. It is true that in this case a motion to remand was made, but there was nothing to indicate that it rested on the contention that there was a lack of jurisdiction in the Federal courts as contradistinguished from the state courts. It did not in terms put in issue the power of the circuit court as a court of the United States to hear and determine the case, and we cannot be called on to say that there may not have been other grounds for the motion, or to attempt to eliminate every other ground for the purpose of bringing the case within the first clause of § 5.

We do not regard the objection now urged, that the suit was in equity, and, as such, not cognizable by the circuit court, as open to consideration on this record by direct appeal, but, if it were, it is unavailing on the question of power.

The principal action was an action at law. If, under existing statutes of Kentucky, the process of attachment or garnishment against nonresidents was equitable in form, as is contended, *this could not cut off the[93] right of removal where diversity of citizenship existed. The right to remove given by

a constitutional act of Congress cannot be taken away or abridged by state statutes, and the case being removed, the circuit court had power to so deal with the controversy that the party could lose nothing by his choice of tribunals. *Cowley v. Northern P. R. Co.* 159 U. S. 569, 40 L. ed. 263, 16 Sup. Ct. Rep. 127. In our opinion *the appeal was improvidently prosecuted directly to this court, and it must, therefore, be dismissed.*

A. L. SMALLEY and F. McLellan, *Plffs. in Err.*,
v.

GEORGE F. LAUGENOUR and Jane Laugenour.

(See S. C. Reporter's ed. 93-98.)

Error to state court—Federal question.

A decision of a state court sustaining a homestead exemption claimed under the state statutes, which rests on the effect, as *res judicata*, of an order of a court of bankruptcy sustaining such exemption in proceedings begun prior to a sale of the property to satisfy the lien of a general judgment, cannot be reviewed in the Federal Supreme Court, where the only Federal right specially claimed, if any, was one of immunity from the discharge in bankruptcy.

[No. 97.]

Submitted November 28, 1904. Decided January 3, 1905.

IN ERROR to the Supreme Court of the State of Washington to review a judgment which reversed a judgment of the Superior Court of Lincoln County, in that State, in favor of plaintiffs in an action of ejectment, and remanded the cause, with directions to enter judgment for defendants. *Dismissed for want of jurisdiction.*

See same case below, 30 Wash. 307, 70 Pac. 786.

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Kipley v. Illinois*, 42 L. ed. U. S. 998; and *Re Buchanan*, 39 L. ed. U. S. 884.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to *Apex Transp. Co. v. Garbade*, 62 L. R. A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to *Mutual L. Ins. Co. v. McGrew*, 63 L. R. A. 33.

On what the record must show respecting the presentation and decision of a Federal ques-

Statement by Mr. Chief Justice **Fuller**:

This was an action of ejectment commenced in the superior court of Lincoln county, Washington, by A. F. Smalley and F. McLellan against George F. Laugenour and Jane Laugenour (with two others, who subsequently ceased to be parties), to recover possession of certain real estate situated in that county. *The action was tried by the [94] court without a jury, which filed findings of fact and conclusions of law, and rendered judgment for plaintiffs, whereupon defendants Laugenour carried the case by appeal to the supreme court of Washington. The judgment was there reversed and the cause remanded with directions to enter judgment for appellants, defendants below. 30 Wash. 307, 70 Pac. 786. This writ of error was then brought.

The facts were stated by that court in brief as follows:

"The appellants are husband and wife, and acquired the land in controversy as early as the year 1885. On March 16, 1895, the respondents and one L. J. Hutchings, as partners, recovered a judgment in the superior court of Lincoln county on a community debt against the appellant Geo. F. Laugenour for the sum of \$363.45. On April 12, 1899, execution was issued on the judgment and levied on the land mentioned, under which, after due advertisement, it was sold at public auction to the respondents for the sum of \$532.15, being the amount then due on the judgment. Thereafter the sale was confirmed by the court, and after the time for redemption had expired, a sheriff's deed was executed and delivered to the purchasers, which they caused to be recorded. On May 10, 1899, three days before the execution sale took place, the appellant Geo. F. Laugenour filed in the United States district court for the district of Washington his voluntary petition in bankruptcy, in the schedule to which he listed the land in controversy, claiming the same as exempt under the bankruptcy act. On May 11, 1899, the referee in bankruptcy, to whom the pro-

tion in order to confer jurisdiction on the Supreme Court of the United States on a writ of error to a state court—see note to *Hooker v. Los Angeles*, 63 L. R. A. 471.

As to what is the record for the purpose of showing the jurisdiction of the Supreme Court of the United States on a writ of error to a state court—see note to *Home for Incurables v. New York*, 63 L. R. A. 329.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to *Missouri ex rel. Hill v. Dockery*, 63 L. R. A. 571.

On the practice and procedure governing the transfer of causes to the Federal Supreme Court on writ of error or appeal—see note to *Wedding v. Meyler*, 66 L. R. A. 833.

ceedings had been referred, adjudged the petitioner a bankrupt, and thereupon gave to the creditors of the bankrupt shown in the schedule attached to the petition, among whom were the respondents, the formal notice required by the bankruptcy act, notifying them of the adjudication of bankruptcy, of the time and place fixed for the first meeting of the creditors, that they might attend at such meeting, prove their claims, examine the bankrupt, and transact such other business as should properly come before the *meeting. None of the creditors appeared at the time fixed for the meeting, viz., June 5, 1899, and no trustee was elected or appointed, the referee finding that no necessity existed therefor. On August 9, 1899, the bankruptcy court entered an order discharging the bankrupt from all debts and claims made provable against the bankrupt's estate; and on August 12 'regularly made an order in said bankruptcy proceedings, setting aside to said bankrupt, as exempt under the act of Congress relating to bankruptcy, the real estate hereinbefore described, and awarding said real estate to the said bankrupt.' The court further found that since the execution sale the appellants had been in possession of the real estate, claiming to be the owners of the same; and for several years last past had resided in Spokane county, Washington, and that the real property, during the time, had been occupied by the defendant Harry Gilliland as their tenant. On the facts so found it ruled that the respondents were the owners and entitled to the possession of the premises, and entered judgment accordingly."

Messrs. Charles S. Voorhees and Reese H. Voorhees submitted the cause for plaintiffs in error. **Messrs. H. A. P. Myers and W. T. Warren** were on their brief.

Mr. W. C. Keegin submitted the cause for defendants in error. **Messrs. Herman D. Crow and James A. Williams** were on his brief.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The state supreme court, after calling attention to the statute of the state permitting a head of a family to select from his or her real property a homestead of limited value, and exempting it from the liens of general judgments and from execution or forced sale thereunder (Ballinger's Code, §§ 5214 et seq.), and to previous rulings of the court that the selection might be made at any time before sale (*Wiss v. Stewart*, 16 Wash. 376, 47 Pac. 736), and that an execution sale thereof after such selection was ineffectual to pass title to the purchaser [96] (*Wiss v. Stewart*; *Asher v. Sekofsky*, 10 196 U. S.

Wash. 379, 38 Pac. 1133), said: "If, therefore, the property in question was exempt from execution at the time the sale was made under the execution issued on the respondents' judgment, the respondents acquired no title thereto by their purchase at the execution sale, and consequently have no title on which they can maintain the present action."

And the court held that the order of the district judge of the United States for the district of Washington, sitting in bankruptcy, awarding the property to Laugenour as property exempt from the claims of his creditors, and which related back to the time of the filing of the petition in bankruptcy, which was prior to the date of the attempted sale, was a judgment conclusive as between the parties that the property was so exempt at that date.

The state court was of opinion that Laugenour and his wife might have pleaded and proved facts showing that the property was exempt from execution at the time of the sale, making the issue directly in the state court; but, as they chose to rely on the principle of *res judicata*, that is, on the adjudication by the bankruptcy court, having jurisdiction of person and estate, in a proceeding in bankruptcy in which the judgment of Smalley and McLellan was provable, the court gave due force and effect to that adjudication.

The jurisdiction of this court to review the final judgments and decrees of a state court rests on § 709 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 575), and in this instance must be derived from the third division of that section, if it exist at all. And on the face of this record we cannot find that plaintiffs in error specially set up or claimed any title, right, privilege, or immunity under the Constitution, or any statute of, or authority exercised under, the United States, which was decided against by the state court. What seems to be complained of is that the state supreme court accepted the judgment of the Federal bankruptcy court as having been rendered in the exercise of the jurisdiction with which it was vested.

*Plaintiffs in error were notified of the [97] proceedings in bankruptcy, as provided by the bankruptcy act, and, if they had desired to contest the claim to exemption, they might have done so, or could have invoked the supervision and revision of the order by the circuit court of appeals; but they did not do that, and could not question its validity in the state courts, unless, indeed, it were absolutely void, which is not and could not be pretended.

The bankruptcy court is expressly vested with jurisdiction "to determine all claims of

bankrupts to their exemptions." (§ 2, cl. 11.) Where there is a trustee, he sets apart the exemptions, and reports thereon to the court (§ 47, cl. 11); where no trustee has been appointed, under general order XV. the court acts in the first instance.

Section 6 of the bankruptcy act provided: "This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition." [30 Stat. at L. 548, chap. 541, U. S. Comp. Stat. 1901, p. 3424.]

The rights of a bankrupt to property as exempt are those given him by the state statutes, and if such exempt property is not subject to levy and sale under those statutes, then it cannot be made to respond under the act of Congress.

In one of the paragraphs of the reply of plaintiffs in error (plaintiffs in the court of original jurisdiction) to the answer of defendants it was asserted that, on the day their judgment was recovered, Laugenour and his wife were the owners of the real estate in question, and the judgment became a lien thereon, and that "said lien, which culminated in the aforesaid sale of real estate to plaintiffs, was obtained and created pursuant to said suit, and more than four months prior to the filing of the alleged petition in bankruptcy;" and it is argued that this amounted to a special assertion of an immunity under the bankruptcy act. But immunity from what? Nothing more, at the best, than immunity from the discharge [98] in bankruptcy; *not from the exemptions authorized by the state statute. And so Fullerton, J., speaking for the state supreme court, said: "Lastly, it is said that the order of the court setting apart the property as exempt does not purport to, nor does it in law, affect existing liens upon the property set apart as exempt, and, unless the liens thereon be such as the law avoids of its own force, such liens may be enforced in the state court against and to the extent of the property affected by the lien, notwithstanding the order setting it apart as exempt, and the discharge of the debt in bankruptcy. In cases of liens which can exist independent of the question whether or not the property is exempt, undoubtedly the rule here invoked would be applicable; but the lien of a general judgment is not such a lien. It is a lien upon real property, only, which is not exempt. Hence, if this property was exempt at the time of the filing of the petition in bankruptcy, the judgment under which it was sold was not a lien thereon, and to assume that the judgment was a

lien is to assume that it was not exempt,—the very question at issue."

We are not able to perceive that the state supreme court denied in any way a right of plaintiffs in error specially set up or claimed under the Constitution or laws of the United States. All that was determined, and all that the state court was called on to determine, was the question of exemption under the state statutes. Its acceptance of the judgment of the Federal court in that regard does not bring the case within § 709.

Writ of error dismissed.

*J. O. COMSTOCK, *Appt.*,

[99]

v.

WILLIAM L. EAGLETON.

(See S. C. Reporter's ed. 99, 100.)

Appeal—distinction between writ of error and appeal.

Writ of error, and not appeal, is the proper method of obtaining a review in the Federal Supreme Court of a judgment of the supreme court of the territory of Oklahoma which affirmed a judgment of the court below sustaining a demurrer to, and dismissing with costs, the petition in an action to recover damages for false imprisonment.

[No. 105.]

Submitted December 15, 1904. Decided January 3, 1905.

A PPEAL from the Supreme Court of the Territory of Oklahoma to review a judgment which affirmed a judgment of the District Court of Pawnee County, in that Territory, sustaining a demurrer to, and dismissing, a petition in an action to recover damages for false imprisonment. *Dismissed* for want of jurisdiction.

See same case below, 11 Okla. 487, 69 Pac. 955.

The facts are stated in the opinion.

Messrs. Andrew Wilson and Noel W. Barksdale submitted the cause, and *Messrs. C. J. Wrightsman and E. L. Fulton* filed a brief for appellant.

No counsel opposed.

THE CHIEF JUSTICE: This was an action brought by Comstock against Eagleton in the district court of Pawnee county, Oklahoma, to recover damages for false imprisonment in the sum of \$5,317.50.

The petition was demurred to on the

NOTE.—On distinction between appeal and writ of error—see note to *Miners' Bank v. Iowa*, 13 L. ed. U. S. 867.

ground that it did not state facts sufficient to constitute a cause of action, the demurrer sustained, and the petition dismissed with costs. The case was then carried to the supreme court of Oklahoma on error, and the judgment affirmed. 11 Okla. 487, 69 Pac. 955.

From the judgment of affirmance this appeal was allowed and prosecuted to this court.

By § 9 of the "Act to Provide a Temporary Government for the Territory of Oklahoma," approved May 2, 1890 (26 Stat. at L. 81, chap. 182), it was provided that "where the value of the property or the amount in controversy" exceeded \$5,000, "writs of error and appeals from the final decisions of said supreme court shall be allowed and may be taken to the Supreme Court of the United States in the same manner and under the same regulations as from the circuit courts of the United States."

Final judgments of the circuit courts of the United States in actions at law can only be revised on writs of error. *Deland v. Platte County*, 155 U. S. 221, 39 L. ed. 128, 15 Sup. Ct. Rep. 82; *Metropolitan R. Co. v. District of Columbia (Metropolitan R. Co. v. Macfarland)* 195 U. S. 322, ante, 219, 25 Sup. Ct. Rep. 28; *Bevins v. Ramsey*, 11 How. 185, 13 L. ed. 657; *Sarchet v. United States*, 12 Pet. 143, 9 L. ed. 1033.

Appeal dismissed.

SALLIE FIELD SCOTT, Eliza Madison Scott, Harriet B. Jones, *et al.*, *Appts.*,
v.

LIZZIE W. CAREW, W. W. Hampton, E. R. Gunby, *et al.*

(See S. C. Reporter's ed. 100-114.)

Public lands—pre-emption rights—land appropriated for military post.

The right of pre-emption given by the act of April 22, 1826 (4 Stat. at L. 154, chap. 28), did not extend to lands which had been appropriated by the United States for a military post, until such post was abandoned.

[No. 52.]

Argued November 7, 8, 1904. Decided January 3, 1905.

APPEAL from the United States Circuit Court of Appeals for the Fifth Circuit to review a decree which affirmed a decree of the Circuit Court for the Southern District of Florida sustaining a demurrer to,

and dismissing, a bill to establish a trust in real property. *Affirmed.*

See same case below, 56 C. C. A. 684, 121 Fed. 1021.

Statement by Mr. Justice **Brewer**:

On December 31, 1900, the plaintiffs, who are now appellants, filed their bill of complaint in the circuit court of the *United States for the southern district of Florida, praying a decree that the defendants, holding the legal title to a tract of land under patent from the United States, be decreed to hold that title in trust for them. A demurrer to the bill was sustained, and a decree of dismissal entered. This was affirmed by the circuit court of appeals for the fifth circuit, and from that affirmance this appeal was taken.

The averments in the bill are: The plaintiffs are the sole descendants and heirs at law of Robert J. Hackley, who died in 1845. In November, 1823, Hackley, then over twenty-one years of age, and the head of a family, settled upon and cultivated the tract in controversy. At that time the surrounding country was a dense wilderness, and he the only settler. He erected on the tract a substantial dwelling and other buildings. In 1824 Colonel Brooke, with a detachment of United States troops, was sent to this portion of Florida, located a camp or cantonment on this tract, dispossessed Hackley, and took possession of the house and land so occupied and cultivated by him. The Secretary of the Interior, in the contest proceedings hereinafter referred to, in an opinion which is attached to the bill as an exhibit, found that this action was taken by order of the War Department. United States troops continued to occupy the camp or cantonment until December 10, 1830, when by an executive order of the President the Fort Brooke military reservation was established, containing 16 square miles of land, and embracing the tract in controversy. Thereafter this military reservation was reduced from time to time by executive orders, until, on June 1, 1878, only the tract in controversy, commonly known as the "Reduced Fort Brooke military reservation," remained. On January 4, 1883, it was relinquished, and transferred by the Secretary of War to the Interior Department. Hackley, after his removal from the tract, remained a resident of Florida up to the time of his death. On March 3, 1823, Congress passed an act [3 Stat. at L. 754, chap. 29] authorizing the President to establish a land office in each of the districts of east and west Florida as soon as, in his *opinion, there was a sufficient quantity of public land surveyed to justify it. Under this act, and by an executive order in 1828,

NOTE.—On pre-emption rights in public lands—see note to United States v. Fitzgerald, 10 L. ed. U. S. 785.

a land office was established at St. Augustine, in the district in which this land was situate. At the time this office was established the hostility of the Indian tribes was such as to render communication between it and that portion of Florida where Hackley resided practically impossible. But in the year 1835, although the public surveys had not been extended into this part of Florida, Hackley filed with the register of the land office evidence designating the particular tract which had been settled upon, inhabited, and cultivated by him as aforesaid, and claimed the right of pre-emption and purchase thereof under and by virtue of the act of Congress of April 22, 1826 [4 Stat. at L. 154, chap. 28]. By change of the boundary lines of the land districts of Florida the land subsequently came within the jurisdiction of the land office at Newnansville, Florida, whereupon, on November 27, 1843, Hackley secured from the register of the land office at St. Augustine a copy of the evidence formerly filed in that office, and filed it with a notice of his claim with the register of the office at Newnansville. On September 26, 1887, the administrator of the estate of Hackley filed in the local land office a supplemental notice of the claim of the legal representatives of Hackley to the right of pre-emption in the purchase of the tract. Other parties made application to the Land Department for an entry of said lands, contest proceedings were had, which were terminated by a decision of the Secretary of the Interior adverse to the claim of the plaintiffs, and a patent was issued to Edmund S. Carew, under whom the defendants claim.

The following statutes are relied upon by the parties: Act of Congress, March 3, 1807 (2 Stat. at L. 445, chap. 46), § 1 of which provides:

"That, if any person or persons shall, after the passing of this act, take possession of, or make a settlement on, any lands ceded or secured to the United States, by any treaty made with a foreign nation, or [103] by a cession from any state to the *United States, which lands shall not have been previously sold, ceded, or leased by the United States, or the claim to which lands, by such person or persons, shall not have been previously recognized and confirmed by the United States; or if any person or persons shall cause such lands to be thus occupied, taken possession of, or settled; or shall survey, or attempt to survey, or 'cause to be surveyed, any such lands; or designate any boundaries thereon, by marking trees or otherwise, until thereto duly authorized by law,—such offender, or offenders, shall forfeit all his or their right, title, and claim, if any he hath, or they have, of whatsoever

nature or kind the same shall or may be, to the lands aforesaid, which he or they shall have taken possession of, or settled, or cause to be occupied, taken possession of, or settled, or which he or they shall have surveyed, or attempted to survey, or cause to be surveyed, or the boundaries thereof he or they shall have designated, or cause to be designated, by marking trees or otherwise. And it shall, moreover, be lawful for the President of the United States to direct the marshal, or officer acting as marshal, in the manner hereinafter directed, and also to take such other measures, and to employ such military force, as he may judge necessary and proper, to remove from lands ceded, or secured to the United States, by treaty, or cession as aforesaid, any person or persons who shall hereafter take possession of the same, or make, or attempt to make, a settlement thereon, until thereunto authorized by law. And every right, title, or claim, forfeited under this act, shall be taken and deemed to be vested in the United States, without any other or further proceedings."

The other sections have no application to this case.

On February 5, 1813 (2 Stat. at L. 797, chap. 20), the following act was passed:

"That every person, or legal representative of every person, who has actually inhabited and cultivated a tract of land lying in either of the districts established for the sale of public lands, in the Illinois territory, which tract is not rightfully claimed *by [104] any other person, and who shall not have removed from said territory; every such person and his legal representatives shall be entitled to a preference in becoming the purchaser from the United States of such tract of land at private sale, at the same price and on the same terms and conditions in every respect as are or may be provided by law for the sale of other lands sold at private sale in said territory, at the time of making such purchase: *Provided*, That no more than one-quarter section of land shall be sold to any one individual, in virtue of this act; and the same shall be bounded by the sectional and divisional lines run, or to be run, under the direction of the surveyor general for the division of the public lands: *Provided also*, That no lands reserved from sale by former acts, or lands which have been directed to be sold in town lots, and out lots, shall be sold under this act.

"Sec. 2. *And be it further enacted*, That every person claiming a preference in becoming the purchaser of a tract of land, in virtue of this act, shall make known his claim, by delivering a notice in writing to the register of the land office, for the dis-

trict in which the land may lie, wherein he shall particularly designate the quarter section he claims; which notice the register shall file in his office, on receiving twenty-five cents from the person delivering the same. And in every case where it shall appear to the satisfaction of the register and receiver of public moneys of the land office, that any person, who has delivered his notice of claim, is entitled, according to the provisions of this act, to a preference in becoming the purchaser of a quarter section of land, such person so entitled shall have a right to enter the same with the register of the land office, on producing his receipt from the receiver of public moneys for at least one-twentieth part of the purchase money, as in case of other public lands sold at private sale: *Provided*, That all lands to be sold under this act shall be entered with the register, at least two weeks before the time of the commencement of the public sales, in the district wherein the land lies; and every person having a right of preference in becoming the *purchaser of a tract of land, who shall fail so to make his entry with the register within the time prescribed, his right shall be forfeited, and the land by him claimed shall be offered at public sale, with the other public lands in the district to which it belongs."

And on April 22, 1826 (4 Stat. at L. 154, chap. 28), Congress passed another act, the 1st section of which reads as follows:

"That every person, or the legal representatives of any person, who, being either the head of a family, or twenty-one years of age, did on or before the first day of January, in the year one thousand eight hundred and twenty-five, actually inhabit and cultivate a tract of land situated in the territory of Florida, which tract is not rightfully claimed by any other person, and who shall not have removed from the said territory, shall be entitled to the right of pre-emption in the purchase thereof, under the same terms, restrictions, conditions, provisions, and regulations, in every respect, as are directed by the act, entitled 'An Act Giving the Right of Pre-emption, in the Purchase of Lands, to Certain Settlers in the Illinois Territory,' passed February the fifth, one thousand eight hundred and thirteen: *Provided*, That no person shall be entitled to the provisions of this section who claims any tract of land in said territory, by virtue of a confirmation of the commissioners, or by virtue of any act of Congress."

Messrs. Henry W. Anderson and Francis P. Fleming argued the cause, and, with *Messrs. William H. Lamar, George H. Lamar, Francis P. Fleming, Jr.*,
196 U. S. U. S., Book 49.

Beverley B. Munford, Eppa Hunton, Jr., and E. Randolph Williams, filed a brief for appellants.

Messrs. William Wade Hampton, Edward R. Gunby, and Horatio Bisbee argued the cause and filed a brief for appellees.

Mr. Justice **Brewer** delivered the opinion of the court:

The vital question in this case is whether Hackley could claim the benefit of the act of 1826, in reference to the tract in controversy. *Prior to that act he was wrong-[109] fully in possession of the tract, and could have been summarily removed by order of the President. Act of March 3, 1807. His dispossession was by authority of law. It was done in the exercise of the power vested in the President as Commander-in-Chief of the Army, the order of the War Department being presumed to be that of the President. The occupation of the tract by the United States troops was rightful, being an occupation of property of the government by direction of the proper officer, and that rightful occupation continued until the act was passed. It is unnecessary to rest the case upon the clause in the act of 1826, "which tract is not rightfully claimed by any other person," although that is not without significance, or to discuss the question whether the United States can be considered another person. A more substantial reason is to be found in the rule that whenever a statute is passed containing a general provision for the disposal of public lands, it is, unless an intent to the contrary is clearly manifest by its terms, to be held inapplicable to lands which for some special public purpose have been, in accordance with law, taken full possession of by and are in the actual occupation of the government. Where particular tracts have been taken possession of by rightful orders of an executive department, to be used for some public purpose, Congress in legislating will be presumed to have intended no interference with such possession nor a sale or disposal of the property to private individuals. Such has been the rule obtaining in the Land Department, as well as in the courts. An early case was *Wilcox v. Jackson*, 13 Pet. 498, 10 L. ed. 264. That case rested upon a claim of right of pre-emption under the act of June 19, 1834 (4 Stat. at L. 678, chap. 54), which revived an act passed May 29, 1830 (4 Stat. at L. 420, chap. 208), containing these provisions:

"That no entry or sale of any land shall be made, under the provisions of this act, which shall have been reserved for the use of the United States, or either of the several states in which any of the public lands

may be situated," or "which is reserved from sale by act of Congress, or by order of the [110] President, or *which may have been appropriated for any purpose whatsoever."

It appeared that at the request of the Secretary of War the Commissioner of the General Land Office had marked upon the official map of that Department the tract in controversy as reserved for military purposes, and directed it to be withheld from sale. The court held that this action was that of the President, saying (p. 513, L. ed. p. 271):

"Now, although the immediate agent, in requiring this reservation, was the Secretary of War, yet we feel justified in presuming that it was done by the approbation and direction of the President. The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties. Both military posts and Indian affairs, including agencies, belong to the War Department. Hence we consider the act of the War Department in requiring this reservation to be made, as being, in legal contemplation, the act of the President; and, consequently, that the reservation thus made was in legal effect a reservation made by order of the President, within the terms of the act of Congress."

And, going beyond the special language of the act in respect to the sale of lands, the court observed:

"But we go further, and say that, whenever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands, and that no subsequent law, or proclamation, or sale would be construed to embrace it, or to operate upon it, although no reservation were made of it."

"The very act which we are now considering will furnish an illustration of this proposition. Thus, in that act there is expressly reserved from sale the land within that district, which had been granted to individuals and the state of Illinois. Now, suppose this reservation had not been made, either in the law, proclamation, or sale, could it be conceived that, if that land were sold at auction, the title of the purchaser [111] would *avail against the individuals or state to whom the previous grants had been made? If, as we suppose, this question must be answered in the negative, the same principle will apply to any land which, by authority of law, shall have been severed from the general mass."

In *Leavenworth, L. & G. R. Co. v. United States*, 92 U. S. 733, 745, 23 L. ed. 634, 639, the doctrine announced in *Wilcox v. Jackson*, 13 Pet. 498, 10 L. ed. 264, was reaffirmed;

the court, quoting the first paragraph in the last quotation, added: "It may be urged that it was not necessary in deciding that case to pass upon the question; but, however this may be, the principle asserted is sound and reasonable, and we accept it as a rule of construction." In that case it was held that a grant of public lands in aid of a railroad did not apply to lands included within an Indian reservation, and that it was immaterial that the reservation was afterwards set aside, and the lands had become a part of the public lands of the nation. *Newhall v. Sanger*, 92 U. S. 761, 23 L. ed. 769, ruled that lands within the boundaries of an alleged Mexican or Spanish grant which was *sub judice* at the time the Secretary of the Interior ordered a withdrawal of lands along the route of the road, were not embraced by a grant to a railroad company, and it was said in the opinion (p. 763, L. ed. p. 770): "The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws."

In *Shively v. Bowlby*, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548, it was held that, while Congress has power to grant lands below high-water mark in navigable waters, yet the fact that the public surveys are made to terminate on the banks or shores of those waters, indicates that such lands are not subject to entry and sale under the general land laws, but, so far as they are situated in a territory, are reserved for the use and control of the future state. This doctrine was reaffirmed in *Mann v. Tacoma Land Co.* 153 U. S. 273, 38 L. ed. 714, 14 Sup. Ct. Rep. 820. Many authorities might be cited to the proposition that a prior appropriation is always understood to except lands from the scope of a subsequent grant, although no reference *is made in the latter to the former. See [112] *Lake Superior Ship Canal, R. & Iron Co. v. Cunningham*, 155 U. S. 354, 373, 39 L. ed. 183, 189, 15 Sup. Ct. Rep. 103.

There is nothing in *United States v. Fitzgerald*, 15 Pet. 407, 10 L. ed. 785, to conflict with the foregoing views. It merely decided that an officer of the United States (in that case an inspector of customs) was not deprived by any act of Congress of the benefit of the pre-emption laws, and the fact that he was put in possession of a tract of land by the collector of customs, who had received no instructions to that effect from the Treasury Department, was not an appropriation to the uses of the government. It is true a letter from the acting commissioner of the General Land Office to the register at New Orleans, stat-

ing that the Secretary of the Treasury had directed that the tract be reserved from sale for the use of the custom house at New Orleans, and requesting the register to note upon his plats that it was so reserved from sale, was in evidence, but this was written two years after the inspector had entered and paid for the land. Of course, such attempted reservation could have no effect upon a title acquired by the entryman prior thereto. Nor is there any conflict in *United States v. Tichenor*, 8 Sawy. 142, 12 Fed. 415. There it appeared that the commanding officer of United States troops in Oregon ordered that a military reservation be established on the tract in controversy. In obedience thereto, a lieutenant erected some buildings thereon for the use of the soldiers. It was held by the circuit court that such action constituted no appropriation of the land so as to exempt it from the operation of the general land laws. But the ground of the decision was that the general commanding was acting without any direction from the President or the War Department, the court saying (p. 151, Fed. p. 423):

"It may be admitted, as suggested in *Wilcox v. Jackson*, 13 Pet. 513, 10 L. ed. 271, that, if the order directing the reservation to be made had been issued by the Secretary of War,—the head of the Department through whom the President would speak and act upon the subject,—in the absence of evidence to the contrary, it would be presumed that he acted by the direction

[113]*of the President.

"But neither General Hitchcock nor Lieutenant Wyman had any authority to designate or establish a reservation at Port Orford for any purpose. It is not alleged that they were acting in the premises under the authority of the President, and there is no presumption of law that they were."

Again, it is urged that the establishment of this camp or cantonment was a mere temporary matter, and not to be considered as in the nature of a reservation or appropriation, and we are referred to orders and other papers found in the records of the War Department, copies of which appear in the brief of appellants' counsel. Those orders, if we are permitted to consider them on this demurrer, make distinctly against the contentions of counsel. We quote from that issued from the Adjutant General's office:

Order 70.

Brevet Col. Brooke, with four companies of the Fourth Infantry, will proceed with as little delay as practicable to Tampa bay, 196 U. S.

east Florida, where he will establish a military post. He will select a position with a view to the health and in reference to the Florida Indians about to be removed to that vicinity agreeable to the late treaty. Upon this point he will consult Col. Gadsden, the commissioner employed in locating the Indians. . . .

The permanent headquarters of the Fourth Infantry will remain at Cantonment Clinch, and, should Col. Clinch have rejoined his regiment, on the receipt of this order he will be charged with the duty of preparing Col. Brooke's command for the expedition to Tampa.

By order of Major Gen. Brown.

E. Kirby, Aide-de-Camp.

It will be seen that the direction is to "establish a military post." It was for this "post" that the tract in controversy was taken, and the statement in the report of Colonel Brooke, as one of the reasons for its selection, that, some 2 miles in *the[114] rear of the place, a ridge of piney lands commences, to which the troops could retire with their tents on the slightest manifestation of disease, does not alter the fact that this tract was selected for the "post." The further fact that permanent headquarters of the Fourth Infantry were to remain at Cantonment Clinch is entirely consistent with the direction to Colonel Brooke to proceed with four companies to Tampa bay and there establish this military post. The judgment of the War Department, whose action is presumed to be the action of the President, was that, having reference to the Florida Indians who were about to be removed to that vicinity, it was important to have a military post established. Its permanence would depend largely on the developments of the future. It remained a military post for half a century, and a very large tract was, in 1830, set apart for a surrounding reservation. True, it has since been all abandoned, but, although it may have been within the contemplation of the authorities that a time would come when the necessity for this military post would cease, it was none the less for the time being a post established by the proper department of the government. It was, until the post was abandoned, an appropriation of the land for military purposes. Quite a number of reservations and posts in our western territory, once established, have afterwards been abandoned; but, while so appropriated they are excepted from the operation of the public land laws, and no right of an individual settler attaches to, or hangs over, the land to interfere with such action as the government may thereafter see fit to take in respect to it. No

cloud can be cast upon the title of the government, — nothing done by an individual to embarrass it in the future disposition of the land.

Without considering, therefore, the question of laches or limitation, we are of opinion that *the decision of the Court of Appeals was correct, and it is affirmed.*

115] *FIRST NATIONAL BANK OF JACKSBORO, Plff. in Err.,

v.

J. L. LASATER.

(See S. C. Reporter's ed. 115-119.)

Usury by national banks—usurious interest must be actually paid—effect of bankruptcy proceedings.

1. The giving of a renewal note will not sustain a recovery from a national bank, under U. S. Rev. Stat. § 5198, U. S. Comp. Stat. 1901, p. 3493, on account of usurious interest in the original note, since the payment contemplated by that statute is an actual payment, and not a further promise to pay.
2. Title to a claim for usurious interest paid to a national bank cannot be asserted by a bankrupt upon the termination of the bankruptcy proceedings, where he returned no assets to the trustee, and failed to notify either the trustee or the creditors of the existence of the claim.

[No. 73.]

Submitted December 6, 1904. Decided January 3, 1905.

IN ERROR to the Court of Civil Appeals of the Second Supreme Judicial District of the State of Texas to review a judgment reversing a judgment of the District Court of Jack County in that State in favor of defendant in an action to recover usurious interest paid to a national bank, and entering judgment in favor of plaintiff for a portion of the relief sought. *Reversed* and remanded for further proceedings.

See same case below in Texas Court of Civil Appeals, 72 S. W. 1054, and in Texas Supreme Court on certified questions, 96 Tex. 345, 72 S. W. 1057.

Statement by Mr. Justice **Brewer**:

This case is here on error to the court of civil appeals of the second supreme judicial district of the state of Texas. It was an action brought in the district court of Jack

county by J. L. Lasater to recover from the First National Bank of Jacksboro twice a sum claimed to have been paid as usurious interest.

The material facts are as follows: J. L. Lasater and W. M. Maggard, as partners, borrowed of the bank \$4,000, and executed their joint note with A. M. Lasater as surety. They also mortgaged cattle as further security. Subsequently Maggard sold all his interest in the mortgaged property to J. L. Lasater, the latter assuming all liabilities and renewing the note with the same surety. Thereafter A. M. Lasater, the surety, bought all the mortgaged cattle, and, as part of the consideration, agreed to assume and pay off the note. In pursuance of this agreement he took up the note of J. L. Lasater, and gave his own note therefor. This last note A. M. Lasater paid in full to the bank. After all these transactions, and on November 19, 1900, J. L. Lasater filed his petition in bankruptcy *in the district [116] court of the United States. On January 7, 1901, he was discharged of his debts, and on June 11, 1901, the trustee was also discharged of his trust. The bankrupt returned no assets to the trustee, and did not tell him or the creditors about this claim for usury.

On July 26, 1901, he brought this action, under the authority of § 5198, Revised Statutes, United States, U. S. Comp. Stat. 1901, p. 3493, to recover twice the amount of the interest paid to the bank. The court of appeals found that part of the interest was paid more than two years prior to the commencement of the action, and held that no recovery could be had as to that, but, reversing the district court, entered a judgment in favor of the plaintiff for double the amount of the balance of the interest, on the ground that usury entered into it all.

Section 5198, Revised Statutes, provides:

"The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid, from the association taking or receiving the same: *Provided*, such action is commenced within two years from the time the usurious transaction occurred."

Mr. J. W. Nichol submitted the cause for plaintiff in error. *Messrs. Thomas D.*

196 U. S.

NOTE.—On usury by national banks—see note to Farmers' & M. Nat. Bank v. Dearing, 23 L. ed. U. S. 196.

As to forfeiture or other effect of usury by national bank—see note to Citizens' Nat. Bank v. Gentry, 56 L. R. A. 673.

Sporer and *E. W. Nicholson* were on his brief.

No counsel opposed.

Mr. Justice **Brewer** delivered the opinion of the court:

[118] The mere discharge by A. M. Lasater of the note executed *by himself and J. L. Lasater, by giving his own note in renewal thereof, would not uphold a recovery from the bank on account of usurious interest in the former note. *Brown v. Marion Nat. Bank*, 169 U. S. 416, 42 L. ed. 801, 18 Sup. Ct. Rep. 390. The payment contemplated by the statute is an actual payment, and not a further promise to pay, and was not made until the bank, in June, 1901, received its money. Prior to the renewal by A. M. Lasater, in October, 1900, there were only two or three small cash payments on the indebtedness.

We shall not stop to inquire whether J. L. Lasater can avail himself of the final payment made by A. M. Lasater. The court of appeals held that he could, reaching this conclusion on the authority of cases like *Hough v. Horsey*, 36 Md. 184, 11 Am. Rep. 484; *Richardson v. Baker*, 52 Vt. 617, to the effect that the grantee of mortgaged property, who in consideration of the purchase agrees to pay off the mortgage, cannot raise the question of usury, that being a personal right of the original debtor.

The court of appeals also held that the claim for usurious interest was one which survived the death of the person in whom the right of action was vested, and under the laws of Texas a part of his estate, and consequently one that could be sold and bought like any other chose in action. If so, that claim passed to the trustee in bankruptcy under § 70 of the bankrupt law [30 Stat. at L. 566, chap. 547, U. S. Comp. Stat. 1901, p. 3451], which, in describing the property passing to the trustee, names "property which prior to filing of the petition he could by any means have transferred."

The question then presented is whether this right of action, having once passed to the trustee in bankruptcy, was retransferred to J. L. Lasater upon the termination of the bankruptcy proceedings, he having returned no assets to his trustee, and having failed to notify him or the creditors of this claim for usury, and beginning this action within less than two months after the final discharge of the trustee. We have held that trustees in bankruptcy are not bound to accept property of an onerous or unprofit-

[119] able character, and that they have a*reasonable time in which to elect whether they will accept or not. If they decline to take the property, the bankrupt can assert title thereto. *American File Co. v. Garrett*, 110

196 U. S.

U. S. 288, 295, 28 L. ed. 149, 152, 4 Sup. Ct. Rep. 90; *Sparhawk v. Yerkes*, 142 U. S. 1, 35 L. ed. 915, 12 Sup. Ct. Rep. 104; *Sessions v. Romadka*, 145 U. S. 29, 36 L. ed. 609, 12 Sup. Ct. Rep. 799; *Dushane v. Beall*, 161 U. S. 513, 40 L. ed. 791, 16 Sup. Ct. Rep. 637. But that doctrine can have no application when the trustee is ignorant of the existence of the property, and has had no opportunity to make an election. It cannot be that a bankrupt, by omitting to schedule and withholding from his trustee all knowledge of certain property, can, after his estate in bankruptcy has been finally closed up, immediately thereafter assert title to the property on the ground that the trustee had never taken any action in respect to it. If the claim was of value (as certainly this claim was, according to the judgment below), it was something to which the creditors were entitled, and this bankrupt could not, by withholding knowledge of its existence, obtain a release from his debts, and still assert title to the property.

The judgment of the Court of Civil Appeals is reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion.

BUTTE CITY WATER COMPANY, *Plff. in Err.*,

v.

BEN BAKER.

(See S. C. Reporter's ed. 119-128.)

Mining claims—location of—validity of state regulations—delegation of power—conflict with congressional legislation.

1. Supplementary regulations concerning the location of mining claims, prescribed by a state in addition to the congressional regulations, are not invalid on the theory that they were enacted in the exercise of an unlawful delegation by Congress of legislative power.
2. The requirement of Mont. Ann. Codes, § 3612, that the declaratory statement filed in the office of the clerk of the county in which a mining lode or claim is situated must contain "the dimensions and location of the discovery shaft, or its equivalent, sunk upon lode or placer claims" and "the location and description of each corner, with the markings thereon," is not invalid as conflicting with congressional legislation prescribing regulations for the location of mining claims.

[No. 109.]

*Argued and submitted December 16, 1904.
Decided January 3, 1905.*

NOTE.—On the delegation of legislative power—see note to *Bradshaw v. Lankford*, 11 L. B. A. 582.

IN ERROR to the Supreme Court of the State of Montana to review a judgment affirming a judgment of the District Court of Silver Bow County, in that State, in favor of plaintiff in an action of ejectment. *Affirmed.*

See same case below, 28 Mont. 222, 72 Pac. 617.

The facts are stated in the opinion.

Mr. L. Orvis Evans argued the cause, and, with **Mr. W. W. Dixon** and **Messrs. Forbis & Evans**, filed a brief for plaintiff in error:

The grant contained in the mineral laws of Congress is more than the right of possession. It is at least a grant of some estate in the public domain.

Belk v. Meagher, 104 U. S. 279, 26 L. ed. 735.

It is under and by virtue of U. S. Const. art. 4, § 3, that Congress is vested with authority to regulate the disposal of the public lands.

Pollard v. Hagan, 3 How. 224, 11 L. ed. 571; *De Lima v. Bidwell*, 182 U. S. 197, 45 L. ed. 1056, 21 Sup. Ct. Rep. 743; *Jourdan v. Barrett*, 4 How. 169, 185, 11 L. ed. 924, 931; *Russell v. Lowth*, 21 Minn. 167, 18 Am. Rep. 389; *United States v. Hughes*, 11 How. 552, 568, 13 L. ed. 809, 816; *United States v. Gratiot*, 14 Pet. 526, 537, 10 L. ed. 573, 578; *United States v. Fitzgerald*, 15 Pet. 407-421, 10 L. ed. 785-790; 2 Story, Const. 1328; 2 Tucker, Const. 605.

Not only is the power of disposition in Congress, but the states have no authority whatever in the matter.

Irvine v. Marshall, 20 How. 558, 15 L. ed. 994; *Wilcox v. Jackson*, 13 Pet. 498, 10 L. ed. 264; *Gibson v. Chouteau*, 13 Wall. 92-104, 20 L. ed. 534-538; *Seymour v. Sanders*, 3 Dill. 437, Fed. Cas. No. 12,690; *Russell v. Lowth*, 21 Minn. 167, 18 Am. Rep. 389; *Miller v. Little*, 47 Cal. 348; *Van Broeklin v. Tennessee (Van Broeklin v. Anderson)*, 117 U. S. 151-167, 29 L. ed. 845-850, 6 Sup. Ct. Rep. 670; *Cross v. Harrison*, 16 How. 164, 14 L. ed. 889; *Headley v. Coffman*, 38 Neb. 68, 56 N. W. 701; *Chapman v. Quinn*, 56 Cal. 266; *Kissell v. St. Louis Public Schools*, 18 How. 19, 15 L. ed. 324.

A legislative body has no power of delegation in the matter of making laws.

Cooley, Const. Lim. 6th ed. 137; *Wayman v. Southard*, 10 Wheat. 48, 6 L. ed. 264; *Re Rahrer (Wilkerson v. Rahrer)* 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865; *Marshall Field & Co. v. Clark*, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495.

Mr. Robert B. Smith submitted the cause for defendant in error. **Mr. J. E. Healy** was on his brief:

The statutes of the United States give full recognition to local and state rules and

regulations, seemingly recognizing that under mining laws everywhere such local rules have ever existed where mining has been carried on.

Lindley, Mines, 2d ed. §§ 1-25.

Plaintiff in error's contention cannot be maintained in the face of the decisions of this court and the state and territorial courts.

O'Donnell v. Glenn, 8 Mont. 248, 19 Pac. 305; *Baker v. Butte City Water Co.* 28 Mont. 222, 72 Pac. 617; *Jackson v. Roby*, 109 U. S. 440, 27 L. ed. 990, 3 Sup. Ct. Rep. 301; *Erhardt v. Boaro*, 113 U. S. 527, 28 L. ed. 1113, 5 Sup. Ct. Rep. 560; *Shoshone Min. Co. v. Rutter*, 177 U. S. 505, 44 L. ed. 864, 20 Sup. Ct. Rep. 726; *Telluride Power Transmission Co. v. Rio Grande Western R. Co.* 175 U. S. 639, 44 L. ed. 305, 20 Sup. Ct. Rep. 245; *De Lamar's Nevada Gold Min. Co. v. Nesbitt*, 177 U. S. 524, 44 L. ed. 872, 20 Sup. Ct. Rep. 715; *Speed v. McCarthy*, 181 U. S. 275, 45 L. ed. 258, 21 Sup. Ct. Rep. 613; *Blackburn v. Portland Gold Min. Co.* 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222.

***Mr. Justice Brewer** delivered the opinion of the court: [122]

This was an action of ejectment brought in the district court of Silver Bow county, Montana. The dispute was between two locations of the same mining ground. The defendant's location was adjudged invalid by the trial court, and its decision was affirmed by the supreme court of the state, on the ground of a failure to comply with certain Montana statutes. 28 Mont. 222, 72 Pac. 617. These statutes contained regulations concerning the location of mining claims in addition to those prescribed by congressional legislation, and the question is as to the validity of those additional requirements.

Section 2319, Rev. Stat. (U. S. Comp. Stat. 1901, p. 1424), provides that "all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable, and not inconsistent with the laws of the United States."

Section 2322 (U. S. Comp. Stat. 1901, p. 1425) gives to the locators the exclusive right of possession and enjoyment of all the surface included within the lines of their locations "so long as they comply with the

laws of the United States, and with state, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title."

Section 2324 contains this grant of authority:

"Sec. 2324 (U. S. Comp. Stat. 1901, p. 1426). The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the state or territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the [123]ground so that its boundaries can *be readily traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim."

Section 2332 (U. S. Comp. Stat. 1901, p. 1433) makes the statute of limitations for mining claims of a state applicable for certain purposes to mining claims under the government.

Section 2338 (U. S. Comp. Stat. 1901, p. 1436) reads as follows:

"As a condition of sale, in the absence of necessary legislation by Congress, the local legislature of any state or territory may provide rules for working mines, involving easements, drainage, and other necessary means to their complete development; and those conditions shall be fully expressed in the patent."

Section 2339 (U. S. Comp. Stat. 1901, p. 1437) contains this clause:

"Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same."

In 1893 Congress passed an act (28 Stat. at L. 6, chap. 12) relieving from the necessity of the annual labor for that year, "so that no mining claim which has been regularly located and recorded as required by the local laws and mining regulations shall be subject to forfeiture for nonperformance of the annual assessment for the year 1893," and a similar statute was enacted in 1894 in respect to the annual labor for that year. 28 Stat. at L. 114, chap. 142.

While, in the above sections, there is not 196 U. S.

that direct grant of authority to the state to legislate respecting locations as there is to miners to make regulations, yet there is a clear recognition of such legislation. All these statutory provisions, except the last two sections referred to, were embodied in the legislation of 1872, and have been in force ever since.

*Acting upon the belief that they were [124] fully authorized, nearly all, if not all, the states in the mining regions have passed statutes prescribing additional regulations in respect to the location of mining claims, some having been in force for more than a score of years.

This court has, in many cases, recognized the validity of such state legislation. In *Belk v. Meagher*, 104 U. S. 279, 284, 26 L. ed. 735, 737, Chief Justice Waite, speaking for the court, declared that "a location is not made by taking possession alone, but by working on the ground, recording, and doing whatever else is required for that purpose by the acts of Congress and the local laws and regulations."

In *Erhardt v. Boaro*, 113 U. S. 527, 28 L. ed. 1113, 5 Sup. Ct. Rep. 560, it appeared that there were no mining regulations prescribed by the miners of the district, and it was said by Mr. Justice Field (p. 536, L. ed. p. 1116, Sup. Ct. Rep. p. 564):

"We are therefore left entirely to the laws of the United States and the laws of Colorado on the subject. And the laws of the United States do not prescribe any time in which the excavations necessary to enable the locator to prepare and record a certificate shall be made. That is left to the legislation of the state, which, as we have stated, prescribes sixty days for the excavations upon the vein from the date of discovery, and thirty days afterwards for the preparation of the certificate and filing it for record. In the judgment of the legislature of that state this was reasonable time."

Kendall v. San Juan Silver Min. Co. 144 U. S. 658, 36 L. ed. 583, 12 Sup. Ct. Rep. 779, turned on the question of compliance by the locator with a regulation prescribed by the statutes of Colorado concerning the record of locations, and the decision was that a failure to comply rendered the attempted location invalid. In *Shoshone Min. Co. v. Rutter*, 177 U. S. 505, 44 L. ed. 864, 20 Sup. Ct. Rep. 726, it was held that a suit brought in support of an adverse claim was not one of which a Federal court necessarily had jurisdiction, because, as said (p. 508, L. ed. p. 865, Sup. Ct. Rep. p. 727):

"In a given case the right of possession may not involve any question under the Con-

[125]stitution or laws of the United States, but simply a determination of local rules and customs, or state statutes, or even only a mere matter of fact."

Other cases containing similar recognition might also be cited.

The validity of such state legislation has been affirmed by the supreme courts of several states. See, in addition to the present case, *Wolfley v. Lebanon Min. Co.* 4 Colo. 112; *O'Donnell v. Glenn*, 8 Mont. 248, 19 Pac. 302; *Metcalf v. Prescott*, 10 Mont. 283, 293, 25 Pac. 1037; *Purdum v. Laddin*, 23 Mont. 387, 59 Pac. 153; *Sisson v. Sommers*, 24 Nev. 379, 77 Am. St. Rep. 815, 55 Pac. 829; *Copper Globe Min. Co. v. Allman*, 23 Utah, 410, 64 Pac. 1019; *Northmore v. Simmons*, 38 C. C. A. 211, 97 Fed. 386.

In 1 Lindley on Mines, 2d ed. § 249, the author says:

"State statutes in reference to mining rights upon the public domain must, therefore, be construed in subordination to the laws of Congress, as they are more in the nature of regulations under these laws than independent legislation.

"State and territorial legislation, therefore, must be entirely consistent with the Federal laws, otherwise it is of no effect. The right to supplement Federal legislation, conceded to the state, may not be arbitrarily exercised; nor has the state the privilege of imposing conditions so onerous as to be repugnant to the liberal spirit of the congressional laws. On the other hand, the state may not, by its legislation, dispense with the performance of the conditions imposed by the national law, nor relieve the locator from the obligation of performing, in good faith, those acts which are declared by it to be essential to the maintenance and perpetuation of the estate acquired by location. Within these limits the state may legislate."

What is the ground upon which the validity of these supplementary regulations prescribed by a state is challenged? It is insisted that the disposal of the public lands is an act of legislative power, and that it is not within the competency of a legislature to delegate to another body the exercise of its power; that Congress alone has the right to dispose of the public lands, and cannot transfer its authority to any state legislature or other body. The authority of Con-

[126]gress over the public lands is granted by § 3, article 4, of the Constitution, which provides that "the Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." In other words, Congress is the body to which is given the power to

determine the conditions upon which the public lands shall be disposed of. The nation is an owner, and has made Congress the principal agent to dispose of its property. Is it inconceivable that Congress, having regard to the interests of this owner, shall, after prescribing the main and substantial conditions of disposal, believe that those interests will be subserved if minor and subordinate regulations are intrusted to the inhabitants of the mining district or state in which the particular lands are situated? While the disposition of these lands is provided for by congressional legislation, such legislation savors somewhat of mere rules prescribed by an owner of property for its disposal. It is not of a legislative character in the highest sense of the term, and, as an owner may delegate to his principal agent the right to employ subordinates, giving to them a limited discretion, so it would seem that Congress might rightfully intrust to the local legislature the determination of minor matters respecting the disposal of these lands.

Further, § 2324 distinctly grants to the miners of each mining district the power to make regulations, and the validity of this grant has been expressly affirmed by this court. In *Jackson v. Roby*, 109 U. S. 440, 441, 27 L. ed. 990, 991, 3 Sup. Ct. Rep. 301, we said:

"The act of Congress of 1866 gave the sanction of law to these rules of miners, so far as they were not in conflict with the laws of the United States. 14 Stat. at L. 251, chap. 262, § 1. Subsequent legislation specified with greater particularity the modes of location and appropriation and extent of each mining claim, recognizing, however, the essential features of the rules framed by miners, and, among others, that which required work on the claim for its development as a condition of its continued ownership."

*See also *Erhardt v. Boaro*, 113 U. S. [127] 527, 28 L. ed. 1113, 5 Sup. Ct. Rep. 560, in which (p. 535, L. ed. p. 1116, Sup. Ct. Rep. p. 564), is this declaration:

"And although since 1866 Congress has, to some extent, legislated on the subject, prescribing the limits of location and appropriation and the extent of mining ground which one may thus acquire, miners are still permitted, in their respective districts, to make rules and regulations not in conflict with the laws of the United States or of the state or territory in which the districts are situated, governing the location, manner of recording, and amount of work necessary to hold possession of a claim."

Now, if Congress has power to delegate to a body of miners the making of additional

regulations respecting location, it cannot be doubted that it has equal power to delegate similar authority to a state legislature.

Finally, it must be observed that this legislation was enacted by Congress more than thirty years ago. It has been acted upon as valid through all the mining regions of the country. Property rights have been built up on the faith of it. To now strike it down would unsettle countless titles and work manifold injury to the great mining interests of the Far West. While, of course, consequences may not determine a decision, yet, in a doubtful case, the court may well pause before thereby it unsettles interests so many and so vast,—interests which have been built up on the faith, not merely of congressional action, but also of judicial decisions of many state courts sustaining it, and of a frequent recognition of its validity by this court. Whatever doubts might exist if this matter was wholly *res integra*, we have no hesitation in holding that the question must be considered as settled by prior adjudications, and cannot now be reopened.

[128] The Montana statute (Montana Codes Annotated, § 3612), among other supplementary regulations, provided that the declaratory statement filed in the office of the clerk of the county in which the lode or claim is situated must contain "the dimensions and location of the discovery shaft, or its *equivalent, sunk upon lode or placer claims," and "the location and description of each corner, with the markings thereon." A failure to comply with these regulations was the ground upon which the supreme court of Montana held the location invalid. It is contended that these provisions are too stringent, and conflict with the liberal purpose manifested by Congress in its legislation respecting mining claims. We do not think that they are open to this objection. They certainly do not conflict with the letter of any congressional statute; on the contrary, are rather suggested by § 2324. It may well be that the state legislature, in its desire to guard against false testimony in respect to a location, deemed it important that full particulars in respect to the discovery shaft and the corner posts should be, at the very beginning, placed of record. Even if there were no danger of false testimony, it was not unreasonable to guard against the resurrection of incomplete locations when, by subsequent explorations, mining claims of great value have been uncovered.

We see no error in the rulings of the Supreme Court of Montana, and its judgment is affirmed.

196 U. S.

CHICAGO, INDIANAPOLIS, & LOUISVILLE RAILWAY COMPANY, *Plff. in Err.*,

v.

PATRICK McGUIRE *et al.*

(See S. C. Reporter's ed. 128-133.)

Error to state court—Federal question—when raised in time.

The suggestion of a violation of a Federal right, first made in a petition for the review, in the highest state court, of the judgment of an intermediate appellate court, is too late to serve as a basis for the exercise of the appellate jurisdiction of the Supreme Court of the United States, where it does not affirmatively appear that the state court passed upon the Federal question, and the denial of the petition may well have been upon the ground that the question, not having been suggested in the court below, could not be made available on appeal.

[No. 69.]

Argued December 2, 5, 1904. Decided January 3, 1905.

IN ERROR to the Appellate Court of the State of Indiana to review a judgment which affirmed a judgment of the Circuit Court for Pulaski County in that State entered on a verdict in favor of defendants in a suit to quiet title and for an injunction. *Dismissed* for want of jurisdiction.

See same case below, 31 Ind. App. 110, 99 Am. St. Rep. 249, 65 N. E. 932.

Statement by Mr. Justice **Brown**:

This was a suit in the nature of a bill in equity instituted in the circuit court for Pulaski county, by the railroad company, to quiet its title to certain land, and for an

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to *Hamblin v. Western Land Co* 37 L. ed. U. S. 267; *Kipley v. Illinois*, 42 L. ed. U. S. 998; and *Re Buchanan*, 39 L. ed. U. S. 884.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to *Apex Transp. Co. v. Garbade*, 62 L. R. A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to *Mutual L. Ins. Co. v. McGrew*, 63 L. R. A. 33.

On what the record must show respecting the presentation and decision of a Federal question in order to confer jurisdiction on the Supreme Court of the United States on a writ of error to a state court—see note to *Hooker v. Los Angeles*, 63 L. R. A. 471.

As to what is the record for the purpose of showing the jurisdiction of the Supreme Court of the United States of a writ of error to a

injunction. The case was tried before a jury, and a verdict returned for the defendants, under instruction of the court.

Both parties claimed title through the Louisville, New Albany, & Chicago Railway Company,—plaintiff in error, which was also plaintiff below,—through certain mortgages given by the New Albany company in 1886, 1890, and 1894, which were foreclosed in the United States circuit court, and through which foreclosure and subsequent sale its title became vested; defendants, through a judgment recovered by McGuire September 24, 1896, in the circuit court of White county, against the New Albany company for \$2,416.30, upon which an execution was issued October 16, 1897, to the sheriff of Pulaski county, and a levy made upon the real

estate in dispute. A sale was made November 13, 1897, to the defendant Hathaway, to whom a deed was executed by the sheriff November 23, 1898.

It was insisted by the plaintiff railroad company that the property in controversy was a part of the ground appurtenant to its station at Francesville, Indiana, and that the foreclosure and sale of the property of the New Albany road, through which it obtained its title, carried with it the title to the premises in dispute. The judgment of McGuire was obtained after the execution of the mortgages through which the plaintiff claimed its title. Defendants insisted that the disputed property was not embraced within the mortgages under the after-acquired property clause inserted therein, be-

state court—see note to *Home for Incurables v. New York*, 63 L. R. A. 329.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to *Missouri ex rel. Hill v. Dockery*, 63 L. R. A. 571.

On the practice and procedure governing the transfer of causes to the Federal Supreme Court on writ of error or appeal—see note to *Wedding v. Meyler*, 66 L. R. A. 833.

When Federal question is raised in time to sustain the appellate jurisdiction of the Federal Supreme Court over state courts.

CHICAGO, I. & L. R. Co. v. McGuire reaffirms the well-settled rule that to sustain the appellate jurisdiction of the Supreme Court of the United States over state courts the Federal question must have been presented for decision at some point in the procedure in the state courts so that it properly should have received consideration in the highest state court, or that court must actually have taken up and decided the question, notwithstanding the delay in its presentation. In the latter case, says Mr. Justice Brown, the burden is upon the plaintiff in error to show that the highest state court did in fact consider the Federal question. There is no presumption that it received consideration.

The Federal question relied upon to confer this jurisdiction cannot first be raised in the Supreme Court of the United States. *Quimby v. Boyd*, 128 U. S. 488, 32 L. ed. 502, 9 Sup. Ct. Rep. 147; *Morrison v. Watson*, 154 U. S. 111, 38 L. ed. 927, 14 Sup. Ct. Rep. 995; *Marrow v. Brinkley*, 129 U. S. 178, 32 L. ed. 654, 9 Sup. Ct. Rep. 267; *Scudder v. Comptroller (Scudder v. Coler)* 175 U. S. 32, 44 L. ed. 62, 20 Sup. Ct. Rep. 26; *Chaplin v. Fye*, 179 U. S. 127, 45 L. ed. 119, 21 Sup. Ct. Rep. 71; *Bergner v. Palethorp*, 131 U. S. Appx. ccviii.; *Spies v. Illinois (Ex parte Spies)* 123 U. S. 131, 31 L. ed. 80, 8 Sup. Ct. 21; *Sweringen v. St. Louis*, 185 U. S. 38, 46 L. ed. 795, 22 Sup. Ct. Rep. 569.

It is not raised in time where it first appears in the petition for writ of error from the Supreme Court of the United States to the state court. *Johnson v. New York L. Ins. Co.* 187 U. S. 491, 47 L. ed. 273, 23 Sup. Ct. Rep. 194; *Telluride Power Transmission Co. v. Rio Grande Western R. Co.* 187 U. S. 569, 47 L. ed. 307, 23 Sup. Ct. Rep. 178; *Wabash R. Co. v. Flannigan*, 192 U. S. 29, 48 L. ed. 328, 24

Sup. Ct. Rep. 224; *CHICAGO, I. & L. R. Co. v. McGuire*.

It is essential that at some point in the procedure before the state courts the Federal question relied upon to confer such jurisdiction be presented for decision. *Murdock v. Memphis*, 20 Wall. 590, 22 L. ed. 429; *Church v. Kelsey*, 121 U. S. 282, 30 L. ed. 960, 7 Sup. Ct. Rep. 897.

The Federal right, title, privilege, or immunity must be set up or claimed in the trial court whenever, under the state practice, the highest state court in reviewing the judgments of the trial court refuses to consider questions not therein raised. *Baldwin v. Kansas*, 129 U. S. 52, 32 L. ed. 640, 9 Sup. Ct. Rep. 193; *Spies v. Illinois (Ex parte Spies)* 123 U. S. 131, 31 L. ed. 80, 8 Sup. Ct. Rep. 21; *Brooks v. Missouri*, 124 U. S. 394, 31 L. ed. 454, 8 Sup. Ct. Rep. 443; *Morrison v. Watson*, 154 U. S. 111, 38 L. ed. 927, 14 Sup. Ct. Rep. 995; *Erie R. Co. v. Purdy*, 185 U. S. 148, 46 L. ed. 847, 22 Sup. Ct. Rep. 605; *Layton v. Missouri*, 187 U. S. 356, 47 L. ed. 214, 23 Sup. Ct. Rep. 137.

And the claim of a Federal right, first made in a motion in arrest of judgment, is not in time, where the highest state court rests its affirmance of the order overruling the motion upon the ground that only errors apparent upon the face of the record can be availed of to sustain a motion in arrest of judgment. *Brown v. Massachusetts*, 144 U. S. 573, 36 L. ed. 546, 12 Sup. Ct. Rep. 757.

But the Federal question is presented in time, whenever raised, if the highest state court actually takes up the question and decides it.

Where the Federal right was specially set up and was denied by the highest state court, it was not regarded as important that it was not so set up or claimed in the declaration as to be decided in passing on a demurrer, and was first presented by a motion to set aside the judgment on the demurrer, and its denial assigned as error on appeal to the highest court of the state. *Meyer v. Richmond*, 172 U. S. 82, 43 L. ed. 374, 19 Sup. Ct. Rep. 106.

Nor is it material that the claim of Federal right was first asserted in a motion to set aside the verdict and grant a new trial, where the case was one in which no provision was made for filing an answer, and the claim was again asserted in the assignment of errors filed in the highest state court. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581.

Jurisdiction has been sustained where the

cause entirely foreign to the operation of the railroad, and therefore could not have been embraced within the foreclosure and sale.

[130] *The appellate court of Indiana sustained their contention, held that the trial court was right in instructing the jury to return a verdict for the appellees, and affirmed its judgment. 31 Ind. App. 110, 99 Am. St. Rep. 249, 65 N. E. 932. The supreme court denied a petition for review.

Mr. H. R. Kurrie argued the cause, and, with **Messrs. E. C. Field** and **G. W. Kretzinger**, filed a brief for plaintiff in error.

Messrs. W. H. H. Miller and **Maurice Winfield** argued the cause and filed a brief for defendants in error.

Federal right was claimed in a motion for new trial and in the assignments of error in a state supreme court, and was fully considered in the opinion of that court, whose decision was adverse to such claim (*San José Land & Water Co. v. San José Ranch Co.* 189 U. S. 177, 47 L. ed. 765, 23 Sup. Ct. Rep. 487), and where the question was presented by a motion to set aside the judgment (*Manley v. Park*, 187 U. S. 547, 47 L. ed. 296, 23 Sup. Ct. Rep. 208), or by a motion in arrest of judgment (*St. Louis Consol. Coal Co. v. Illinois*, 185 U. S. 203, 46 L. ed. 872, 22 Sup. Ct. Rep. 616).

A question as to the repugnancy of a state statute to the Federal Constitution, first raised in the supreme court of a state, and there decided, not on the ground that it was not raised in the lower court, but upon its merits, is not raised too late for the purpose of review on writ of error from the Supreme Court of the United States. *Sully v. American Nat. Bank*, 178 U. S. 289, 44 L. ed. 1072, 20 Sup. Ct. Rep. 935.

A Federal question was not set up too late to confer jurisdiction on the Supreme Court of the United States of a writ of error to a state court, where it was raised by the assignments of error in the state supreme court, and was considered and decided by a commission appointed to aid that court in the discharge of its duties, and the judgment of such commission was, for the reasons stated in its report, affirmed by the state supreme court. *Farmers' & M. Ins. Co. v. Dobney*, 189 U. S. 301, 47 L. ed. 821, 23 Sup. Ct. Rep. 565.

And where a judgment of the highest court of a state necessarily involves a denial of rights claimed under the Constitution of the United States, the Supreme Court of the United States has jurisdiction, although the question was presented for the first time in the highest state court. *Arrowsmith v. Harmoning*, 118 U. S. 194, 30 L. ed. 243, 6 Sup. Ct. Rep. 1023.

So, where exemption from suit as consul of a foreign power is first claimed in an assignment of errors in the highest state court, the Supreme Court of the United States will not refuse to take jurisdiction of a writ of error to the state court, where the record shows no objection founded on the omission to plead the exemption in the lower court, and the only answer to the assignment of error is that the fact of such consulship does not appear in the record. *Davis v. Packard*, 7 Pet. 276, 8 L. ed. 684.

A claim that the admission in evidence of
196 U. S.

Mr. Justice Brown delivered the opinion of the court;

Motion is made to dismiss this writ of error upon two grounds: (1) That the supposed Federal question was not set up and claimed until too late; (2) that there is no Federal question in the case.

The motion must be sustained upon the first ground. The Federal question now put forward by the plaintiff is that the *appel-[131] late court failed to give full faith and credit to the foreclosure decree made by the circuit court of the United States and the sale in pursuance thereof, in refusing to hold that the mortgages foreclosed by said decree covered and included in their description of the property therein conveyed the

the previous testimony of an absent witness was in violation of the 14th Amendment to the Federal Constitution was not specially set up, at the proper time and in the proper way to confer jurisdiction on the Supreme Court of the United States to review the judgment of the highest court of a state, by an assignment of error in that court, which was not considered by it, presumably because no such question had been raised in the trial court. *Jacobi v. Alabama*, 187 U. S. 133, 47 L. ed. 106, 23 Sup. Ct. Rep. 48.

The Federal question must be raised before final decision in the highest state court of the state. *Winona & St. P. Land Co. v. Minnesota*, 159 U. S. 540, 40 L. ed. 252, 16 Sup. Ct. Rep. 88; *Slimmerman v. Nebraska*, 116 U. S. 54, 29 L. ed. 535, 6 Sup. Ct. Rep. 333.

It is not in time when first presented on an application for rehearing in the highest state court (*De La Lande v. Louisiana*, 18 How. 192, 15 L. ed. 350; *Steines v. Franklin County*, 14 Wall. 15, 20 L. ed. 846; *Susquehanna Boom Co. v. West Branch Boom Co.* 110 U. S. 57, 28 L. ed. 69, 3 Sup. Ct. Rep. 438; *Simmerman v. Nebraska*, 116 U. S. 54, 29 L. ed. 535, 6 Sup. Ct. Rep. 333; *Bushnell v. Crooke Min. & Smelting Co.* 148 U. S. 682, 37 L. ed. 610, 13 Sup. Ct. Rep. 771; *Miller v. Texas*, 153 U. S. 535, 38 L. ed. 812, 14 Sup. Ct. Rep. 874; *Sayward v. Denny*, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; *Miller v. Cornwall R. Co.* 168 U. S. 131, 42 L. ed. 409, 18 Sup. Ct. Rep. 34; *Capital Nat. Bank v. First Nat. Bank*, 172 U. S. 425, 43 L. ed. 502, 19 Sup. Ct. Rep. 202; *Turner v. Richardson*, 180 U. S. 87, 45 L. ed. 438, 21 Sup. Ct. Rep. 295; *Eastern Bldg. & L. Asso. v. Welting*, 181 U. S. 47, 45 L. ed. 739, 21 Sup. Ct. Rep. 531; *Weber v. Rogan*, 188 U. S. 10, 47 L. ed. 363, 23 Sup. Ct. Rep. 263; *Fullerton v. Texas*, 196 U. S. 192, *post*, 443, 25 Sup. Ct. Rep. 221),—at least where such petition for rehearing is overruled without any determination or allusion to the alleged Federal question (*Pim v. St. Louis*, 165 U. S. 273, 41 L. ed. 714, 17 Sup. Ct. Rep. 322), or the question presented therein was not dealt with by the state court as a Federal question (*Mallett v. North Carolina*, 181 U. S. 589, 45 L. ed. 1015, 21 Sup. Ct. Rep. 730), or where the state court refused to consider the question because it had not sooner been raised (*Chappell v. Bradshaw*, 128 U. S. 132, 32 L. ed. 369, 9 Sup. Ct. Rep. 40).

In Louisiana, as elsewhere, a claim of a Federal right, title, privilege, or immunity is not in time when first suggested on such an ap-

real estate in controversy. This question, however, never seems to have been presented either to the court of first instance or to the court of appellate jurisdiction. It is true the question was argued at length as to what was intended to be covered by the description in the mortgages and by the foreclosure and sale, but the Federal character of this question was not indicated until after a petition for a rehearing in the appellate court had been overruled. Plaintiff then filed in the supreme court of the state a petition for the transfer of the cause to that court, and, as grounds for such transfer, insisted that the appellate court erred in holding that the property in controversy was after-acquired property not used for railway purposes, and on this account was not within the mortgages upon which appellant's title was based, and that the court thereby "refused to give due effect to the judgment of the Federal court."

plication, although under the laws of that state a judgment of the highest court does not become final until a specified time from the rendering of the judgment, within which time a dissatisfied party may apply for a rehearing; as it does not follow that new grounds for decision will be allowed to be presented, or will be considered on such application, and the general rule is otherwise. *Texas & P. R. Co. v. Southern P. Co.* 137 U. S. 48, 34 L. ed. 614, 11 Sup. Ct. Rep. 10.

But if the state court entertains the petition and disposes of the Federal question, that will be sufficient. *Mallett v. North Carolina*, 181 U. S. 589, 45 L. ed. 1015, 21 Sup. Ct. Rep. 730; *Missouri, K. & T. R. Co. v. Elliott*, 184 U. S. 530, 46 L. ed. 673, 22 Sup. Ct. Rep. 446; *Leigh v. Green*, 193 U. S. 79, 48 L. ed. 623, 24 Sup. Ct. Rep. 390.

Even if an exception to the general rule that the privilege or immunity under the Federal Constitution is claimed too late when first set up in the state court on petition for rehearing can, however, be based on the ground that the state court permitted argument on the question and delivered an opinion and decision upon it, yet, if the misconception of the constitutional provision relied on is very obvious, the Federal Supreme Court will not retain the cause for further argument, but will avail itself of the general rule ordinarily applicable, and dismiss the writ of error. *Caldwell v. Texas*, 137 U. S. 692, 34 L. ed. 816, 11 Sup. Ct. Rep. 224.

A certificate of the presiding judge of a state court, that a Federal question which was first raised by a petition for rehearing was duly considered and decided, cannot confer jurisdiction on the Federal Supreme Court of a writ of error to the state court, where, from the face of the record proper and from the opinions, the reasonable inference is that the court may have denied the application in the mere exercise of its discretion, or may have declined to pass upon the Federal question in terms because it was suggested too late. *Fullerton v. Texas*, 196 U. S. 192, *post*, 443, 25 Sup. Ct. Rep. 221.

The denial, by a division of the supreme court of Missouri, of a right under Federal law which was first claimed on a motion to transfer the cause to the court in banc after judgment

This petition appears to have been denied by the supreme court without an opinion. Doubtless, if that court had proceeded to pass upon this as a Federal question we should have held it sufficient, but it will be observed that the petition contained a mere suggestion of a violation of a Federal right, not the distinct presentation of a Federal question, and that no reference was made to the Constitution of the United States. *F. G. Oxley Stave Co. v. Butler County*, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709. We are left to infer that the petition was denied because the point of constitutionality was not made in either of the courts below. The rule seems to be settled in Indiana, as in many other states, that the matter assigned in the supreme court of the state as error must have been properly presented in the court below and there adjudicated. *Coleman v. Dobbins*, 8 Ind. 156-164; *Priddy v. Dodd*, 4 Ind. 84; *Wesley v.*

and after an application for rehearing had been overruled, is not a decision against a right specially set up or claimed at the proper time. *Duncan v. Missouri*, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570; *Bobb v. Jamison*, 155 U. S. 416, 39 L. ed. 206, 15 Sup. Ct. Rep. 357.

Where the supreme court of the state renders judgment without any suggestion that a Federal question has been presented, and no such question is presented in the petition for rehearing, the denial of a subsequent motion that oral argument of the case on its merits be permitted, which does not necessarily involve a decision of a Federal question, does not give the Supreme Court of the United States jurisdiction of a writ of error to the denial. *Butler v. Gage*, 138 U. S. 52, 34 L. ed. 869, 11 Sup. Ct. Rep. 235.

An attempt to raise, for the first time, a Federal question on a motion in an inferior state court to quash a fieri facias issued in pursuance of a decree of the highest court of the state stands upon no better footing than if attempted on a petition for rehearing. *Loeber v. Schroeder*, 149 U. S. 580, 37 L. ed. 856, 13 Sup. Ct. Rep. 934.

A Federal question is not set up in a state court soon enough to sustain a writ of error from the Supreme Court of the United States, where it is first presented by new pleas filed after the case is decided by the supreme court of the state and remanded to the lower court for a new trial, and the supreme court on a second appeal refuses to reopen the questions involved on the first hearing, to let in the Federal defense presented by the new pleas. *Yazoo & M. Valley R. Co. v. Adams*, 180 U. S. 1, 45 L. ed. 395, 21 Sup. Ct. Rep. 240.

A Federal question raised after the case has been decided on the merits by the highest court of a state and remanded to a lower court merely for an accounting is raised too late for the purpose of a writ of error from the Supreme Court of the United States, where such question does not arise on the accounting itself, but by a motion for leave to amend the answer to set up a defense which might have been originally made. *Union Mut. L. Ins. Co. v. Kirchhoff*, 169 U. S. 103, 42 L. ed. 677, 18 Sup. Ct. Rep. 260.

[132] *Milford*, 41 *Ind. 415; *Selking v. Jones*, 52 Ind. 409; *Russell v. Harrison*, 49 Ind. 97. This is also the practice in this court. * *Cornell v. Green*, 163 U. S. 75-80, 41 L. ed. 76-78, 16 Sup. Ct. Rep. 969; *Ansbro v. United States*, 159 U. S. 695, 40 L. ed. 310, 16 Sup. Ct. Rep. 187; *Pine River Logging & Improv. Co. v. United States*, 186 U. S. 279-289, 46 L. ed. 1164-1169, 22 Sup. Ct. Rep. 920. If the supreme court did in fact consider the Federal question the burden was upon the plaintiff to show it. There is no presumption that the court considered such question. Under such circumstances we decline to review the constitutional question here. This was expressly held in *Jacobi v. Alabama*, 187 U. S. 133, 47 L. ed. 106, 23 Sup. Ct. Rep. 48; *Layton v. Missouri*, 187 U. S. 356, 47 L. ed. 214, 23 Sup. Ct. Rep. 137; *Spies v. Illinois*, 123 U. S. 131, 31 L. ed. 80, 8 Sup. Ct. Rep. 21.

True, the Federal question was set up at length in the petition filed in the appellate court for a writ of error from this court, but that was clearly too late. *Fowler v. Lamson*, 164 U. S. 252, 41 L. ed. 424, 17 Sup. Ct. Rep. 112; *Missouri P. R. Co. v. Fitzgerald*, 160 U. S. 566, 575, 40 L. ed. 539, 540, 16 Sup. Ct. Rep. 389; *Ansbro v. United States*, 159 U. S. 695, 40 L. ed. 310, 16 Sup. Ct. Rep. 187.

In this connection the plaintiff in error urges upon us the proposition that, as it relied solely upon a title derived by a foreclosure and sale in a Federal court, the state court must necessarily have considered and decided that question, and that in such cases the Federal Constitution need not be specially set up and claimed. This argument would necessarily not apply to the supreme court of the state, which, as above indicated, might have held, and probably did hold, that the Federal question, not having been suggested in the court below, could not be made available on appeal. The appellate court did not discuss it. There are doubtless a few cases which hold that, where the validity of a treaty or statute or authority of the United States is raised, and the decision is against it, or the validity of a state statute is drawn in question, and the decision is in favor of its validity, and the Federal question appears in the record and was decided, or such decision was necessarily involved in the case, the fact that it was not specifically set up and claimed is not conclusive against a review of such question here. *Columbia Water Power Co. v. Street R. Light & P. Co.* 172 U. S. 475-488, 43 L. ed. 521-525, 19 Sup. Ct. Rep. 247.

[133] But as the validity of *no statute, state or Federal, or authority thereunder, was called in question here, this rule does not apply.
196 U. S.

The true and rational rule stated by this court in *Bridge Proprietors v. Hoboken Land & Improv. Co.* 1 Wall. 116-145, 17 L. ed. 571-576, is clearly applicable: "That the court must be able to see clearly from the whole record that a certain provision of the Constitution or act of Congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied." This case is the not infrequent one of an attempt to clutch at the jurisdiction of this court as an afterthought, when all other resources of litigation have been exhausted.

The Federal question, if any such existed,—as to which we express no opinion,—was not set up or claimed at the proper time, and the writ of error must therefore be dismissed.

AMERICAN EXPRESS COMPANY and R.
M. Coffin, *Plffs. in Err.*,

v.

STATE OF IOWA.

(See S. C. Reporter's ed. 133-146.)

Error to state court—decision on non-Federal ground—commerce—C. O. D. shipments of intoxicating liquors—when subject to seizure under state law.

1. A writ of error to review a decision of a state court upholding a seizure, under the state laws, of intoxicating liquors shipped C. O. D. into that state from another state, on the ground that the sale was completed in the former state, will not be dismissed on the theory that its ruling rests upon a non-Federal ground broad enough to sustain it, where the protection of the commerce clause of the

On state regulation of interstate or foreign commerce—see notes to Norfolk & W. R. Co. v. Com. 13 L. R. A. 107; *McCanna & F. Co. v. Citizens' Trust & S. Co.* 24 C. C. A. 13; *Ratterman v. Western U. Teleg. Co.* 32 L. ed. U. S. 229; *Harmon v. Chicago*, 37 L. ed. U. S. 216; *Cleveland, C. C. & St. L. R. Co. v. Backus*, 38 L. ed. U. S. 1041; and *Postal Teleg. Cable Co. v. Adams*, 39 L. ed. U. S. 311.

As to police power as affecting commerce—see notes to People v. Budd, 5 L. R. A. 559; and *State ex rel. Corwin v. Indiana & O. Oil, Gas & Min. Co.* 6 L. R. A. 579.

On importations in original packages—see notes to Re Wilson, 12 L. R. A. 624; *State ex rel. Cochran v. Winters*, 10 L. R. A. 616; *Pittsburg & S. Coal Co. v. Bates*, 39 L. ed. U. S. 539.

On the right of a state to prohibit trade in intoxicating liquors as affected by the commerce clause of the Federal Constitution—see notes to State v. Creeden, 7 L. R. A. 295; and *State ex rel. Cochran v. Winters*, 10 L. R. A. 616.

Appellate review in Federal Supreme Court of state court decisions involving questions of interstate commerce.

The character of the controversy essential to

Federal Constitution was directly invoked in the state court.

2. Intoxicating liquors shipped C. O. D. from one state into another cannot be subjected to seizure under the laws of the latter state, while in the hands of the express company, without infringing the commerce clause of the Federal Constitution.

[No. 67.]

Argued December 2, 1904. Decided January 3, 1905.

IN ERROR to the Supreme Court of the State of Iowa to review a judgment which reversed a judgment of the Tama District Court, which had reversed a judgment of a justice's court, sustaining a seizure of intoxicating liquors shipped C. O. D. into the state from Illinois, while in the hands of the express company's agent at the place of delivery. *Reversed* and remanded for further proceedings.

See same case below, 118 Iowa, 447, 92 N. W. 66.

Statement by Mr. Justice **White**:

The American Express Company received at Rock Island, Illinois, on or about March 29, 1900, four boxes of merchandise to be carried to Tama, Iowa, to be there delivered to four different persons, one of the packages being consigned to each. The shipment was C. O. D., \$3 to be collected on each

confer jurisdiction upon the Supreme Court of the United States of a writ of error to the highest court of a state is discussed in a note to *Apex Transp. Co. v. Garbade*, 62 L. R. A. 531, entitled *What adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts*. As is there pointed out, the term "Federal question" is constantly employed by the courts to designate this kind of controversy. This term obviously includes the question whether or not a state statute as construed by the state courts is in violation of the commerce clause of the Constitution of the United States. *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; *Western U. Teleg. Co. v. Alabama Bd. of Assessment (Western U. Teleg. Co. v. Seay)* 132 U. S. 472, 33 L. ed. 409, 2 Inters. Com. Rep. 726, 10 Sup. Ct. Rep. 161; *Illinois C. R. Co. v. Illinois*, 163 U. S. 142, 41 L. ed. 107, 16 Sup. Ct. Rep. 1096.

Jurisdiction exists to review the judgment of a state court sustaining a demurrer to a plea which draws in question nothing but the validity of a state statute authorizing the construction of a dam across a navigable river, as the consistency of such statute with or repugnancy to the Constitution of the United States necessarily arises, and must have been determined by such decision. *Willson v. Black Bird Creek Marsh Co.* 2 Pet. 245, 7 L. ed. 412.

But the exceptions on a prosecution for selling intoxicating liquors in violation of a state prohibitory law, in which it appeared that such liquors were sent by defendant by express C. O. D. from another state to the purchasers, that the facts as established did not constitute an

package, exclusive of 35 cents for carriage on each. On March 31 the merchandise reached Tama, and on that day was seized in the hands of the express agent. This was based on an information before a justice of the peace, charging that the packages contained intoxicating liquor held by the express company for sale. The express company and its agent answered, setting up the receipt of the packages in Illinois, not for sale in Iowa, but for carriage and delivery to the consignees. An agreed statement of facts was stipulated admitting the receipt, the carriage, and the holding of the packages as above stated. The seizure was sustained. Appeal was taken to a district court. The express company and its agent amended their answer, specially setting up the commerce clause of the Constitution of the United States. There was judgment in favor of the express company, and the state of Iowa appealed to the supreme court and obtained a reversal. 118 Iowa, 447, 92 N. W. 66. This writ of error was prosecuted.

Mr. Lewis Cass Ledyard argued the cause and filed a brief for plaintiffs in error:

The following propositions, which are stated in the language of the court, must be deemed to be firmly established:

1. That ardent spirits, distilled liquors,

offense against the state statute, and that defendant ought not to have been found guilty under the facts, are too general to raise any question in a state court as to the commerce clause of the Constitution of the United States, or as to any rights claimed under it. *O'Neil v. Vermont*, 144 U. S. 323, 36 L. ed. 450, 12 Sup. Ct. Rep. 693.

And the mere affirmance of the conviction does not involve any Federal question, where the attention of the court was not called to the commerce clause of the Constitution of the United States, or to any right claimed under it. *Ibid.*

A decision of a state court sustaining the defense in an action for a breach of contract, that the contract sued on was in violation of the Interstate Commerce Act, does not entitle the plaintiff to a writ of error from the Supreme Court of the United States, unless he set up some claim under the Federal statute, which was denied by the state court. This because the decision was in favor of the only claim made under the Federal statute. *Kizer v. Texarkana & Ft. S. R. Co.* 179 U. S. 199, 45 L. ed. 152, 21 Sup. Ct. Rep. 100.

See also note to *Mutual L. Ins. Co. v. McGrew*, 63 L. R. A. 33, on *How and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States*.

A question under the act of March 2, 1893, requiring interstate carriers to equip their cars with automatic couplings, is not so involved as to be cognizable by the Supreme Court of the United States in reviewing a judgment of a state court holding such a carrier liable to one

ale, and beer are subjects of exchange, barter, and traffic, like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world, the laws of Congress, and the decisions of the courts.

Leisy v. Hardin, 135 U. S. 100-110, 34 L. ed. 128-132, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681.

2. That the transportation of merchandise from one state into and across another is interstate commerce, and is protected from the operation of state laws from the moment of shipment, whilst in transit, and up to the ending of the journey by the delivery of the goods to the consignee at the place to which they were consigned.

Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *Rhodes v. Iowa*, 170 U. S. 412, 415, 42 L. ed. 1088, 1092, 18 Sup. Ct. Rep. 664.

3. That the power to ship merchandise from one state into another carries with it, as an incident, the right in the receiver of the goods to sell them in the original packages, any state regulation to the contrary notwithstanding; that is to say, that the goods received by interstate commerce remain under the shelter of the interstate commerce clause of the Constitution until by a sale in the original package they have

of its employees for injuries sustained in attempting to make a coupling, where the carrier did not specially set up or claim any right under that act or dependent upon its construction, which was denied by the state court. *Southern R. Co. v. Carson*, 194 U. S. 136, 48 L. ed. 907, 24 Sup. Ct. Rep. 609.

Where a state court has construed a state statute as applying solely to domestic commerce, that construction must be accepted as conclusive by the Supreme Court of the United States on writ of error to review a decision of the state court maintaining the validity of such enactment over the objection that it was a regulation of interstate commerce. *Louisville, N. O. & T. R. Co. v. Mississippi*, 133 U. S. 587, 33 L. ed. 784, 2 Inters. Com. Rep. 801, 10 Sup. Ct. Rep. 348; *Osborne v. Florida*, 164 U. S. 650, 41 L. ed. 586, 17 Sup. Ct. Rep. 214; *Missouri, K. & T. R. Co. v. McCann*, 174 U. S. 580, 43 L. ed. 1093, 19 Sup. Ct. Rep. 755; *Chesapeake & O. R. Co. v. Kentucky*, 179 U. S. 388, 45 L. ed. 244, 21 Sup. Ct. Rep. 101; *Erie R. Co. v. Purdy*, 185 U. S. 148, 46 L. ed. 847, 22 Sup. Ct. Rep. 605.

The same rule obtains where the construction given by the state court to the state statute makes such enactment applicable to interstate commerce. *Hall v. De Cuir*, 95 U. S. 485, 24 L. ed. 547; *Howe Mach. Co. v. Gage*, 100 U. S. 676, 25 L. ed. 754; *Illinois C. R. Co. v. Illinois*, 163 U. S. 142, 41 L. ed. 107, 16 Sup. Ct. Rep. 1096.

See also note to *Missouri ex rel. Hill v. Dockery*, 63 L. R. A. 571, on *What questions the Federal Supreme Court will consider in reviewing the judgments of state courts*.

The construction put by the highest state court upon a provision of the state Constitution, 196 U. S.

been commingled with the general mass of property in the state.

Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Vance v. W. A. Vandercook Co.* 170 U. S. 438, 444, 42 L. ed. 1100, 1103, 18 Sup. Ct. Rep. 674.

4. That the last preceding proposition, whilst generically true, is no longer applicable to intoxicating liquors, since Congress, in the exercise of its lawful authority by the passage of the act of August 8, 1890, has recognized the power of the several states to control the incidental right of sale in the original packages of intoxicating liquors shipped into one state from another, so as to enable the states to prevent the exercise, by the receiver, of the accessory right of selling intoxicating liquors in original packages except in conformity to lawful state regulations.

Re Rahrer (Wilkerson v. Rahrer), 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865; *Rhodes v. Iowa*, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; *Vance v. W. A. Vandercook Co.* 170 U. S. 438, 445, 42 L. ed. 1100, 1103, 18 Sup. Ct. Rep. 674.

5. That the above-mentioned act of Congress, which provides that intoxicating liquors transported into any state or territory, or remaining therein for use, con-

by which a different effect is given to it than to similar language in the interstate commerce law, is binding upon the Federal Supreme Court on writ of error to the state court, in a case in which the validity of such constitutional provision under the Federal Constitution is involved. *Louisville & N. R. Co. v. Kentucky*, 183 U. S. 503, 46 L. ed. 298, 22 Sup. Ct. Rep. 95.

The rule that the Supreme Court will not entertain moot cases was applied in *American Book Co. v. Kansas*, 193 U. S. 49, 48 L. ed. 613, 24 Sup. Ct. Rep. 394, to a controversy over the commerce clause of the Federal Constitution, with the result that the compliance by a foreign corporation with a judgment of the highest state court ousting it from doing business in the state until it should satisfy the requirements which the state laws exact of foreign corporations was held to preclude any review of such judgment in the Federal Supreme Court, although, in another similar suit pending in the state courts, such judgment was pleaded as decisive of all or some of the issues.

In addition to the notes hereinbefore referred to, other notes involving questions respecting the appellate jurisdiction of the Supreme Court of the United States over state courts are: *What the record must show respecting the presentation and decision of a Federal question in order to confer jurisdiction on the Supreme Court of the United States of a writ of error to a state court*, *Hooker v. Los Angeles*, 63 L. R. A. 471; *The record for this purpose*, *Home for Incurables v. New York*, 63 L. R. A. 329; *Practice and procedure governing the transfer of causes to the Federal Supreme Court on writ of error or appeal*, *Wedding v. Meyler*, 66 L. R. A. 833.

sumption, sale, or storage therein, shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory, enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise,—did not intend to, and did not, cause the power of the state to attach to an interstate commerce shipment whilst the merchandise was in transit under such shipment, and until its arrival at the point of destination and delivery there to the consignee.

Rhodes v. Iowa, 170 U. S. 412, 426, 42 L. ed. 1088, 1096, 18 Sup. Ct. Rep. 664.

6. That the power to ship from one state into another embraces, of necessity, the right to have the goods carried to the place of destination and delivered at that point to the consignee, and that the fundamental right which these decisions hold to be protected from the operation of state laws by the Constitution is the continuity of shipment of goods coming from one state into another, from the point of transmission to the point of consignment, and the accomplishment there of the delivery covered by the contract. The power which it was held in *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062, the state did not possess was that of stopping interstate shipments at the state line by breaking their continuity and intercepting their course from the point of origin to the point of consummation.

Rhodes v. Iowa, 170 U. S. 412-419, 42 L. ed. 1088, 1093, 18 Sup. Ct. Rep. 664.

The sale is complete upon a delivery of the goods to the carrier, who becomes the agent of the consignee for the purpose of accepting a delivery and transporting the goods to him, and the agent of the consignor for the purpose of the collection of the purchase price.

Com. v. Russell, 11 Ky. L. Rep. 576; *State v. Cairns*, 64 Kan. 782, 58 L. R. A. 55, 68 Pac. 621; *James v. Com.* 102 Ky. 108, 42 S. W. 1107; *Com. v. Fleming*, 130 Pa. 138, 5 L. R. A. 470, 17 Am. St. Rep. 763, 18 Atl. 622; *State v. Flanagan*, 38 W. Va. 53, 22 L. R. A. 430, 45 Am. St. Rep. 836, 17 S. E. 792; *Pilgreen v. State*, 71 Ala. 368; *Higgins v. Murray*, 73 N. Y. 252.

That the technical question of the passing of title is immaterial has been very lately held by this court.

Norfolk & W. R. Co. v. Sims, 191 U. S. 441, 48 L. ed. 254, 24 Sup. Ct. Rep. 151.

Mr. Charles W. Mullan argued the

cause and filed a brief for defendant in error:

The ownership and possession of merchandise which is shipped C. O. D. remain in the consignor until it is delivered to the consignee by the common carrier upon payment of the purchase price, and the sale is made at the place of delivery, except where the consignee expressly designates the common carrier as his agent to transport and deliver such merchandise, or where the acts of the parties show that the consignor intended to part with his property and to transfer the title and possession thereof to the consignee at the time of delivery to the common carrier.

United States v. Shriver, 23 Fed. 134; *United States v. Cline*, 26 Fed. 515; *McElwee v. Metropolitan Lumber Co.* 16 C. C. A. 232, 37 U. S. App. 266, 69 Fed. 302; *McNeal v. Braun*, 53 N. J. L. 617, 26 Am. St. Rep. 441, 23 Atl. 687; *Thompson v. Cincinnati, W. & Z. R. Co.* 1 Bond, 152, Fed. Cas. No. 13,950; *Hooper v. Chicago & N. W. R. Co.* 27 Wis. 81, 9 Am. Rep. 439; *Braddock Glass Co. v. Irvin*, 153 Pa. 440, 25 Atl. 490; *Millhiser v. Erdman*, 98 N. C. 292, 2 Am. St. Rep. 334, 3 S. E. 521; *Stone v. Perry*, 60 Me. 48; *Moakes v. Nicolson*, 19 C. B. N. S. 290; *Hirschhorn v. Canney*, 98 Mass. 149; *Daugherty v. Fowler*, 44 Kan. 628, 10 L. R. A. 314, 25 Pac. 40; *Suit v. Woodhall*, 113 Mass. 391; *Wasserboehr v. Boulicier*, 84 Me. 165, 30 Am. St. Rep. 344, 24 Atl. 808; *Lane v. Chadwick*, 146 Mass. 68, 15 N. E. 121; *Benjamin, Sales*, 1883, § 1040; *State v. O'Neil*, 58 Vt. 140, 56 Am. Rep. 557, 2 Atl. 586; *Gipps Brewing Co. v. De France*, 91 Iowa, 108, 28 L. R. A. 386, 51 Am. St. Rep. 329, 58 N. W. 1087; *State v. United States Exp. Co.* 70 Iowa, 271, 30 N. W. 568; *The Frances*, 9 Cranch, 183, 3 L. ed. 698; *Mechem, Sales*, §§ 494, 502, 740.

The place of the sale of goods or merchandise is the place of delivery; that is, where the sale is completed by delivery.

Dow v. Gould & C. Silver Min. Co. 31 Cal. 629; *Mead v. Dayton*, 28 Conn. 39; *Lewis v. McCabe*, 49 Conn. 155, 44 Am. Rep. 217; *Weil v. Golden*, 141 Mass. 364, 6 N. E. 229.

Under the act of Congress of August 8, 1890, all fermented, distilled, or other intoxicating liquors transported into any state, or remaining therein for use, consumption, sale, or storage, are, upon arrival in such state, subject to the operation and effect of the laws of the state to which they are shipped, and subject to the police powers of such state, to the same extent as domestic property therein, whether such liquors are transported in original packages or otherwise.

Re Rahrer (Wilkerson v. Rahrer) 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep.

865; *Rhodes v. Iowa*, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664.

Where merchandise is shipped C. O. D., the liability of the carrier ceases and that of a warehouseman attaches at the time of the arrival of such merchandise at the place of its destination.

Weed v. Barney, 45 N. Y. 344, 6 Am. Rep. 96; *Gibson v. American Merchants' Union Exp. Co.* 1 Hun, 387; *Marshall v. Wells*, 7 Wis. 1, 73 Am. Dec. 381; *Pacific Exp. Co. v. Wallace*, 60 Ark. 100, 29 S. W. 32; *Schouler, Bailments & Carriers*, 2d ed. § 507.

There is no duty or obligation arising out of the nature of a carrier's business, which requires such carrier to collect payment of the price of goods transported by it as a condition precedent to their delivery. Such obligation arises, if at all, by special contract, express or implied.

Cox v. Columbus & W. R. Co. 91 Ala. 392, 8 So. 824; *Union R. & Transp. Co. v. Riegel*, 73 Pa. 72.

No Federal question is involved herein which gives this court jurisdiction to hear and determine the cause.

O'Neil v. Vermont, 144 U. S. 323, 36 L. ed. 450, 12 Sup. Ct. Rep. 693.

Mr. Justice **White**, after making the foregoing statement, delivered the opinion of the court:

Although the majority of the supreme court of Iowa doubted the correctness of a ruling previously made by that court, nevertheless it was adhered to under the rule of *stare decisis*, and was made the basis of the decision in this cause. In the previous case it was held by the supreme court of Iowa that, where merchandise was received by a carrier with a duty to collect the price on delivery to the consignee, the merchandise remained the property of the consignor, and was held by the carrier as his agent with authority to complete the sale. Upon this premise it was decided that intoxicating liquors shipped C. O. D. from another state were subject to be seized on their arrival in Iowa, in the hands of the express company. Sustaining, upon this principle, the seizure in this case, the supreme court of Iowa did not expressly consider the defense based on the commerce clause of the Constitution of the United States, because the court deemed that its ruling on the subject of the effect of the C. O. D. shipment was a wholly non-

[141] Federal *ground, broad enough to sustain the conclusion reached. And this the court considered was sanctioned by *O'Neil v. Vermont*, 144 U. S. 324, 36 L. ed. 450, 12 Sup. Ct. Rep. 693.

In accord with the opinion of the supreme court of Iowa it is insisted at bar that this writ of error should be dismissed for want

of jurisdiction, because the decision below involved no Federal question, and the case of *O'Neil v. Vermont*, 144 U. S. 324, 36 L. ed. 450, 12 Sup. Ct. Rep. 693, is relied upon. The contention is untenable. As pointed out in *Norfolk & W. R. Co. v. Sims*, 191 U. S. 446, 48 L. ed. 256, 24 Sup. Ct. Rep. 151, the view taken of the *O'Neil Case* is a mistaken one. True, in that case the supreme court of Vermont gave to a C. O. D. shipment the effect attributed to it by the supreme court of Iowa in this case. True, also, a writ of error was prosecuted from this court to the Vermont court upon the assumption that the commerce clause of the Constitution was involved, but this court dismissed the writ of error because it did not appear that the commerce clause of the Constitution was relied on in the state court, was in any way called to the attention of that court, or was passed upon by it. As on this record it appears that the protection of the commerce clause was directly invoked in the state court, it is apparent that the *O'Neil Case* is inapposite. And as, in order to decide the contention that the judgment below rests upon an adequate non-Federal ground, we must necessarily consider how far the C. O. D. shipment was protected by the commerce clause of the Constitution, which is the question on the merits, we pass from the motion to dismiss to the consideration of the rights asserted under the commerce clause of the Constitution.

We can best dispose of such asserted rights by a brief reference to some of the controlling adjudications of this court.

In *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062, it was held that the statutes of Iowa forbidding common carriers from bringing intoxicating liquors into the state of Iowa from another state or territory without obtaining a certificate required by the laws of Iowa was void, as being a regulation of commerce between the states, and, therefore, that those laws *did [142] not justify a common carrier in Illinois from refusing to receive and transport intoxicating liquors consigned to a point within the state of Iowa.

In *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681, it was held that a law of the state of Iowa, forbidding the sale of liquor in that state, could not be made to apply to liquors shipped from another state into Iowa, before the merchandise had been delivered in Iowa, and there sold in the original package, without causing the statute to be a regulation of commerce, repugnant to the Constitution of the United States. In *Rhodes v. Iowa*, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664, the same doctrine was reiterated,

except that it was qualified to the extent called for by the provisions of the act of Congress of August 8, 1891 (26 Stat. at L. 313, chap. 728, U. S. Comp. Stat. 1901, p. 3177), commonly known as the Wilson act. In that case a shipment of intoxicating liquors had been made into the state of Iowa from another state, and the agent of the ultimate railroad carrier in Iowa was proceeded against for an alleged violation of the Iowa law, because, when the merchandise reached its destination in Iowa, he had moved the package from the car in which it had been transported to a freight depot, preparatory to delivery to the consignee. The contention was that, as by the Wilson act, the power of the state operated upon the property the moment it passed the state boundary line; therefore the state of Iowa had the right to forbid the transportation of the merchandise within the state, and to punish those carrying it therein. This was not sustained. The court declined to express an opinion as to the authority of Congress, under its power to regulate commerce, to delegate to the states the right to forbid the transportation of merchandise from one state to another. It was, however, decided that the Wilson act manifested no attempt on the part of Congress to exert such power, but was only a regulation of commerce, since it merely provided, in the case of intoxicating liquors, that such merchandise, when transported from one state to another, should lose its character as interstate commerce upon completion of delivery under the contract of interstate shipment, and before sale in the original packages.

[143] *The doctrine of the foregoing cases was applied in *Vance v. W. A. Vandercook Co.* 170 U. S. 438, 442, 42 L. ed. 1100, 1102, 18 Sup. Ct. Rep. 674, to the right of a citizen of South Carolina to order from another state, for his own use, merchandise, consisting of intoxicating liquors, to be delivered in the state of South Carolina.

Coming to test the ruling of the court below by the settled construction of the commerce clause of the Constitution, expounded in the cases just reviewed, the error of its conclusion is manifest. Those cases rested upon the broad principle of the freedom of commerce between the states, and of the right of a citizen of one state to freely contract to receive merchandise from another state, and of the equal right of the citizen of a state to contract to send merchandise into other states. They rested, also, upon the obvious want of power of one state to destroy contracts concerning interstate commerce, valid in the states where made.

True, as suggested by the court below, there has been a diversity of opinion concerning the effect of a C. O. D. shipment, some courts holding that, under such a shipment, the property is at the risk of the buyer, and therefore that delivery is completed when the merchandise reaches the hands of the carrier for transportation; others deciding that the merchandise is at the risk of the seller, and that the sale is not completed until the payment of the price, and delivery to the consignee, at the point of destination.

But we need not consider this subject. Beyond possible question, the contract to sell and ship was completed in Illinois. The right of the parties to make a contract in Illinois for the sale and purchase of merchandise, and, in doing so, to fix by agreement the time when and condition on which the completed title should pass, is beyond question. The shipment from the state of Illinois into the state of Iowa of the merchandise constituted interstate commerce. To sustain, therefore, the ruling of the court below would require us to decide that the law of Iowa operated in another state so as to invalidate a lawful contract as to interstate commerce made in such other state; and, indeed, would require us to go yet further, and say *that, although, under the [144] interstate commerce clause, a citizen in one state had a right to have merchandise consigned from another state delivered to him in the state to which the shipment was made, yet that such right was so illusory that it only obtained in cases where, in a legal sense, the merchandise contracted for had been delivered to the consignee at the time and place of shipment.

When it is considered that the necessary result of the ruling below was to hold that, wherever merchandise shipped from one state to another is not completely delivered to the buyer at the point of shipment so as to be at his risk from that moment, the movement of such merchandise is not interstate commerce, it becomes apparent that the principle, if sustained, would operate materially to cripple, if not destroy, that freedom of commerce between the states which it was the great purpose of the Constitution to promote. If upheld, the doctrine would deprive a citizen of one state of his right to order merchandise from another state at the risk of the seller as to delivery. It would prevent the citizen of one state from shipping into another unless he assumed the risk; it would subject contracts made by common carriers, and valid by the laws of the state where made, to the laws of another state; and it would remove

from the protection of the interstate commerce clause all goods on consignment upon any condition as to delivery, express or implied. Besides, it would also render the commerce clause of the Constitution inoperative as to all that vast body of transactions by which the products of the country move in the channels of interstate commerce by means of bills of lading to the shipper's order, with drafts for the purchase price attached, and many other transactions essential to the freedom of commerce, by which the complete title to merchandise is postponed to the delivery thereof.

But general considerations need not be further adverted to in view of prior decisions of this court relating to the identical question here presented. In *Caldwell v. North Carolina*, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229, the facts were these:

[145] The Chicago Portrait Company *shipped to Greensboro, North Carolina, by rail, consigned to its order, certain pictures and frames. At Greensboro the company had an agent who received the merchandise, put the pictures and frames together, and delivered them to the purchasers who had ordered them from Chicago. The contention was that the portrait company was liable to a license charge imposed by the town of Greensboro for selling pictures therein, and this was supported by the argument that, although the contract for sale was made in Chicago, it was completed in North Carolina by the assembling of the pictures and frames, and the delivery there made. It was held that the license could not be collected, because the transaction was an interstate commerce one. In the course of the opinion, after a full review of the authorities, it was observed (p. 632, L. ed. p. 341, Sup. Ct. Rep. p. 233):

"It would seem evident that if the vendor had sent the articles by an express company, which should collect on delivery, such a mode of delivery would not have subjected the transaction to state taxation. The same could be said if the vendor himself, or by a personal agent, had carried and delivered the goods to the purchaser. That the articles were sent as freight, by rail, and were received at the railroad station by an agent, who delivered them to the respective purchasers, in nowise changes the character of the commerce as interstate."

In *Norfolk & W. R. Co. v. Sims*, 191 U. S. 441, 48 L. ed. 254, 24 Sup. Ct. Rep. 151, these were the facts: A resident of North Carolina ordered from a corporation in Chicago a sewing machine. The machine was shipped under a bill of lading to the order of the buyer, but this bill of lading was

sent to the express agent at the point of delivery in North Carolina, with instructions to surrender the bill on payment of a C. O. D. charge. The contention was that the consummation of the transaction by the express agent in transferring the bill of lading upon payment of the C. O. D. charge was a sale of the machine in North Carolina, which subjected the company to a license tax. The contention was held untenable. Calling attention to the fact that the contract of sale was completed as a contract in Chicago, *and after reviewing some of the [146] authorities on the subject of interstate commerce, the court said (p. 450, L. ed. p. 258, Sup. Ct. Rep. p. 154):

"Indeed, the cases upon this subject are almost too numerous for citation, and the one under consideration is clearly controlled by them. The sewing machine was made and sold in another state, shipped to North Carolina in its original package for delivery to the consignee upon payment of its price. It had never become commingled with the general mass of property within the state. While technically the title of the machine may not have passed until the price was paid, the sale was actually made in Chicago; and the fact that the price was to be collected in North Carolina is too slender a thread upon which to hang an exception of the transaction from a rule which would otherwise declare the tax to be an interference with interstate commerce."

The controlling force of the two cases last reviewed upon this becomes doubly manifest when it is borne in mind that the power of the states to levy general and indiscriminating taxes on merchandise shipped from one state into another may attach to such merchandise before sale in the original package when the merchandise has become at rest within the state, and therefore enjoys the protection of its laws, and this upon the well-recognized distinction that the movement of merchandise from state to state, whilst constituting interstate commerce, is not an import in the technical sense of the Constitution. *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 48 L. ed. 538, 24 Sup. Ct. Rep. 365.

As from the foregoing considerations it results that the court below erred in refusing to apply and enforce the commerce clause of the Constitution of the United States, its judgment must be reversed.

The judgment of the Supreme Court of Iowa is reversed, and the cause is remanded to that court for proceedings not inconsistent with this opinion.

Mr. Justice Harlan dissents.

[147]*ADAMS EXPRESS COMPANY, *Plff. in*
Err.,
v.
 STATE OF IOWA.

(See S. C. Reporter's ed. 147, 148.)

Error to state court—decision on non-Federal ground—commerce—C. O. D. shipments of intoxicating liquors—when subject to seizure under state law.

This case is governed by the decision in *American Express Company v. Iowa*, *ante*, 417.

[No. 82.]

Argued December 2, 1904. Decided January 3, 1905.

IN ERROR to the Supreme Court of the State of Iowa to review a judgment which affirmed a judgment of the District Court of Madison County of that State, entered upon a verdict finding an express company guilty of maintaining a nuisance in holding for delivery to the consignees intoxicating liquors shipped C. O. D. from other states. *Reversed* and remanded for further proceedings.

See same case below (Iowa), 95 N. W. 1129.

The facts are stated in the opinion.

Mr. **Lawrence Maxwell, Jr.**, argued the cause and filed a brief for plaintiff in error:

The Iowa statute as construed by its supreme court is repugnant to the Constitution and laws of the United States, unless it is authorized by the Wilson act.

Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823. 8 Sup. Ct. Rep. 689, 1062; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681.

The Wilson act does not allow the state of Iowa to prevent the delivery of liquor shipped from another state. Its power under the Wilson act does not attach until the interstate transportation has been completed by delivery to the consignee in Iowa.

Rhodes v. Iowa, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; *Vance v. W. A. Vandercook Co.* 170 U. S. 438, 444, 42 L. ed. 1100, 1103, 18 Sup. Ct. Rep. 674.

The express company did not sell the liquor. It acted only as a common carrier to deliver, on certain conditions, liquor already sold.

Norfolk & W. R. Co. v. Sims, 191 U. S. 441, 447, 48 L. ed. 254, 256, 24 Sup. Ct. Rep. 151; *Com. v. Russell*, 11 Ky. L. Rep. 576; *United States v. Laeky*, 120 Fed. 577; *Com. v. Fleming*, 130 Pa. 138, 5 L. R. A. 470, 17 Am. St. Rep. 763, 18 Atl. 622; *Higgins v.* 424

Murray, 73 N. Y. 252; *State v. Cairns*, 64 Kan. 782, 58 L. R. A. 55, 68 Pac. 621; *McClain*, Carr. 1903; 6 Enc. Law & Prac. 476; *Pilgreen v. State*, 71 Ala. 368; *State v. Carl*, 43 Ark. 353, 51 Am. Rep. 565; *Carthage v. Duvall*, 202 Ill. 234, 66 N. E. 1099; *Carthage v. Munsell*, 203 Ill. 474, 67 N. E. 831; *Breehwal v. People*, 21 Ill. App. 213; *Frohlich v. Alexander*, 36 Ill. App. 428; *Coffeen v. Huber*, 78 Ill. App. 455; *James v. Com.* 102 Ky. 108, 42 S. W. 1107; *State v. Intoxicating Liquors*, 73 Me. 278; *State v. Peters*, 91 Me. 31, 39 Atl. 342; *Norfolk S. R. Co. v. Barnes*, 104 N. C. 25, 5 L. R. A. 611, 10 S. E. 83; *Bruee v. State*, 36 Tex. Crim. Rep. 53, 35 S. W. 383, 39 S. W. 683; *Freshman v. State*, 37 Tex. Crim. Rep. 126, 38 S. W. 1007; *State v. Flanagan*, 38 W. Va. 53, 22 L. R. A. 430, 45 Am. St. Rep. 836, 17 S. E. 792; *Sarbeck v. State*, 65 Wis. 171, 56 Am. Rep. 624, 26 N. W. 541; *United States v. Adams Exp. Co.* 119 Fed. 240; *United States v. Orene Parker Co.* 121 Fed. 596.

If the state of Iowa had attempted to tax the express company or the consignors on the theory that either was engaged in selling goods in Iowa, this court would have held the attempt to be an unlawful interference with interstate commerce.

Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; *Norfolk & W. R. Co. v. Sims*, 191 U. S. 441, 48 L. ed. 254, 24 Sup. Ct. Rep. 151. See also *State v. Hanaphy*, 117 Iowa, 15, 90 N. W. 601.

The right to contract in Missouri for the transportation of merchandise from that state into Iowa, and, incidentally, to fix the terms upon which the goods shall be delivered, involves interstate commerce in its fundamental aspect, and cannot be controlled by the state of Iowa.

Rhodes v. Iowa, 170 U. S. 412, 424, 42 L. ed. 1088, 1095, 18 Sup. Ct. Rep. 664.

The supreme court of Iowa misconceived the decision of this court in *O'Neil v. Vermont*, 144 U. S. 323, 36 L. ed. 450, 12 Sup. Ct. Rep. 693.

Mr. **Charles W. Mullan** argued the cause and filed a brief for defendant in error. For his contentions see his brief as reported in *American Exp. Co. v. Iowa*, *ante*, 417.

Mr. Justice **White** delivered the opinion of the court:

This was an indictment against the Adams Express Company, in a court of Iowa, for maintaining a nuisance in violation of a section of the Code of that state. It was charged in the indictment, in substance, that the Adams Express Company, between July and December, 1900, at St. Charles, Mad-

ison county, Iowa, used a building for the purpose of selling intoxicating liquors therein, contrary to law, and that the company owned and kept in said building intoxicating liquors with the intent unlawfully to sell them within the state, contrary to an Iowa statute. There was a plea of not guilty, a trial and verdict of guilty, and a sentence imposing a fine of \$350 and costs.

[148] An agreed statement of facts was stipulated, from which it appears that the Adams Express Company was a common carrier, engaged in the express business between the states of Missouri and Iowa; that it received the liquor in question at *St. Joseph, Missouri, to be carried to St. Charles, Iowa, there to be delivered to the consignees, whose names were upon the packages, and that each and all were marked C. O. D.,—meaning that they were not to be delivered by the express company to the consignees until the purchase price and the express charges were paid to the agent of the express company. It was further recited in the statement of facts that the only connection of the Adams Express Company with the transaction or transactions in relation to said liquors was as a common carrier, having received the same in Missouri for carriage to the consignees at St. Charles, Iowa.

The trial court charged the jury, in substance, that if, from the evidence, it appeared, beyond a reasonable doubt, that the defendant express company held at its depot, for delivery to the consignees, packages of liquor shipped from other states, upon which the price was to be collected under a C. O. D. arrangement, the defendant must be found guilty of keeping and maintaining a place for the sale of intoxicating liquors within the meaning of the Iowa statutes.

On appeal to the supreme court of Iowa from the judgment of conviction the action of the trial court was approved upon the authority of the case of the State of Iowa against the American Express Company, and at bar it was conceded that the issues in this case "are identical in every particular" with those which were involved in that case. As we have just reversed the judgment of the supreme court of Iowa in the *American Express Company Case* (196 U. S. 133, ante, 417, 25 Sup. Ct. Rep. 182), it follows, for the reasons stated in the opinion in that case, that the judgment in this must also be reversed.

The judgment of the Supreme Court of Iowa is reversed, and the cause is remanded to that court for proceedings not inconsistent with this opinion.

Mr. Justice **Harlan** dissents.

196 U. S.

*D. D. LUCIUS, *Appt.*,
v.

[149]

CAWTHON-COLEMAN COMPANY.

(See S. C. Reporter's ed. 149-152.)

Direct appeal from district court — when jurisdiction is in issue.

A decision of a court of bankruptcy upholding its jurisdiction to adjudicate the validity of an alleged equitable lien upon property which it decided to be an asset of the estate in bankruptcy, and not exempt property of the bankrupt, does not create a question of jurisdiction which will sustain a direct appeal to the Federal Supreme Court under the act of March 3, 1891 (26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549), since, by the express terms of the bankruptcy act of 1898 (30 Stat. at L. 546, chap. 541, U. S. Comp. Stat. 1901, p. 3421), § 2, subd. 11, jurisdiction is conferred upon courts of bankruptcy to determine all claims of bankrupts to their exemptions.

[No. 110.]

Submitted December 13, 1904. Decided January 3, 1905.

A PPEAL from the District Court of the United States for the Southern District of Alabama to review a decree enforcing a lien on property in the hands of the trustee in bankruptcy. *Dismissed* for want of jurisdiction.

See same case below, 124 Fed. 455.

Statement by Mr. Justice **White**:

This is an appeal from a decree of the district court of the United States for the southern district of Alabama, sitting in bankruptcy, establishing and directing the enforcement of a lien upon the proceeds of two policies of insurance in the hands of a trustee in bankruptcy. The district court filed findings of fact and its conclusions of law, in pursuance to the third subdivision of General Order in Bankruptcy 36; and an appeal was taken upon the question of jurisdiction alone, under the supposed authority of the 5th section of the judiciary act of March 3, 1891 [26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549].

In substance the pertinent facts stated in the findings were as follows:

D. D. Lucius, a resident citizen of Alabama, was, in voluntary proceedings, adjudged a bankrupt, and the case was sent to a referee. In his schedules, Lucius claimed as exempt drugs to the value of \$1,000 and \$1,000 of a balance of \$1,150 due upon the aforementioned policies of insur-

NOTE.—On direct appeal to Federal Supreme Court from circuit or district courts—see note to *Gwin v. United States*, 46 L. ed. U. S. 741.

425

ance. The policies subsequently came into the possession of the trustee in bankruptcy.

The Cawthon-Coleman Company were creditors of Lucius for about the sum of \$1,000, evidenced by a note containing a [150]*waiver of exemption of personal property, and secured by a mortgage upon the homestead of Lucius, which mortgage contained a stipulation for insurance for the benefit of the mortgagees. The two policies above referred to were obtained in consequence of the stipulation referred to, and while in force, and before the adjudication in bankruptcy, the dwelling insured was destroyed by fire. Claiming, by reason of the facts just stated, an equitable lien upon the proceeds of the insurance, the Cawthon-Coleman Company filed a petition in the bankruptcy proceedings to establish and enforce their alleged lien. During the pendency of this proceeding the trustee in bankruptcy collected the balance due upon the policies. The trustee reported an allowance of the exemption out of such proceeds, as claimed by the bankrupt, and shortly afterwards the bankrupt filed a plea denying jurisdiction in the court to hear and determine the claim of lien. This plea was overruled by the referee, who also refused to confirm the allowance of the exemption claimed by the bankrupt, and an order was made by the referee directing the trustee to pay to the Cawthon-Coleman Company on the mortgage indebtedness the sum of \$1,001.40 out of the insurance proceeds. Thereafter, to quote from the findings, "upon a review by the district judge sitting in bankruptcy, of the referee's decision, the judge affirmed it, and rendered a decree asserting that the bankruptcy court had jurisdiction to hear and determine this matter, and granted the relief prayed by the petition of Cawthon-Coleman Company." This appeal on the question of jurisdiction was then taken direct to this court.

Mr. Harry Pillans submitted the cause for appellant. Mr. William James Johnson and Messrs. Pillans, Hanaw, & Pillans were with him on the brief.

No counsel opposed.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court:

By the express terms of subdivision 11 of § 2 of the bankruptcy act of 1898 [30 Stat. at L. 546, chap. 541, U. S. Comp. Stat. 1901, p. 3421], jurisdiction is conferred upon courts of bankruptcy to determine all claims of bankrupts to their exemptions. When, therefore, as in the case at bar, property of the bankrupt has come into the possession of the trustee in bankruptcy, and the bankrupt has asserted in the bankruptcy court a

claim to be entitled to a part or the whole of such property, as exempt property, the bankruptcy court necessarily is vested with jurisdiction to determine, upon the facts before it, the validity of the claimed exemption. An erroneous decision against an asserted right of exemption, and a consequently erroneous holding that the property forms assets of the estate *in bankruptcy, to [152] be administered under the direction of the bankruptcy court, while subject to correction in the mode appropriate for the correction of errors (*Lockwood v. Exchange Bank*, 190 U. S. 294, 47 L. ed. 1061, 23 Sup. Ct. Rep. 751), does not create a question of jurisdiction proper to be passed upon by this court by a direct appeal under the provisions of the act of March 3, 1891. *First Nat. Bank v. Klug*, 186 U. S. 203, 204, 46 L. ed. 1127, 1128, 23 Sup. Ct. Rep. 899, and cases cited. It necessarily results from the foregoing that, as the bankruptcy court determined that the proceeds of the insurance policies in the hands of the trustee were assets of the estate in bankruptcy, and not exempt property of the bankrupt, the jurisdiction existed to proceed to adjudicate the validity of an alleged equitable lien upon such property. *Hutchinson v. Otis*, 190 U. S. 552, 555, 47 L. ed. 1179, 1181, 23 Sup. Ct. Rep. 778.

As, therefore, upon the record before us, the jurisdiction of the court was not in issue within the meaning of the act of March 3, 1891, the direct appeal to this court was not properly brought, and the order must be *appeal dismissed*.

ABRAHAM WOLFF, *Plff. in Err.*,
v.

DISTRICT OF COLUMBIA.

(See S. C. Reporter's ed. 152-157.)

Highways—duty of municipality to keep sidewalks free from obstructions—duty to light streets.

1. A stepping stone on a sidewalk, near the curb, is not made an unlawful obstruction by the provision of D. C. Rev. Stat. § 222, that no portion of the public streets and avenues shall be occupied by any private person, or for any private purpose whatever.
2. The District of Columbia is not charged with the duty so to light a street as to show the presence of a stepping stone on the sidewalk, near the curb, by D. C. Rev. Stat. § 233, directing the proper authorities to increase, as the public good may require, the number of street lamps in the city of Washington, and to do any and all things pertaining to the well lighting of the city.

[No. 62.]

196 U. S.

Argued November 11, 1904. Decided January 3, 1905.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District entered on a directed verdict in favor of defendant in an action for damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

See same case below, 21 App. D. C. 464.

The facts are stated in the opinion.

Mr. John C. Gittings argued the cause, and, with **Mr. D. W. Baker**, filed a brief for plaintiff in error:

An obstruction on a public street of the city of Washington is a nuisance *per se*.

United States v. Cole, 7 Mackey, 504.

It is the duty of a municipal corporation to cause all unlawful obstructions on the streets, avenues, etc., to be removed.

Scranton v. Catterson, 94 Pa. 203; *Davis v. Austin*, 22 Tex. Civ. App. 460, 54 S. W. 927.

There can be no contention that the District of Columbia is not liable to the same extent that other municipal corporations are.

Barnes v. District of Columbia, 91 U. S. 540, 23 L. ed. 440; *District of Columbia v. Woodbury*, 136 U. S. 450, 34 L. ed. 472, 10 Sup. Ct. Rep. 990.

Mr. Edward H. Thomas argued the cause, and, with **Mr. Andrew B. Duvall**, filed a brief for defendant in error:

Projections beyond the building line of houses are legal obstructions.

O'Linda v. Lothrop, 21 Pick. 292, 32 Am. Dec. 261; 2 Dill. Mun. Corp. § 734.

The rule exists in this jurisdiction.

Hovess v. District of Columbia, 2 App. D. C. 193.

That cannot be a nuisance, such as to give a common-law right of action, which the law authorizes.

Northern Transp. Co. v. Chicago, 99 U. S. 635, 25 L. ed. 336.

Stepping stones or carriage blocks have been elsewhere judicially determined to be lawful structures upon the highway.

Dubois v. Kingston, 102 N. Y. 219, 55 Am. St. Rep. 804, 6 N. E. 273; *Robert v. Powell*, 168 N. Y. 414, 55 L. R. A. 775, 85 Am. St. Rep. 673, 61 N. E. 699; *Cincinnati v. Fleischer*, 63 Ohio St. 229, 58 N. E. 568.

A hitching post is not a defect.

Macomber v. Taunton, 100 Mass. 255; *Rockford v. Tripp*, 83 Ill. 247, 25 Am. Rep. 381.

A city's failure to place a fence around a water hydrant which is properly located cannot render it liable for an injury caused by a traveler driving against it. Indeed,

the fence would likely be the more dangerous.

Vincennes v. Thuis, 28 Ind. App. 523, 63 N. E. 315; *Canavan v. Oil City*, 183 Pa. 611, 38 Atl. 1096.

A municipality has the discretionary power to locate a fire-plug on a sidewalk; and if in the exercise of such discretion it places a plug of ordinary diameter on a sidewalk, 4 inches from the curb, it cannot be made liable for personal injuries to a pedestrian who stumbles over the plug.

Horner v. Philadelphia, 194 Pa. 542, 45 Atl. 330.

Mr. Justice McKenna delivered the opinion of the court:

*This is an action for damages for injury[153] caused to plaintiff in error (who was also plaintiff below) by an alleged negligent omission of duty by the District of Columbia.

On the 27th of October, 1895, about 9 o'clock in the evening, plaintiff had occasion to visit Sangerbund hall, a house on C street, in the city of Washington. On coming out, and for the purpose of approaching a wagon which was standing in the street, he walked rapidly across the sidewalk and, by falling over a block of stone called a stepping stone or carriage step, which was on the sidewalk near the curb, broke his leg. Some time subsequently he was compelled to submit to its amputation.

The charge against the city was that it was a body corporate and municipal, and had the power, and it was its duty, to keep the sidewalks free of obstructions and nuisances, one of which, it was alleged, said stone was. And further, that it was the duty of the District of Columbia to keep the streets properly lighted. In neglect of both, it was alleged, it did "allow and suffer" the stone to be securely fastened into and remain upon the sidewalk, and did "keep and continue" it there during the nighttime of the 27th of October, without a light to show its presence or a watchman to notify wayfarers of its existence. Damages were laid at \$25,000. The District of Columbia pleaded not guilty. A jury was impaneled. At the conclusion of the testimony the District moved the court to instruct a verdict for it on the ground that the plaintiff had not made out a case. The motion was granted, and a verdict in accordance with the instructions. A motion for a new trial was made and denied, and the case was then taken to the court of appeals, which affirmed the judgment of the court below. 21 App. D. C. 464.

The first contention of plaintiff in error is that the stone was an unlawful obstruc-

tion *per se*. This is deduced as a consequence from § 222 of the Revised Statutes of the District of Columbia, which reads as follows:

"No open space, public reservation, or other public ground in the city of Washington, nor any portion of the public streets or avenues in said city, shall be occupied by any private person or for any private purpose whatever."

This section cannot be construed to prohibit putting upon a street any object without regard to its effect on the use of the street. The sweeping character of such a construction need not be pointed out. There are objects which subserve the use of streets, and cannot be considered obstructions to them, although some portion of their space may be occupied. This is illustrated by a number of cases.

In *Dubois v. Kingston*, 102 N. Y. 219, 55 Am. Rep. 804, 6 N. E. 273, a stepping stone 3 feet 4 inches in length and 20 inches wide was placed on the edge of the sidewalk. The court observed that the stone was not of unusual size or located in an improper place, and that it would be extending the liability of cities too far to hold them liable for permitting stepping stones on the edge of sidewalks.

[156] **Robert v. Powell*, 108 N. Y. 411, 55 L. R. A. 775, 85 Am. St. Rep. 673, 61 N. E. 699, was also an action for injuries caused by a stepping stone. The court said: "There are some objects which may be placed in, or exist in, a public street, such as water hydrants, hitching posts, telegraph poles, awning posts, or stepping stones, such as the one described in this case, which cannot be held to constitute a nuisance. They are in some respects incidental to the proper use of the street as a public highway. . . . The stepping stone in this case, located upon the sidewalk in front of a private house, was a reasonable and necessary use of the street, not only for the convenience of the owner of the house, but for other persons who desired to visit or enter the house for business or other lawful purposes."

It was further remarked: "The question involved in this class of cases is whether an object complained of is usual, reasonable, or necessary in the use of the street by the owner of the premises, or anyone else."

Cincinnati v. Fleischer, 63 Ohio St. 229, 234, 58 N. E. 568, 569, also passed upon a city's liability for the existence of a stepping stone upon a sidewalk. The court said: "It [the stone] was within that portion of the street by the curb, which, according to common knowledge, is devoted to carriage blocks, lamps, hitching posts, and

shade trees, which pedestrians of ordinary care observe and avoid." And *Elster v. Springfield*, 49 Ohio St. 82, 96, 30 N. E. 274, was quoted, to the effect that "the laying of sewers, like that of gas and water pipes, beneath the soil, and the erection of lamps and hitching posts, etc., upon the surface, is a street use, sanctioned as such by their obvious purpose and long-continued usage."

It was held in *Macomber v. Taunton*, 100 Mass. 255, that a hitching post was not a defect in the highway for which the city was liable for permitting it to remain.

Plaintiff in error cites *Scranton v. Catterson*, 94 Pa. 203, and *Davis v. Austin*, 22 Tex. Civ. App. 460, 54 S. W. 927.

In the first case an iron water plug in the middle of a street, and projecting above its surface, was held to be a nuisance. Obviously, the case is not in point. The second case sustains* the contention of plaintiff [157] in error, but cannot be followed against the authority and reasoning of the other cases.

2. The second contention of plaintiff in error is that it was the duty of the District of Columbia to so light the street as to show the presence of the stone thereon, the District having full knowledge thereof. This duty is made to rest mainly upon § 233 of the Revised Statutes of the District of Columbia, which is as follows:

"The proper authorities are directed to increase, from time to time, as the public good may require, the number of street lamps on any of the streets, lanes, alleys, public ways, and grounds in the city of Washington, and to do any and all things pertaining to the well lighting of the city."

This, in one sense, is but another form of the first contention. The duty of a city to especially illuminate a place where an object is, or to put a policeman on guard by it to warn pedestrians, depends upon the object being an unlawful obstruction.

The plaintiff in error can claim nothing from the general duty of the city under the statute to light the streets. The exercise of such duty was necessarily a matter of judgment and discretion, depending upon considerations which this record does not exhibit.

Judgment affirmed.

JOHN J. MOORE, Trading under the Firm Name of J. J. Moore & Company, Appt..

v.

UNITED STATES.

(See S. C. Reporter's ed. 157-163.)

Contracts—effect of usage—performance.

1. A custom existing in San Francisco between

NOTE.—On custom and usage as part of a
196 U. S.

shippers and shipowners, requiring a consignee to designate a berth for the discharge of cargo, cannot prevail over the terms of contracts requiring the delivery of certain quantities of coal respectively "at the wharf" and "on wharf as customary," to the Quartermaster's Department of the United States Army at Honolulu, at which place the custom is to discharge freight upon the wharves, so as to render the government liable for the delay in reaching a berth, which was caused by the conditions existing in Honolulu harbor, to the ships chartered by the vendor to carry out his contract.

2. The delivery and receipt of 4,634 tons of coal, under a contract for the delivery and acceptance of "about 5,000 tons," does not so complete the contract as to entitle the vendee for that reason to refuse a tender of the remaining 366 tons.

[No. 71.]

Argued December 6, 1904. Decided January 3, 1905.

APPPEAL from the Court of Claims to review a judgment denying reimbursement from the United States of demurrage, and refusing a recovery of the difference between the contract price of coal which the United States refused to receive, and the price obtained therefor upon sale in open market. *Reversed* and remanded, with directions to enter judgment for appellant for the difference between contract and market price.

See same case below, 38 Ct. Cl. 590.

The facts are stated in the opinion.

Mr. L. T. Michener argued the cause, and, with **Mr. W. W. Dudley**, filed a brief for appellant:

The words of an agreement will be taken most strongly against the party who prepares it, and any liberality of construction will be in favor of the party who simply signs it. It will be construed most strongly against the party who uses the language.

Garrison v. United States, 7 Wall. 688. 690, 19 L. ed. 277, 278; *Chambers v. United States*, 24 Ct. Cl. 387, 392; *Simpson v. United States*, 31 Ct. Cl. 217, 243; *Edgar & T. Foundry & Mach. Works v. United States*, 34 Ct. Cl. 205.

The custom at San Francisco was written into the contracts sued on by implication of law.

2 Parsons, Contr. pp. 535-539; *Robinson v. United States*, 13 Wall. 363, 366, 20 L. ed. 653, 654; *Hostetter v. Park*, 137 U. S. 30, 40, 34 L. ed. 568, 572, 11 Sup. Ct. Rep. 1; *Houge v. Woodruff*, 19 Fed. 136; *Smith v. 60,000 Feet of Yellow Pine Lumber*, 2 Fed. 396; *Moody v. 500,000 Laths*, 2 Fed.

607; *Pleasants v. Pendleton*, 6 Rand. (Va.) 493, 18 Am. Dec. 726; *Barlow v. Lambert*, 28 Ala. 704, 65 Am. Dec. 374; *Foley v. Mason*, 6 Md. 37; *Van Hoesen v. Cameron*, 54 Mich. 609, 20 N. W. 609; *McCulsky v. Klosterman*, 20 Or. 108, 10 L. R. A. 785, 25 Pac. 366; *Lyon v. Culbertson*, 83 Ill. 33, 25 Am. Rep. 349; *MacLachlan, Merchant Shipping*, 360, 361; *Abbott, Shipping*, 228; 1 Parsons, Shipping, 324.

It is immaterial whether the officers and agents of the government, who made the contracts, had knowledge or notice of the custom at San Francisco, or not.

Hostetter v. Park, 137 U. S. 30, 40, 34 L. ed. 568, 572, 11 Sup. Ct. Rep. 1; *Phillips, Ins.* §§ 980, 1003; *Thatcher v. McCulloh*, Olcott, 365, Fed. Cas. No. 13,862; *Lowry v. Russell*, 8 Pick. 360; *McMasters v. Pennsylvania R. Co.* 69 Pa. 374, 8 Am. Rep. 264; *Pittsburgh Ins. Co. v. Dravo*, 2 W. N. C. 194; *MacLachlan, Merchant Shipping*, 361.

Although the number of lay days may not be specified in the charter party, yet, if they may be arrived at by reason of the rate of discharge having been fixed in the charter party and the tonnage of the cargo being known, they must be treated as being as definite as if specifically stated.

Williams v. Theobald, 8 Sawy. 445, 15 Fed. 468.

The parties having contracted in such a way as to fix the rate of discharge, it follows inevitably that local conditions at Honolulu could not relieve them from such contract stipulations.

Cross v. Beard, 26 N. Y. 85; *Abbott, Shipping*, 307, 387; *Ford v. Cotesworth*, L. R. 4 Q. B. 127; *Williams v. Theobald*, 8 Sawy. 445, 448, 15 Fed. 468; *Allen v. 785 Tons of Coal*, 27 Fed. 316; 9 Am. & Eng. Enc. Law, 2d ed. pp. 223, 242; *Randall v. Lynch*, 2 Campb. 352.

Even if there be no contract at all concerning lay days or demurrage, the law will imply a contract that the ship shall be detained a reasonable time only, and that it shall have reasonable demurrage therefor.

MacLachlan, Merchant Shipping, 243, 244, 546; 1 Parsons, Maritime Law, 152; 1 Leggett, Bills of Lading, 297-300.

The government was entitled to inspect the coal on the wharf before receiving it.

1 Parsons, Shipping, 226; Porter, Bills of Lading, 400, 401; *MacLachlan, Merchant Shipping*, 369.

The party who is to inspect and receive the coal should designate in the contract, or otherwise, the wharf at which he will receive it, in order that there may be cer-

contract—see notes to *Weyand v. Atchison*, T. & S. F. R. Co. 1 L. R. A. 650; *Newhall v. Appleton*, 3 L. R. A. 859; *Smith v. Clews*, 4 L. R. 196 U. S.

A. 392; *MacCulsky v. Klosterman*, 10 L. R. A. 785; and *Adams v. Otterback*, 14 L. ed. U. S. 805.

tainty of contract and liability, as well as full protection to him.

Of course this power must be used justly and reasonably.

Oliver, Shipping, 77.

A dispute between the charterer and the consignee on a question which relates to the designation of a wharf is analogous; in legal effect, to one between the ship and the charterer on a question of that kind.

Where the ship is to proceed to a certain port and deliver the cargo at a wharf, the obligation is on the charterer to select the wharf, or, at least, he has an option so to do. Having that option, his obligation is the same as if the contracts had read that the cargo should be delivered at a wharf to be named by the charterer.

Tharsis Sulphur & Copper Co. v. Morel Bros. [1891] 2 Q. B. 647; 1 Parsons, Shipping, p. 311; Porter, Bills of Lading, 403; *The Boston*, 1 Low. Dec. 464, Fed. Cas. No. 1,671; *Manson v. New York, N. H. & H. R. Co.* 55 Conn. 592, 26 Fed. 923, 31 Fed. 297; *Moody v. 500,000 Laths*, 2 Fed. 607; *Smith v. Lee*, 13 C. C. A. 506, 21 U. S. App. 650, 66 Fed. 344; *Philadelphia & R. R. Co. v. Northam*, 2 Ben. 1, Fed. Cas. No. 11,090; *Reed v. Weld*, 6 Fed. 304; *Scrutton, Charter Parties*, 90-92; *Stewart v. Rogerson*, L. R. 6 C. P. 424; *Jacques & Co. v. Wilson*, 7 Times L. R. 119.

If the wharves were all occupied on account of a congestion of business, or if they could not be used for any other reason, the claimant had the right to demand demurrage for the time lost in waiting for the government to take the coal.

Williams v. Theobald, 8 Sawy. 445, 15 Fed. 465; *Allen v. 785 Tons of Coal*, 27 Fed. 316.

Even if it should be held that the custom of the port of San Francisco to write such charter parties as are described in the findings of the court below did not become a part of the contract between the parties to the case at bar, still, the appellant is entitled to relief:

(1) In the absence of any express agreement as to the time for unloading, the law implies a contract to unload within a reasonable time; and if the charterer or consignee fails to do so, through his own fault or that of his agent, he is liable for damages in the nature of demurrage for the detention of the vessel.

9 Am. & Eng. Enc. Law, p. 253, note 3; *Melloy v. Lehigh & W. Coal Co.* 37 Fed. 377; *The Hyperion*, 2 Low. Dec. 93, Fed. Cas. No. 6,987; *The Z. L. Adams*, 26 Fed. 655; *The M. S. Bacon v. Erie & W. Transp. Co.* 3 Fed. 344; *Cross v. Beard*, 26 N. Y. 85; *Empire Transp. Co. v. Philadelphia & R. Coal & I. Co.* 35 L. R. A. 623, 23 C. C. A.

564, 40 U. S. App. 157, 77 Fed. 919; *Randall v. Sprague*, 21 C. C. A. 334, 33 U. S. App. 464, 74 Fed. 247; *Howie v. The Reuben Doud*, 46 Fed. 800.

(2) The same rule applies where the liability is *in personam* or *in rem*; and it is settled that a contract will be implied on the part of the consignee or his assignee to unload within a reasonable time, when no time is specified in the contract; and a libel *in personam* or *in rem* may be maintained against him for damages for breach of such implied contract.

9 Am. Eng. Enc. Law, p. 255, notes 3-5.

The government, having accepted the cargo as consignee, is liable in the case at bar the same as if it had been the charterer or a party to a bill of lading.

1 Parsons, Shipping, 312.

The acceptance of a cargo, without objection, under the charter party or bill of lading, imports an agreement to pay demurrage according to its terms.

Sutton v. Housatonic R. Co. 45 Fed. 507; *North-German Lloyd v. Heule*, 10 L. R. A. 814, 44 Fed. 100; *Neilsen v. Jesup*, 30 Fed. 138; *Gates v. Ryan*, 37 Fed. 154.

The authorities clearly establish our view that the government is liable, as consignee, for the demurrage paid by the charterer to the shipowner.

Crawford v. Mellor, 1 Fed. 638; *275 Tons of Mineral Phosphates*, 9 Fed. 209; *Young v. 140,000 Hard Brick*, 78 Fed. 149; *Falkenburg v. Clark*, 11 R. I. 278; *Jesson v. Solly*, 4 Taunt. 52; *Mitchell v. Langdon*, 10 Biss. 527, 9 Fed. 472; *Wright v. New Zealand Shipping Co.* L. R. 4 Exch. Div. 165; *Tillett v. Cum. Avon Works*, 2 Times L. R. 675; *Carver, Carr.* §§ 644, 712.

Mr. Philip M. Ashford argued the cause, and, with Assistant Attorney General *Pradt*, filed a brief for appellee:

If custom and usage are to be called into service for the purpose of interpreting or explaining the contracts in question, the custom of the port of discharge, so far as it relates to the manner and mode of discharge, must regulate and determine the contracts.

Carver, Carr. § 461.

The liability of the United States in this instance is that of consignee. In such case the only liability, if any, is for damages in the nature of demurrage for failure to use reasonable diligence in discharging in accordance with the custom of the port.

9 Am. & Eng. Enc. Law, p. 229; *Houge v. Woodruff*, 19 Fed. 136.

The general rule is that the consignee is not liable for delay due to causes beyond his control.

9 Am. & Eng. Enc. Law, p. 257.

He is not liable if the delay is due to in-

terference of the government or public authorities. Where the consignee is not bound by the contract to furnish a berth, and where the vessel is required to take its turn in unloading, he is not liable for delay caused by an extraordinary accumulation of vessels to be unloaded.

9 Am. & Eng. Enc. Law, p. 258.

Where the vessel arriving is obliged, either by the custom of the port or the contract or bill of lading, to await its turn in discharging, the consignee is not liable for damages in the nature of demurrage resulting from delay caused by the harbor being overcrowded with vessels.

The J. E. Owen v. 49,774 Bushels of Rye, 54 Fed. 185; *Riley v. A Cargo of Iron Pipes*, 40 Fed. 605; *Cross v. Beard*, 26 N. Y. 85; *Wordin v. Bemis*, 32 Conn. 268, 85 Am. Dec. 255; *The Glover*, Brown, Adm. 166, Fed. Cas. No. 5,488; *Clendaniel v. Tuckerman*, 17 Barb. 184; *Towle v. Kettell*, 5 Cush. 18; *Weaver v. Walton*, 1 Flipp. 441, Fed. Cas. No. 17,312; *Abbott*, Shipping, 311-313; *Fulton v. Blake*, 5 Biss. 371, Fed. Cas. No. 5,153; *Rodgers v. Forresters*, 2 Campb. 483; *Burmester v. Hodgson*, 2 Campb. 488; *The M. S. Bacon v. Erie & W. Transp. Co.* 3 Fed. 344; *Coombs v. Nolan*, 7 Ben. 301, Fed. Cas. No. 3,189; *Bellatty v. Curtis*, 41 Fed. 479; *The Mary Riley v. 3,000 Railroad Ties*, 38 Fed. 254; *Empire Transp. Co. v. Philadelphia & R. Coal & I. Co.* 35 L. R. A. 623, 23 C. C. A. 564, 40 U. S. App. 157, 77 Fed. 919; *The Elida*, 31 Fed. 420.

In the absence of any custom or express contract to the contrary, it is the ship's business to find a berth in the port of discharge.

Smith v. New York Granite Paving Block Co. 56 Fed. 525.

Reasonableness is all that is required of the consignee with reference to the receipt and disposal of a cargo, in all shipping contracts; and, as we have before stated, where the charter party or the bill of lading is silent as to the matters in dispute here, reasonable conduct only is required.

Whitehouse v. Halstead, 90 Ill. 95; *Van Etten v. Newton*, 134 N. Y. 143, 30 Am. St. Rep. 630, 31 N. E. 334; *Dayton v. Parke*, 142 N. Y. 391, 37 N. E. 642; 9 Am. & Eng. Enc. Law, 2d ed. p. 255, note 3; Carver, Carr. ¶ 636; 7 Comp. Dec. 573.

If the ship cannot reach the port by reason of blockade or any similar cause, this, though not the fault of the ship, is its misfortune.

2 Parsons, Shipping, 423.

The general rule is that lay days for unloading do not commence when the vessel arrives in the port of discharge.

Brown v. Johnson, 10 Mees. & W. 331.

They are to be computed from the time

she arrives at the place of discharge usual for such vessels in the particular port,—ordinarily at the wharf or dock,—and is ready to discharge there in accordance with the contract and the custom of the port.

9 Am. & Eng. Enc. Law, p. 231. See also Carver, Carr. ¶ 622.

The vessel does not fulfil its contract by stopping at the entrance of the port of discharge, but must proceed to the very berth or dock designated, if one is named in the contract, but, if not, to the place customarily used for discharge by vessels loaded with similar cargoes.

Brereton v. Chapman, 5 Moore & P. 526; *Bremner v. Bunell*, 4 Sess. Cas. 934.

The burden of proving that the detention was due to some fault or negligence on the part of the United States was upon the appellant.

The J. E. Owen, 54 Fed. 185.

The meaning of the word "about" is so well known that no definition need be given.

Benjamin, Sales, ¶ 691; *Brawley v. United States*, 96 U. S. 168, 171, 172, 24 L. ed. 622, 623, 624; *Norrington v. Wright*, 115 U. S. 189-204, 29 L. ed. 367, 368, 6 Sup. Ct. Rep. 12; *Finelite v. Sinnott*, 25 Jones & S. 57, 5 N. Y. Supp. 439; *Baltimore Permanent Bldg. & L. Soc. v. Smith*, 54 Md. 187, 39 Am. Rep. 374; *Indianapolis Cabinet Co. v. Herrman*, 7 Ind. App. 462, 34 N. E. 579; *Pembroke Iron Co. v. Parsons*, 5 Gray, 589; *Barker v. Windle*, 6 El. & Bl. 675; *Hayward v. Scougall*, 2 Campb. 56; *McConnel v. Murphy*, L. R. 5 P. C. 203; *Morris v. Levi-son*, L. R. 1 C. P. Div. 155.

Mr. Justice **McKenna** delivered the opinion of the court:

The appellant is a general commission merchant and shipper at San Francisco. He filed his petition in the court of claims, consisting of two paragraphs, in the first of which he claimed reimbursement from the United States of the sum of \$1,053.36, demurrage paid by him for the detention over lay days of two ships chartered by him to transport coals to Honolulu, and there to be delivered to the United States. By the second paragraph he prayed the recovery of the sum of \$1,120.87, the *difference between [163] the contract price of 366 tons of coal, which the United States refused to receive, and the price obtained for the same upon the sale in open market.

The causes of action rested on two contracts entered into by appellant with the United States through the proper officer of the Quartermaster's Department, United States Army, by which appellant agreed to furnish and deliver to that department, Honolulu, Hawaiian islands, "at the wharf," about 3,900 tons of the best merchantable

"Wallsend" Australian steam coal, at the rate of not less than 100 tons a day, at 2,240 pounds to the ton, dangers of the sea and any causes beyond appellant's control excepted, the deliveries to commence on the arrival of the Hawaiian ship *Euterpe* at Honolulu, on or about July 23, 1898, for and in consideration of which appellant was to be paid at the office of the Quartermaster, United States Army, at San Francisco, California, at the rate of \$9 per ton, in gold coin of the United States.

And by the second contract appellant was to deliver "on wharf, as customary," about 5,000 tons of the best merchantable Australian, Seaham, Wallsend, or Pacific Co-operative steam coal, deliveries to commence at Honolulu on or about October 1, 1898. The other facts were found by the court of claims as follows:

"III. That at the respective times these contracts were made it was the custom at San Francisco between shippers and ship-owners to insert in their charter parties a stipulation to the effect that cargoes were to be discharged as customary, in such customary berth or place as consignee shall direct, ship being always afloat, and at an average specified number of tons per weather working days (Sundays and holidays excepted), to commence when ship is ready to discharge, and notice thereof has been given by the captain in writing, and, if detained over and above the said laying days, demurrage to be at 4d. register ton per day; which stipulation was duly inserted in the contract of the claimant with the ships employed by him to transport the coal mentioned in the contracts. It does not appear [164]*that the officers and agents of the defendant, who were authorized to make, and did make, the contracts for the defendant, had knowledge or notice of such custom, nor that the contracts, or either of them, were made in view of such custom.

"IV. The claimant [appellant] discharged his said contracts as follows: The first contract: By the arrival at Honolulu of the ship *Euterpe* with 1,543 tons of coal, July 31, 1898, which was placed in berth at the wharf by the harbor master of said port August 8, 1898, at 2.15 P. M., and commenced discharging coal at 3 P. M. same day, and finished August 29, 1898, consuming eighteen working days. If she had been discharged at not less than 100 tons per day, the time consumed would have been sixteen days. It does not appear that the defendant was at fault either in the loss of time in arriving at the wharf, nor in the discharge of the cargo afterwards. The court finds the defendant was able, ready, and willing to receive the cargo as rapidly as discharged at the wharf. The claimant

paid to the shipowner \$1,053.36 demurrage for these delays.

"The second contract: 1. By the arrival of the bark *Harvester*, with 2,179 tons of coal, August 28, 1898, at Honolulu, which was placed at a berth at the wharf by the harbor master September 16, 1898, and began discharging coal on that date, and completed same October 7, 1898, a period of eighteen working days. It does not appear that the defendant was at fault in the loss of time of said last-mentioned ship in arriving at the wharf.

"2. By the arrival of the ship *General Gordon* at Honolulu, August 27, 1898, with 2,455 tons of coal. While at anchor, September 9, 10, and 11, 330 tons were discharged into steamship *Arizona*, a transport of defendant, for its own use, after which the *Gordon* was placed at a berth at the wharf by the harbor master, September 14, at 1 P. M., and then commenced the further discharge of the cargo, completing the same October 4, no delays having occurred at the wharf. It does not appear the defendant was at fault in the ship's delay in reaching the wharf. In the case of each ship the defendants had notice in writing of their respective arrivals *within twenty-[165] four hours thereafter. The wharves at Honolulu are under the control of a harbor master. The practice of such harbor master was to assign ships to berths at the wharves in the order of their respective arrivals, and this practice was followed by him in respect to the ships mentioned. Claimant paid said shipowners for delays \$1,433.12 to the *Harvester* and \$744.48 to the *General Gordon*. All coal delivered was paid for by defendant.

"V. The coal actually delivered under the second contract was 4,634 tons, completed October 7, 1898. About a month subsequent to this, claimant purchased 366 tons of coal of the barkentine *Omega*, then in the Honolulu harbor, and tendered the same to the defendant upon its contract of June 23, 1898, but the defendant refused to receive it, whereupon claimant sold the same in market, for the best price he could obtain, at \$3.06½ per ton less than \$9, the contract price with the defendant, equivalent to \$1,120.87 in all, and to his loss in that amount.

"VI. At the time of the delivery of the coal mentioned in the foregoing findings the Honolulu harbor had eleven docks or wharves, three of which only were used for the discharge of coal. The docks were crowded, and several vessels were moored at the reef. By local regulations of the government, a harbor master had general supervision of all vessels in the harbor, and all vessels were anchored and assigned to berths, in the order of their arrival, by the

harbor master. There were no lighters for public use, and defendant had none at the port, and it was usual or customary to discharge freight upon the wharves. The defendant had no authority over the wharves, and was subject to local regulations and the order of the harbor master, the same as individuals."

As a conclusion of law the court decided that appellant was not entitled to recover. 38 Ct. Cl. 590.

The question in the case is whether the delay at Honolulu in the delivery of the coal was caused by the United States or by appellant; or, in other words, whether it [166] was the duty of *the United States to designate and furnish a wharf for the discharge of the coal from the ships, or its duty only to receive the coal at the wharf when delivered there by appellant.

The question is one of law. Any fault in fact upon the part of the United States is excluded by the findings of the court. The cause of delay is expressly found to have been due to the conditions in Honolulu harbor, and that to these conditions the United States was as subordinate and subject as appellant. The liability of the United States is asserted, nevertheless, on account of the custom existing in San Francisco between shippers and shipowners.

But the terms of the contracts are explicitly opposite to the custom. The custom requires a consignee to designate a berth for the discharge of cargo, and is hence responsible, it is contended, for the delays to a ship in reaching the berth, though caused by the conditions existing at the port of discharge. The contracts have no such provision, nor do they refer to the charter parties entered into between claimant and the ships. The contracts require delivery to be "at wharf" (first contract); "*on wharf as customary*" (second contract). "As customary" meant the mode of discharging freight at Honolulu. *Culver, Carriage by Sea*, 696. The custom there was to discharge freight upon the wharves. The terms of the contracts, therefore, are reinforced by the custom at Honolulu, and the custom at San Francisco cannot prevail against them.

The effect of usage upon the contracts of parties has been decided many times. It may be resorted to in order to make definite what is uncertain, clear up what is doubtful, or annex incidents, but not to vary or contradict the terms of a contract. Various applications of this principle are presented in the following cases: *Barnard v. Kellogg*, 10 Wall. 383, 19 L. ed. 987; *Hearne v. New England Mut. Marine Ins. Co.* 20 Wall. 488, 22 L. ed. 395; *Orient Mut. Ins. Co. v. Wright*, 1 Wall. 456, 17 L. ed. 196 U. S.

505; *Oelricks v. Ford*, 23 How. 49, 16 L. ed. 534; *Hostetter v. Park*, 137 U. S. 30, 34 L. ed. 568, 11 Sup. Ct. Rep. 1; *First Nat. Bank v. Burkhardt*, 100 U. S. 686, 25 L. ed. 766. We do not think it is necessary to make a detailed review of these cases or of the cases which appellant has cited in which *consignees have been charged with [167] demurrage. To trace and relate the various conditions upon which consignees have been held liable would extend this opinion to too great length, and discuss matters irrelevant to the case as we regard it. In all of the cases cited there was an omission of duty on the part of the consignees. In the case at bar there was no omission of duty, and, besides, the United States was not a consignee of the coal in any proper sense of that word. There was no privity between it and the ships. Its contract was to receive coal at the wharf, and pay for it on delivery there, after inspection. Its contract was not to receive coal in lighters, or to bear any expense in the transportation to the wharves. It is manifest that coal on board ships in a harbor is not in the same situation as coal on a wharf. The wharf, under the contract, was the place of destination, and the appellant took the chances, as observed by the court of claims, of obstacles which should intervene to delay the delivery of the coal at the wharf, as they did of other obstacles which might have intervened to prevent the coal reaching the harbor. It was not strictly the coal in the ships that the United States contracted to take. It was certain quantities of coal, and on account of this, in the exercise of their rights under the second contract, appellant bought coal in the open market and tendered it in fulfilment of that contract. The liability of the United States to accept we shall presently consider. We cite the fact now as illustrating the meaning of the contract. It is manifest, from these views, the court of claims was right in holding the United States was not liable for the delay caused to the ships by the conditions which existed in Honolulu harbor.

2. By the terms of the second contract (June 23, 1898) the appellant agreed to deliver and the United States agreed to "receive about 5,000 tons" of coal, delivery to commence with about 2,200 tons, to arrive at Honolulu on or about the 1st day of October, 1898. By the 7th of October delivery was made of 4,634 tons. About a month subsequently appellant purchased 366 tons of coal of a ship then in the harbor, *and tendered the coal to the United States [168] in fulfilment of the contract to deliver 5,000 tons. The United States refused to receive it, and appellant sold it in the open market for \$3.06½ per ton less than \$9, the

contract price. This was the best price which could be obtained, and the loss to appellant was \$1,120.87. The court of claims held that the appellant was not entitled to recover. We think this was error. The obligations of parties were reciprocal; one to deliver, the other to receive, about 5,000 tons of coal, and equally reciprocal is the liability for nonperformance of the obligations. The only question can be, Is 366 tons less than 5,000 tons, "about 5,000 tons?" We think not. The difference is too great. We said in *Brawley v. United States*, 96 U. S. 168, 172, 24 L. ed. 622, 624, that in engagements to furnish goods to a certain amount the quantity specified is material and governs the contract. "The addition of the qualifying words 'about,' 'more or less,' and the like, in such cases, is only for the purpose of providing against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure, or weight." See also *Cabot v. Winsor*, 1 Allen, 546, 550; *Salmon v. Boykin*, 66 Md. 541, 7 Atl. 701; *Indianapolis Cabinet Co. v. Herrman*, 7 Ind. App. 462, 34 N. E. 579; *Cross v. Eglin*, 2 Barn. & Ad. 106; *Morris v. Levison*, L. R. 1 C. P. Div. 155, 158; *Bourne v. Seymour*, 16 C. B. 337, 353; 38 N. Y. Supp. 341, 342.

The record does not inform us why the United States refused the tender, and we must assume that it had no other justification than its supposed right under the contract.

Judgment reversed, and cause remanded with directions to enter judgment for appellant (claimant) in the sum of \$1,120.87.

Mr. Justice **Holmes** concurs in the result.

[169] *THOMAS L. HARTIGAN, *Appt.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 169-174.)

Army—West Point cadet not an officer.

A cadet in the United States Military Academy at West Point is not an officer in the Army, within the meaning of U. S. Rev. Stat. § 1229, U. S. Comp. Stat. 1901, p. 868, prohibiting dismissals from service in time of peace, except after trial and conviction by court-martial.

[No. 72.]

Submitted December 6, 1904. Decided January 3, 1905.

APPEAL from the Court of Claims to review a judgment dismissing a petition

to recover the pay of a cadet in the United States Military Academy at West Point after his summary dismissal by order of the President. *Affirmed*.

See same case below, 38 Ct. Cl. 346.

The facts are stated in the opinion.

Messrs. L. T. Michener and *W. W. Dudley* submitted the cause for appellant.

Assistant Attorney General Pradt and *Mr. George M. Anderson* submitted the cause for appellee.

Mr. Justice **McKenna** delivered the opinion of the court:

Appellant filed a petition in the court of claims to have declared void his dismissal from the United States Military Academy at West Point, and for judgment for his pay as a cadet from July 27, 1883, to July 1, 1889, amounting to \$3,417.

The appellant was duly appointed a cadet in the Military Academy on the 1st day of July, 1880, and served as such until the 27th of July, 1883, when he was summarily dismissed, by order of the President, upon charges of maltreating a new cadet upon guard, as well as other improper conduct. After the dismissal of appellant another cadet was appointed to succeed him, was duly graduated from the Academy, and appointed and commissioned a second lieutenant in the Army, and subsequently a captain of the Twenty-fifth Regiment of Infantry.

The appellant, subsequently to his dismissal, presented petitions respectively to the Adjutant General of the Army and to the Secretary of War, in which he asserted his innocence of the charges made against him, and prayed for reinstatement or trial by court-martial. He also presented a petition April 21, 1888, to the President, asking for a revocation of the order of dismissal, a trial by court-martial, and for an order assigning and appointing him to the Army as of the date of the assignment of the last graduate of his class. The petitions were all denied.

The court of claims held that he was not entitled to recover, and dismissed his petition. 38 Ct. Cl. 346.

The contention of appellant is that, as a cadet, he was an officer in the Army, within the meaning of § 1229 of the Revised Statutes of the United States, U. S. Comp. Stat. 1901, p. 868, and could only have been dismissed from the Academy upon trial and conviction by court-martial, as provided in that section.

That section provides as follows: "The President is authorized to drop from the rolls of the Army for desertion any officer who is absent from duty three months without leave; and no officer so dropped shall

be eligible for reappointment. And no officer in the military or naval service shall in time of peace be dismissed from service, except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof."

In the Articles of War, enacted by § 1342 of the Revised Statutes, the word "commutation" is changed to "mitigation." Art. 99, U. S. Comp. Stat. 1901, p. 967.

The first impression of claimant's contention is that it ignores obvious distinctions, and makes a state of preparation for a position the same as the position itself, and [172] claims its *sanction for one who is not bearing its responsibilities or capable of discharging its duties. And an examination of the Revised Statutes relating to the organization of the Army confirms the impression.

Manifestly, it is impossible to reproduce all the sections of the Revised Statutes applicable to the military establishment, and we will only observe that they distinguish between the Army proper and the Military Academy, and make a distinction between an officer and a cadet. A few citations only are necessary.

Title XIV. of the Revised Statutes of the United States, U. S. Comp. Stat. 1901, p. 942, provides "for the organization of the Army of the United States. The name, rank, and function of each officer is provided for, and § 1213, U. S. Comp. Stat. 1901, p. 854, explicitly states when a cadet shall become an officer. That section enacts that when a cadet shall have regularly graduated from the Academy he "shall be considered a candidate for a commission in any corps for whose duties he may be deemed competent." He then becomes a commissioned officer. Prior to that time he is denominated a cadet, appointed as a cadet, and provision made for him under that name and state. He becomes an officer when he ceases to be a cadet; that is, when he has finished his pupilage; or, as § 1213 expresses it, when "he has gone through all his classes and received a regular degree from the academic staff" and commissioned. And his government while a cadet is provided for in chapter 5 of title XIV.

A cadet may be in the Army (§ 1094, U. S. Comp. Stat. 1901, p. 783), may be an officer in a certain sense, as distinguished from an enlisted man, as it is contended by counsel for the government he is, but nevertheless § 1229 does not apply to him. That section is one of a number of provisions for the organization and government of the Army, distinct from, and having no relation whatever to, the provisions for the government of the Military Academy and the cadets. Section 1229 is made part of, 196 U. S.

and the word "officer" given exact definition by, § 1342, U. S. Comp. Stat. 1901, p. 944, which provides as follows:

*"Sec. 1342. The armies of the United [173] States shall be governed by the following rules and articles: The word 'officer,' as used therein, shall be understood to designate commissioned officers; the word 'soldier' shall be understood to include noncommissioned officers, musicians, artificers, and privates, and other enlisted men, and the convictions mentioned therein shall be understood to be convictions by court-martial."

By article 99 it is enacted:

"No officer shall be discharged or dismissed from the service except by order of the President or by sentence of a general court-martial; and in time of peace no officer shall be dismissed except in pursuance of the sentence of a court-martial or in mitigation thereof."

It is only a commissioned officer, therefore, who is entitled to the protection of a general court-martial, and a cadet is not a commissioned officer.

The argument of appellant, contending against this construction of the statute, is not easy to reproduce or make clear, and it involves the anomaly that there can be an officer in the Army of the United States who is not covered by the Articles of War, notwithstanding the declaration of § 1342, that the Armies of the United States shall be governed by those articles.

The object of the argument is to make independent § 1229 of § 1342, and to give a cadet the protection expressed by the former, on the ground that a cadet is an officer, but not a commissioned officer. That a cadet is an officer is deduced from the fact that he is appointed by the President, takes an oath to obey his "superior officers," and receives pay. But, as we have already intimated, it is not necessary to dispute that a cadet is an officer. Whether he is or not is not the question in the case. The question is whether § 1229 applies to him, and to so construe it would seemingly give it no application except to cadets (and officers in the naval service), and transfer it from the government of the Army to the government of the Academy; and, we may observe, *would render the distinction im- [174] plied by it between a time of peace and a time of war almost meaningless. It is nevertheless contended by appellant that § 1229 is unaffected by § 1342 and the Articles of War, but is a part of § 1326, U. S. Comp. Stat. 1901, p. 934, which gives the superintendent of the Academy the power to convene general courts-martial for the trial of cadets. In other words, the contention is

that § 1326 is not merely a grant of power to the superintendent of the Academy to convene courts-martial for the trial of cadets, but commands him to do so, and, it would seem, necessarily, for every infraction of discipline. What, it may be asked, under the contention of appellant, is the relation between § 1326 and § 1325, U. S. Comp. Stat. 1901, pp. 933, 934? By the latter section there can be deficiency in studies as well as conduct. Can there be no discharge from the Academy for deficiency in studies except upon and in pursuance of a court-martial to that effect?

The cases cited by appellant do not conflict with these views. *United States v. Morton*, 112 U. S. 1, 28 L. ed. 613, 5 Sup. Ct. Rep. 1, decides only that the time of service as a cadet was actual time of service in the Army within the meaning of the statutes giving longevity pay to officers. In *United States v. Baker*, 125 U. S. 646, 31 L. ed. 824, 8 Sup. Ct. Rep. 1022, and *United States v. Cook*, 128 U. S. 254, 32 L. ed. 464, 9 Sup. Ct. Rep. 108, statutes giving longevity pay to officers in the Navy were construed, and it was held that a cadet midshipman was an officer of the Navy. The reasoning of the court, however, has no application to the construction of §§ 1229 and 1342.

The power of the President to dismiss a delinquent cadet we do not understand is questioned, except as that power is affected by §§ 1229 and 1342. We may, however, refer to *Ex parte Hennen*, 13 Pet. 259, 10 L. ed. 152; *Blake v. United States*, 103 U. S. 227, 236, 26 L. ed. 462, 465; *Mullan v. United States*, 140 U. S. 240, 35 L. ed. 489, 11 Sup. Ct. Rep. 788; *Parsons v. United States*, 167 U. S. 334, 42 L. ed. 188, 17 Sup. Ct. Rep. 880; *Shurtleff v. United States*, 189 U. S. 314, 47 L. ed. 831, 23 Sup. Ct. Rep. 535.

Judgment affirmed.

[175] *ADOLFO SIXTO, *Plff. in Err.*,
v.

LAUREANO SARRIA.

(See S. C. Reporter's ed. 175-192.)

Payment—effect of, to discharge liability when made pursuant to decree—trial—province of court and jury.

1. Payments by a mortgagor to the person who has been decreed the heir *ab intestato* of the mortgagee in proceedings under the Porto Rico Code, §§ 976-980, are not made at the risk of being required to respond to others who may subsequently be found to be coheirs

because the decree expressly reserved the rights of third parties.

2. Payment of debts due an intestate to the legally declared heirs is not made at the risk of being required to respond to others who may within five years establish a right to the property, because the Porto Rico Mortgage Law provides that property acquired through inheritance or legacy cannot be cleared until five years from the date of recording; but the effect of the proceedings to designate the heirs *ab intestato* is, under the Porto Rico Code, §§ 1000, 1001, to permit them, after final decision, to receive and collect the estate.
3. Payment into court of sums due under a mortgage, pending proceedings under Porto Rico Code, §§ 976-980, to have the petitioner declared sole heir *ab intestato* of the mortgagee, discharged the obligation, where made under an order of the court and before any proceedings were begun to establish the rights of an alleged coheir.
4. The validity of a payment on the principal of a mortgage to the person who has been decreed the sole heir *ab intestato* of the mortgagee in proceedings taken under Porto Rico Code, §§ 976-980, is a question for the jury, where the evidence shows that it was made more than one month before maturity, and after an unsuccessful attempt by a son of the mortgagee, whose relationship was well known to the mortgagor, to establish his rights by invoking the "voluntary jurisdiction" of the court, and on the same day on which he began a "contentious" proceeding, which the court had held was his only remedy, making the adjudged heir a party defendant, and seeking an order requiring the registrar to make a cautionary entry concerning the mortgaged property, and requiring the mortgagor to retain, at the disposition of the court, whatever sums he owed to the mortgagee's estate.
5. After a judgment of an appellate court reinstating an order of the court below by which instalments due under a mortgage had been directed to be paid into court, pending the determination of the rights of a party claiming to be an heir of the mortgagee, who had died intestate, the mortgagor, acting with full knowledge of this decision of the higher court, cannot discharge his liability by obtaining an order from the lower court permitting the withdrawal of his deposit to pay an assignee of the mortgage, and by paying such assignee pursuant to a decree in a suit to which the alleged heir was not a party.

[No. 40.]

Submitted November 3, 1904. Decided January 3, 1905.

IN ERROR to the District Court of the United States for the District of Porto Rico to review a judgment in favor of defendant in an action of assumpsit. *Reversed* and remanded for further proceedings.

Statement by Mr. Justice Day:

This is a writ of error bringing in review the proceedings of the district court of the United States for the district of Porto Rico.

The original action was in assumpsit,

brought by Adolfo Sixto, an alien and a subject of the King of Spain, against Laureano Sarria, a citizen of Porto Rico. The declaration set forth in substance:

[176] That on November 27, 1892, the defendant was indebted to one Manuel Sixto, since deceased, in the sum of \$16,000, Spanish money, with interest from May 15 of the same year, which sum said Sarria had promised to pay in four annual instalments, *falling due respectively on the 15th day of May of each and every year from 1893 until 1896, inclusive. That the said Manuel Sixto departed this life on November 27, 1892, leaving two children, plaintiff and one Maria Belen Sixto Melendez, as his heirs at law. That as such heir the plaintiff was entitled to one half of the indebtedness of \$16,000, Spanish money, with interest at the rate of 8 per cent from May 15, 1892. The declaration contained the usual averments in assumpsit, of promise and default. The defendant filed a plea and amended plea to this declaration, which set up the general issue, and for further plea averred:

"And for a further and second plea to the said declaration, the defendant says that on the fifteenth day of May, eighteen hundred and ninety-two, the defendant became indebted in the sum of sixteen thousand dollars (16,000) Mexican dollars, money then current in Porto Rico, to one Manuel Sixto, on account of the purchase price of a farm situated in the island of Vieques, district of Porto Rico, and called 'Monte Santo;' that on the said fifteenth day of May, eighteen hundred and ninety-two, the defendant made and constituted a mortgage upon the said farm in favor of the said Sixto, as security for the payment of the aforesaid amount of sixteen thousand (16,000) Mexican dollars, together with a certain interest as stipulated in the said instrument of mortgage; that thereafter the said mortgage was duly registered in the registry of property of Humacao, Porto Rico, on the eleventh day of July, eighteen hundred and ninety-two; that the payment of the aforesaid sum of sixteen thousand (16,000) Mexican dollars, as provided for in the said instrument of mortgage, was to be made in the manner following, to wit: Four thousand (4,000) dollars on the fifteenth day of May, eighteen hundred and ninety-three, and four thousand (4,000) dollars on the fifteenth day of May of the years eighteen hundred and ninety-four, eighteen hundred and ninety-five, and eighteen hundred and ninety-six. And the defendant further says that the aforesaid Emanuel Sixto departed this life [177] on the twenty-seventh day of *November, eighteen hundred and ninety-two, before any of the instalments aforesaid had fallen due; that the said Sixto died intestate, and soon

after his death, to wit, in the year eighteen hundred and ninety-three, judicial proceedings touching and respecting the settlement and inheritance of the estate of the said Manuel Sixto, deceased, and which said proceedings are known in the law of Porto Rico as 'proceedings *ab intestato*,' were instituted in the court of first instance of Humacao, Porto Rico, the said court being then and there a court of record and of general jurisdiction; and the said court in said proceedings by a decree dated the fifteenth day of June, eighteen hundred and ninety-three, ordered the said defendant to pay into and deposit with the said court all sums of money then due by the said defendant to the said estate of the said Manuel Sixto, deceased, by virtue of the aforesaid mortgage; and the defendant thereupon and in obedience to the said order of the said court did, on the twenty-second day of June, eighteen hundred and ninety-three, consign and deposit with the said court, and did place at the disposal of the same, the sum of four thousand (4,000) pesos of the money then current in Porto Rico, and the further sum of eight hundred twenty-two and fifty-two hundredths (822.52) dollars of the same kind of money, the first sum being the amount of the first instalment due May fifteenth, eighteen hundred and ninety-three, and the second sum being the interest due on the aforesaid mortgage credit up to the first of June, eighteen hundred and ninety-three. And the said decree of the said court was duly entered before the commencement of this action, and still is in full force and effect.

"And the defendant further says, as to the third instalment above mentioned, that by judgment of the supreme court of Porto Rico, then known as the *audiencia territorial*, dated the eighteenth day of February, eighteen hundred and ninety-six, rendered and entered in certain foreclosure proceedings had before the said court on appeal from the court of first instance of Humacao; in which proceedings the *defend- [178] ant and one Antonio Roig y Torruellas were plaintiffs, and which said proceedings the said Roig, as owner of the third and fourth instalments of the mortgage before mentioned, sought to foreclose the same to the extent of the third instalment aforesaid, together with certain interest, the defendant was found to be indebted to the said plaintiff Roig in the amount of the third instalment aforesaid, together with the corresponding interest, and was ordered to pay the amount of said indebtedness so found due by the said judgment to the said Roig within the period of thirty days thereof; and the said judgment further provided for execution to issue upon the noncompliance

with the terms thereof by the defendant. Said judgment was duly entered before the commencement of this suit, and is still in force and effect. And the said defendant thereupon, and in compliance with the said judgment of the said court, thereafter paid unto the said plaintiff Roig the amounts ordered to be paid by the said judgment, to wit, the amount of the third instalment of the aforesaid mortgage, together with the corresponding interest. And all of this the defendant is ready to verify."

The additional or amended plea sets forth:

"And the defendant, as to the second instalment aforesaid, says that he has paid the same, together with the corresponding interest, on the 4th day of April, 1894, to one Belen Sixto, who was then the record owner of said mortgage credit, and who had previously been declared heir *ab intestato* of said Manuel Sixto, deceased, by the order and decree of the proper court, to wit, the court of the first instance of Humacao, respectively on the 21st and 23d of the month of November, 1893.

"And as to the third and fourth instalments the defendant says that on the 11th day of September, 1894, the aforesaid Belen Sixto, for a valuable consideration, ceded and transferred the said two instalments to one Antonio Roig y Torruella; that thereupon the said transfer was duly recorded, and the said two instalments appeared up-
[179] on the record to *be the property of the said Roig, and thereupon, to wit, on or about the 16th day of May, 1896, the defendant paid the said Roig the amount of said two instalments, together with all interest due."

The bill of exceptions brings into the case the testimony and the rulings and charge of the court. The facts developed are: Manuel Sixto sold a farm to the defendant Sarria for \$16,000 Mexican money, payable in four equal instalments, with interest. A mortgage was taken upon the property to secure the payment of the purchase price. Manuel Sixto y Andino died November 27, 1892, leaving no issue except two natural children, a daughter by the name of Maria Belen Sixto y Melendez (hereinafter called Maria Belen), who lived in Vieques, and the plaintiff in error, a son, who lived in the island of St. Thomas. After the death of Manuel Sixto, the daughter, Maria Belen, filed her petition in the court of first instance of Humacao, Porto Rico, alleging that she was the only heir of Manuel Sixto, deceased, and praying the court to declare her heir *ab intestato* according to the provisions of §§ 980 and following of the Code of Porto Rico then in force. Upon June 22, 1893, the defendant in error, Sarria, paid into court, where the petition of Maria

Belen was then pending, the first instalment due, with interest. On November 21, 1893, Maria Belen, by decree of the court, was adjudged heir *ab intestato* of Manuel Sixto, without prejudice to the rights of third parties. On the 25th of the same month the assets received by the administrator of Manuel Sixto, who had been appointed during the proceeding, and the money paid into court by defendant in error, by order of the court, were made over to Maria Belen as sole heir *ab intestato*. On November 24, 1893, the plaintiff in error, Adolfo Sixto, presented to the same court of first instance his petition to be declared the heir of Manuel Sixto, deceased (jointly entitled with Maria Belen), invoking the exercise by the court of "voluntary jurisdiction" under the section of the Code whereby Maria Belen had been adjudged heir. To *this petition Maria [180] Belen answered, alleging that she had been duly declared the only heir of Manuel Sixto, and that the plaintiff in error could only contest her right by a "contentious suit" (*expediente contencioso*).

The court sustained this contention, and Sixto appealed, but later abandoned the appeal, and on April 4, 1894, began a suit in the form of a contentious proceeding, making Maria Belen a party defendant, and praying the court to declare him (Adolfo Sixto) an equal heir with her in the estate of Manuel Sixto, and asking the court to issue an order to the registrar of property, requiring him to make a cautionary entry in the register concerning the property affected by this suit, and also requiring the defendant in error to retain, at the disposition of the court, the sums still owing to the estate of Manuel Sixto. On June 2, 1894, a notice was accordingly issued to Sarria and one to the registrar. The one to Sarria was issued on June 5, 1894, and the one to the registrar on June 4, 1894. The defendant, Maria Belen, being notified of these orders, on June 26, 1894, answered the plaintiff's petition, and in her answer prayed that the interlocutory order of June 2, 1894, be vacated and the notices canceled. On August 30, 1894, the prayer of defendant's answer was granted by the court, and orders issued accordingly to the registrar and to Sarria, and notice was given to the solicitor of the plaintiff. On September 1, 1894, the order reached the registrar, and the order of cancellation was made on the books on September 3, 1894. On September 3, 1894, the plaintiff filed a petition for an appeal from the court's order of August 30, 1894, praying that it be allowed "in both effects," that is (Code, § 383), with the effect of a review and stay of proceedings, but the judge granted the same with one effect only, that is, for a review of the judgment. In

the appellate court, on November 17, 1894, that court held that the allowance of both effects had been wrongfully denied, and ordered that the appeal be considered as having been taken for both effects. On December 22, 1894, the appellate court granted [181] a further *order, that Sarria, the defendant in error, be notified of his obligation under the decree of June 2, 1894, which order was accordingly issued. On November 29, 1895, the appellate court (*audiencia*) rendered its decision on the merits of the appeal, and reversed the order of August 30, 1894, and re-affirmed the order of June 2, 1894, in its validity and regularity. The court used the following language:

"That which was ordered in the decree appealed from, regarding Mr. Laureano Sarria, is hereby set aside, leaving in force the requisition ordered and directed to said Sarria on June 2 by the judge of first instance, until the resolution of the pending appeal."

This decision was certified to the court below in January, 1896, and in March following the solicitor of the plaintiff requested the court to notify Sarria and the registrar that the order of June 2, 1894, was still in force, which was accordingly done, and the defendant in error made reply thereto as follows:

"Having received notice that the instalment of the mortgage had been transferred to Mr. Antonio Roig, who has recorded said transfer in the registry of property, and supposing that he will proceed to collect the same judicially as he did the previous instalment, he is unable to accept the notification, and he will appear before the *audiencia* in the premises."

The registrar refused to comply with the order for these reasons: "First, because, subsequent to the illegal cancelation of the cautionary notice, the property as well as the encumbrance had been transferred on the registry; and, second, because the mortgage law contained no provision regarding the form of carrying into effect such an order." Thereafter the plaintiff asked the court for a further order to the registrar, but this was denied.

The case proceeded to proof and argument, and on December 15, 1896, a final decision was rendered, adverse to the plaintiff, from which decree he took an appeal, which was allowed "in both effects." The appeal was [182] also allowed from *the order denying a further order to the registrar. On February 2, 1897, the appellate court consolidated the appeals and ordered the suspension of further proceedings until final decision.

In the meantime, on April 26, 1896, by an order of the court of the first instance, Sarria was allowed to withdraw his deposit of 196 U. S.

the third instalment. The order recited that one Roig had become the purchaser from Maria Belen of the third and fourth instalments, and had recovered judgment in the *audiencia* against Sarria for the third instalment, and found that Maria Belen had the right to transfer these instalments, and ordered a copy of the decree to be placed in the records by the actuary.

Thus the matter remained until after the conclusion of the war with Spain, resulting in a change of sovereignty of Porto Rico.

By the military government, an order was issued abolishing the territorial *audiencia*, the appellate court aforesaid, creating in its place the district court of San Juan. On September 29, 1899, that court rendered its final decision upon both appeals, reversing the action of the court below, and deciding the plaintiff to be legally proved the heir of Manuel Sixto. The trial in the United States district court in the present suit resulted in a verdict and judgment for the defendant.

Mr. N. B. K. Pettingill submitted the cause for plaintiff in error.

No counsel opposed.

Mr. Justice Day delivered the opinion of the court:

It is evident from the foregoing statement of facts that the controversy, as it appeared in the United States district court, was resolved into the question whether Adolfo Sixto, who had been duly adjudged the co-heir with Maria Belen of Manuel *Sixto, de- [183] ceased, was entitled to recover one half of the amount due on the mortgage debt which the defendant Sarria claimed to have discharged by legal payments. The recovery sought was for one half of the four instalments of purchase money due respectively on the 15th day of May in the years from 1893 until 1896, inclusive. The defendant interposed different defenses to different instalments of the debt. We will proceed to consider them, together with the charge and rulings of the court concerning the same.

Referring to the first and second instalments, we find it to be the contention of the plaintiff in error that Maria Belen, having been adjudged heir *ab intestato* under a decree which expressly reserved the rights of third parties, no payment could have been lawfully made to her as against the rights of the plaintiff in error, and that if any such payment was made it was subject to the risk that the subsequent-established rights of the plaintiff in error might entitle him to recover from Sarria one half of such payments. Upon this subject the court charged the jury:

"On February 15, 1894, she [Maria

Belen] having been declared the heir, the entry was made of that fact in the registry (of property). I say to you, as a matter of law, that that declaration of her heirship was without prejudice to the rights of third parties.—and that meant that if any other person showed himself afterwards to be an heir he was entitled to a proper proportion of the estate; but so far as a collection of debts, and so far as a proper attention to the assets were concerned and the control of them, she became entitled to attend to that.”

Upon the same subject the plaintiff in error had requested the court to charge:

“As the *ex parte* decree declaring Belen Sixto the heir of Manuel Sixto expressly saved the rights of third parties, that was notice to the defendant that any payment made to her was made at his peril as against the other true heirs; and, as defendant was not required by any legal authority to pay the *first two payments to Belen Sixto, and as the plaintiff is shown in truth to have been an equal heir with Belen Sixto, the plaintiff is entitled to recover one half of those two payments.”

So far as this contention is concerned, we think the court below was right. The sections of the Code of Porto Rico (War Department translation) under which Maria Belen was declared the heir *ab intestato* of Manuel Sixto are as follows:

“976. After the measures indispensable for the security of the property prescribed in the foregoing section have been taken, and without prejudice to including in the same proceedings the making of the inventory, the designation of heirs *ab intestato* shall be proceeded with in a separate record.

“977. This designation may also be made at the instance of the interested parties, without the necessity of previously taking the steps mentioned, in cases in which they are not necessary and in which the institution of intestate proceedings is not requested.

“978. Heirs *ab intestato*, who are descendants of the deceased, may obtain a declaration of their rights by proving, with the proper documents or with the evidence obtainable, the death of the person whose estate is in question, their relationship to the same, and with the evidence of witnesses that said person died intestate, and that they, or the persons whom they designate, are his only heirs.

“The services of a solicitor or attorney are not necessary in order to present this claim.

“979. The deputy public prosecutor shall be cited to appear at said proceeding, to whom the record shall afterward be referred

for the period of six days for his report thereon.

“Should he find the proof insufficient, a hearing shall be granted to the interested parties in order that they may cure the defect.

“When the deputy public prosecutor requests it, or the judge considers it necessary, the documents presented shall be compared with the originals.

“980. When the foregoing steps have been [185] taken, the judge shall, without further proceedings, make a ruling designating the heirs *ab intestato* should he deem it proper, or he may refuse to make such declaration, reserving the rights of the claimants to institute an ordinary action. This ruling may be appealed from both for review and a stay of proceedings. . . .

“1000. After the declaration of heirs *ab intestato* has been made by a final judgment or ruling, the proceedings shall be continued according to the procedure prescribed for testamentary proceedings.

“1001. The judge shall order that there be delivered to the heirs instituted all the property, books, and papers of the intestate, and that the administrator render an account of his administration to them, the judicial intervention ceasing.”

It is argued that this appointment of the heir *ab intestato* is subject to the limitation that the rights of the heir are not fixed until five years have elapsed from the date of the designation by the court proceedings, and in support of this contention certain articles of the Mortgage Law of Porto Rico are cited:

“2. In the registries mentioned in the preceding article shall be recorded:

“1. Instruments transferring or declaring ownership of realty, or of property rights thereto.

“2. Instruments by which rights of use, use and occupancy, emphyteusis, mortgage, annuity, servitudes, and any others by which estates are created, acknowledged, modified, or extinguished. . . .

“23. The instruments mentioned in articles 2 and 5, which are not duly recorded or entered in the registry, cannot prejudice third persons.

“The record of real property and property rights acquired through an inheritance or legacy shall not prejudice third persons until five years have elapsed since the date thereof, excepting in cases of testate or intestate inheritances, legacies, and additions thereto, when left to legal heirs.

“381. Property acquired through inheritance or legacy cannot *be cleared until five [186] years have elapsed from the date of their record in the registry.”

But we think this limitation of five years

was intended to permit such heirs at law or parties beneficially interested in the estate to assert their rights as against the heir and the property in his hands, and to prevent its transfer except subject to the right of such persons to assert their claims within the permitted limitation. We are here dealing with the right to collect the assets, and the Code provides—§§ 1000, 1001—that after the designation of the heir or heirs *ab intestato* by a final judgment or ruling of the court the proceedings shall be continued according to the procedure prescribed for testamentary proceedings, and the judge may order that all the property, books, and papers of the intestate be turned over to the heirs, and that the administrator render his account of his administration of the estate, and thereupon judicial intervention shall cease. It seems to us manifest that the effect of these proceedings is to permit the heir *ab intestato*, after such final decision, to receive and collect the estate. It may be that others will establish an interest in the property for which the heir will have to respond, and it is specially provided that, for the purpose of transfer, property shall not be deemed clear until after five years have elapsed. But this does not require that the collection of debts shall be delayed for a like period, or that they shall be paid to the legally declared heir or heirs, upon pain of being required to respond to others who may, within the limitation permitted, establish a right to the property. Such construction would seem to be unreasonable, and we are cited to no authority that goes to that extent. It is opposed to the practice of the civil law, upon which the Code of Porto Rico is based, in which system the heir by intestacy corresponded with the common-law administrator, except that the Roman heir was entitled to administer both the real and personal estate. Story, Conf. L. § 508.

In the present case the first instalment [187] was due on May 15, *1893, and was paid into the court of first instance according to its order, and a receipt given therefor under the seal of the court, on June 22, 1893. This was done before any proceedings were instituted by the plaintiff in error. The payment was made under the order of the court, and we see no reason why the defendant in error should not be discharged thereby.

As to the second instalment, other considerations apply. Sarria testified that while this instalment fell due on May 15, 1894, he paid the same on April 1, 1894, to Maria Belen, which payment, he says, was solemnized by a notarial act duly acknowledged. As to this payment, the court in its charge took the view that the contentious suit of Adolfo Sixto was not commenced until April 4, 1894, of which fact Sarria was

not notified until June 5, 1894, and therefore Maria Belen had the right to collect this payment. The suit of April 4, 1894, was the one begun by Adolfo Sixto after the decision against him in the court of first instance, holding that he could only contest the right of Maria Belen by a contentious proceeding, from which the plaintiff in error took an appeal, but abandoned the same, and on April 4, 1894, amended the suit to a contentious proceeding, making Maria Belen a party defendant, and seeking for an order to the registrar to make a cautionary order touching the property in controversy, and also an order to the defendant in error requiring him to retain at the disposition of the court whatever sums he owed to the estate of Manuel Sixto, deceased. On the day of the beginning of this contentious suit, Sarria paid to Maria Belen, anticipating the maturity of the instalment by more than a month, the amount which would have fallen due on the 15th day of May following.

We think that, in view of the testimony produced, the validity of this payment should have been submitted to the jury under proper instructions. The plaintiff testified that he was known to the defendant, and that the latter was well aware that he was a son of Manuel Sixto, deceased. The proceeding to declare his rights had been begun. It is evident *from a letter written to [188] him on November 11, 1892, by Maria Belen, that she recognized the plaintiff in error as her brother, for in this letter she announces the death of "our beloved father," subscribed herself as "sister," and requests Sixto to come over to Vieques at once, as his presence was necessary in order to collect money coming from the estate. Under these circumstances, the question of whether Sarria had notice of the plaintiff in error's rights and demands, and whether this was a valid payment, or was made in anticipation of the possible claims of Adolfo Sixto, with intent to deprive him of his rights, should have been left to the jury, instead of the instruction given, which practically required a finding for the defendant in error.

As to the third and fourth instalments, the defendant claims to have paid these to one Roig. It appears that these alleged payments to Roig were evidenced by certain notarial instruments, which became of record in the office of the registrar of deeds, and, as is recited in that record, Roig appears to have been the declared purchaser of the third and fourth instalments by assignment from Maria Belen, and the court of first instance, on April 25, 1896, at the instance of Sarria, permitted him to withdraw the third instalment, and declared Roig entitled to collect the third and fourth

instalments. Upon this subject the court charged the jury:

"In this contentious suit by Adolfo Sixto against Belen, this defendant, Sarria, was ordered on June 2, 1894, to pay into court whatever money he might be owing. That order was served on Sarria on June 5, 1894, and afterwards that court decided that Sixto, the plaintiff in this suit, was not entitled to attach this money. He obtained an appeal from that judgment, but not from that portion of it that canceled the annotation made in the registry of deeds of the attachment of that fund. Subsequently, on November 17, 1894, an appeal was allowed in the upper court from that portion of it, but no notice was given as to Sarria, who was merely a garnishee in the suit, and who had received no notice not to pay over *the money until the lower court decided whether he had the right to pay it over. Between the time the court decided the attachment and the time the appeal was allowed in the upper court, Belen Sixto assigned to Roig the third and fourth instalments. I say to you, as a matter of law, that there was nothing to hinder her from doing that at that time; she had, in law, the right to do it."

The counsel for the plaintiff requested the court, upon the same subject, to charge:

"As it is shown by the uncontradicted evidence that the judge of the court of first instance of Humacao was entirely without authority or jurisdiction to issue his order on August 30, 1894, directing the registrar to make annotation on his books of said order, said order to the registrar was void, and the annotation made by the registrar was void, and the former annotation remained in force, which was notice to all the world, including this defendant, that the plaintiff had an interest in those payments such as might be declared by the court; and, the court having afterwards decided that the plaintiff here is entitled to a one-half interest in said estate, the plaintiff is now entitled to recover one half of the last two payments, with interest."

It appears that Adolfo Sixto was not a party to the suit between Roig and Sarria, in which it is declared that Roig was held entitled to recover the third instalment, and if Sarria had notice of the pendency of the suit to establish the rights of Adolfo Sixto, in such wise as to be bound by the result thereof, he could not prevent Sixto's recovering an interest in the property by wrongfully paying it over in the proceedings to which the plaintiff in error was not a party. The court below seems to have given its charge upon this subject upon the theory that the order of August 30, 1894, was not appealed from in such wise as to prevent Sarria from paying the third and fourth in-

stalments to the assignee, Roig, and it is said that he was merely a garnishee in the suit, and had then received no notice not to pay over the money *until the lower court [190] had decided whether he had the right to pay it over. The payment of the third and fourth instalments was made to Roig by permitting Sarria, in the court of first instance, to withdraw the instalment which he had paid into court under the order of June 2, 1894. These instalments were paid to Roig on May 16, 1896, but in the attitude of the suit then pending to establish the rights of Adolfo Sixto, and Sarria's knowledge thereof, could the latter legally make these payments so as to conclude the rights of the plaintiff in error? It is true that the lower court on August 30, 1894, had held in favor of Maria Belen, vacating the notice sent to Sarria and the cautionary notices to the registrar, and the plaintiff in error had prayed an appeal "in both effects,"—i. e., for a review of the order and a stay of proceedings,—but was refused an appeal in the latter aspect, from which refusal he also appealed, and this was the attitude of the case at the time of the alleged purchase by Roig on September 11, 1894. On November 17, 1894, the *audiencia* considered the application of Sixto for the enlargement of the appeal, and held that such allowance was wrongfully denied in the lower court, and ordered that the appeal be "considered as having been taken for both effects." On the 8th of January, 1895, Sarria was notified of this order, and appeared and asked that a clear and detailed statement be given him "as to what he has to comply with." Thereupon a new explanatory order was directed to Sarria, informing him that the previous requisition meant the ratification of the one previously directed to him by the court, "in order that the sums which he owed from that time to Mr. Manuel Sixto should not be delivered by him except to the court in order to deposit the same in the royal treasury." This order was duly served on Sarria on February 5, 1895.

On November 29, 1895, the *audiencia* heard the appeal, and, reversing the order of August 30, declared the order of June 2, 1894, in full force, whereby the cautionary entry was ordered to be made by the registrar of property, and the notification *or- [191] dered to Sarria to hold the payments on the mortgage, or pay the same into the treasury, to abide the order of the court.

The registrar refused to comply, assigning as a reason that the encumbrance had been assigned to third parties, and that the mortgage law did not justify such an order. Subsequent proceedings resulted in the final decree of the military court deciding the merits of the controversy in favor of Sixto.

The decision of November 29, 1895, was also notified to Sarria, and on May 4, 1896, the entry of the court discloses:

"On May 4, 1896, appeared Mr. Laureano Sarria y Gonzalez and stated: That, having received notice that the instalment of the mortgage had been transferred to Mr. Antonio Roig, who has recorded said transfer in the registry of property, and supposing that he will proceed to collect the same judicially, as he did the previous instalment, he is unable to accept the notification, and he will appear before the *audiencia* in the premises."

Over the objection of the plaintiff in error, Sarria was permitted to testify that he paid the instalment to Roig by order of the *audiencia*. But the plaintiff in error was not a party to such proceeding, if it had been legally proved, and of course could not be concluded by it. On being notified that the order of June 2, 1894, was in full force, requiring him to hold the funds, while Sarria says he is unable to accept the notification, he declares "he will appear before the *audiencia* in the premises." Instead of so doing, unless the appearance in the Roig case can be so considered, he made application in the court of first instance for a release of the deposited instalment in order to pay it to Roig, and that court made the order, although it had been notified of the decision of the *audiencia* of November 29, 1895. This order could have no effect on the rights of the plaintiff in error, nor can it protect Sarria, who acted in the face of knowledge of the decision of the higher court, instead of appearing in that court at the suit of Sixto, and having the rights of Roig and the contesting heirs determined. We conclude that the plaintiff in error had the right to recover his share of the third [192] and fourth instalments, *notwithstanding the alleged transfers and payments to Roig, and the alleged decree of the *audiencia* in a proceeding to which Sixto was not a party.

For error in the court's charge as to the second, third, and fourth instalments, the judgment will be reversed, and the cause remanded for further proceedings consistent with this opinion.

HARVEY FULLERTON, *Plff. in Err.*,
v.

STATE OF TEXAS.

(See S. C. Reporter's ed. 192-194.)

Error to state court—Federal question.

A certificate of the presiding judge of a state

court that a Federal question which was first raised by a petition for rehearing was duly considered and decided cannot confer jurisdiction on the Federal Supreme Court of a writ of error to the state court, where, from the face of the record proper and from the opinions, the reasonable inference is that the court may have denied the application in the mere exercise of its discretion, or may have declined to pass upon the Federal question in terms because it was suggested too late.

[No. 112.]

Argued December 16, 1904. Decided January 9, 1905.

IN ERROR to the Court of Criminal Appeals of the State of Texas to review a judgment which affirmed a conviction in the County Court of Hunt County, in that state, of unlawfully dealing in futures. Dismissed for want of jurisdiction.

See same case below (Tex. Crim. App.), 75 S. W. 534.

The facts are stated in the opinion.

Mr. William W. Griffin argued the cause, and, with Mr. A. D. Englesman, filed a brief for plaintiff in error.

No brief was filed for defendant in error.

Mr. Chief Justice Fuller delivered the opinion of the court:

Fullerton was charged by information with unlawfully conducting, carrying on, and transacting the business of dealing in futures in cotton, grain, etc.; and unlawfully keeping a bucket shop, so-called, "where future contracts were then and *there [193] bought and sold with no intention of an actual bona fide delivery of the articles and things so bought and sold." He was found guilty as charged, and sentenced to a fine of \$200 and imprisonment for thirty days. The case was carried to the court of criminal appeals of Texas, and judgment affirmed. The court, in its opinion, stated the contention to be that the evidence did not show a violation of the statute, namely, art. 377 of the Penal Code; and held, on a consideration of the facts, that Fullerton had clearly brought himself within and violated the statute. 75 S. W. 534. Fullerton thereupon moved for a rehearing, which motion was overruled. This application for rehearing assigned, among other grounds, that the statute, as construed by the court, was in violation of the Constitution of the United States, vesting in Congress the

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Kipley v. Illinois, 196 U. S.

42 L. ed. U. S. 998; and *Re Buchanan*, 39 L. ed. U. S. 884.

On what adjudications of state courts can be brought up for review in the Supreme Court

power to regulate commerce among the several states. In overruling the motion, the court delivered a second opinion on the question of the sufficiency of the indictment, which was attacked, not in the motion for rehearing, but in an additional brief, presented after the submission of that motion. The court, however, held the indictment good, and, after stating that "the motion for rehearing was mainly devoted to an attack on the original opinion, wherein the evidence was held sufficient," adhered to that opinion. 75 S. W. 535. No reference to the Constitution of the United States was made by the court, nor does the record disclose any such reference except in the petition for rehearing, as before stated.

We have repeatedly ruled that it is too late to raise a Federal question by a petition for rehearing in the supreme court of a state after that court has pronounced its final decision, although, if the state court entertains the petition, and disposes of the Federal question, that will be sufficient. *Mallett v. North Carolina*, 181 U. S. 589, 45 L. ed. 1015, 21 Sup. Ct. Rep. 730. In that case it was observed: "Had that court declined to pass upon the Federal questions, and dismissed the petition without considering them, we certainly would not undertake to revise their action."

[194] Some weeks after the denial of the motion for a rehearing, *this writ of error was allowed by the presiding judge of the court of criminal appeals, who certified that on that motion it was contended "that, under the evidence in the cause, plaintiff in error was engaged in interstate commerce and commerce between different states within the meaning of article 1, § 8, of the Constitution

of the United States by writ of error to those courts—see note to *Apex Transp. Co. v. Garbade*, 62 L. R. A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to *Mutual L. Ins. Co. v. McGrew*, 63 L. R. A. 33.

On what the record must show respecting the presentation and decision of a Federal question, in order to confer jurisdiction on the Supreme Court of the United States on a writ of error to a state court—see note to *Hooker v. Los Angeles*, 63 L. R. A. 471.

As to what is the record for the purpose of showing the jurisdiction of the Supreme Court of the United States of a writ of error to a state court—see note to *Home for Incurables v. New York*, 63 L. R. A. 329.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to *Missouri ex rel. Hill v. Dockery*, 63 L. R. A. 571.

On the practice and procedure governing the transfer of causes to the Federal Supreme Court on writ of error or appeal—see note to *Wedding v. Meyler*, 66 L. R. A. 833.

of the United States, and that the statutes of the state of Texas could not make such matters and transactions an offense, and that to do so would violate said constitutional provision." And further, "that said contention was duly considered by us and decided adversely to plaintiff in error."

But, on the face of the record proper, and from the opinions, the reasonable inference is that the court may have denied the application in the mere exercise of its discretion, or declined to pass on the alleged constitutional question, in terms, because it was suggested too late; and nothing is more firmly established than that such a certificate cannot, in itself, confer jurisdiction on this court. *Henkel v. Cincinnati*, 177 U. S. 170, 44 L. ed. 720, 20 Sup. Ct. Rep. 573; *Dibble v. Bellingham Bay Land Co.* 163 U. S. 63, 41 L. ed. 72, 16 Sup. Ct. Rep. 939.

Writ of error dismissed.

CENTRAL OF GEORGIA RAILWAY COMPANY, *Plff. in Err.*, v.

A. O. MURPHEY and J. L. Hunt, Partners,
Doing Business as A. O. Murphey & Hunt.

(See S. C. Reporter's ed. 194-206.)

Commerce — state regulation — interstate freight shipments.

The imposition upon the initial or any connecting carrier by Ga. Code 1895, §§ 2317, 2318, as a condition of availing itself of a valid contract of exemption from liability beyond its own line, of the duty of tracing the freight, and informing the shipper, in writing, when, where, and how, and by which carrier, the freight was lost, damaged, or destroyed, and of giving the names of the parties and their official position, if any, by whom the truth of the facts set out in the information can be established, is, when applied to an interstate shipment, a violation of the commerce clause of the Federal Constitution.

[No. 111.]

Argued December 16, 1904. Decided January 9, 1905.

NOTE.—On state regulation of interstate or foreign commerce—see notes to *Norfolk & W. R. Co. v. Com.* 13 L. R. A. 107; *McCanna & F. Co. v. Citizens' Trust & Surety Co.* 24 C. C. A. 13; *Ratterman v. Western U. Teleg. Co.* 32 L. ed. U. S. 229; *Harmon v. Chicago*, 37 L. ed. U. S. 216; *Cleveland, C. C. & St. L. R. Co. v. Backus*, 38 L. ed. U. S. 1041; *Postal Teleg. Cable Co. v. Adams*, 39 L. ed. U. S. 311.

As to police power as affecting commerce—see notes to *People v. Budd*, 5 L. R. A. 559; *State ex rel. Corwin v. Indiana & O. Oil, Gas, & Min. Co.* 6 L. R. A. 579.

IN ERROR to the Supreme Court of the State of Georgia to review a judgment which affirmed a judgment of the Superior Court of Pike County, in that State, in favor of plaintiffs in an action to recover from an initial carrier for the damages to an interstate freight shipment. *Reversed* and remanded for further proceedings.

See same case below, 116 Ga. 863, 60 L. R. A. 817, 43 S. E. 265

Statement by Mr. Justice Peckham:

The plaintiff in error brings this case here to review the judgment of the supreme court of Georgia, affirming a judgment of the trial court, in favor of the defendants in error, for the damages sustained by them on the shipment of certain grapes, as hereinafter more particularly stated. First reported, 113 Ga. 514, 53 L. R. A. 720, 38 S. E. 970, and again, on appeal from judgment on second trial, 116 Ga. 863, 60 L. R. A. 817, 43 S. E. 265.

The trial court gave judgment for the shippers of the grapes, who were plaintiffs below, for the amount of the difference between the market price of the grapes as shipped in good order and the amount they actually received for the same in their damaged condition, being the sum of \$434.55. The action was commenced in the Pike county court, in the state of Georgia, and the petition averred that on July 31, 1897, the petitioner shipped a carload of grapes from Barnesville, Georgia, consigned to Rocco Brothers, Omaha, Nebraska, by way of the Central of Georgia Railway Company. The freight was to be conveyed by more than two common carriers, the initial carrier being the Central of Georgia Railway Company, and the freight was shipped under a contract of shipment in which it was provided that the responsibility of each carrier should cease upon delivery to the next "in good order." The grapes were greatly damaged on the route between Barnesville and Omaha, and the damage resulted from the negligence of the common carriers on the route. The petitioners applied to the plaintiff in error, the initial carrier on the route, and served it with an application in writing August 20, 1897, in which they requested that the railway company should trace the freight, and inform the petitioners, in writing, when, how, and by which carrier the freight was damaged, and also that the company should furnish the petitioners the names of the parties and their official position, if any, by whom the truth of the facts set forth in [196] the *information could be established. The railroad company failed to trace the freight and give the information in writing within the thirty days required by law, where-

fore the petitioners averred that the railroad company became indebted to the petitioners to the amount of the damage to the grapes, as stated.

The plaintiff in error demurred to the petition, the demurrer was overruled, and it then put in an answer denying many of the allegations of the petition. Upon the trial it appeared that the grapes were shipped from Barnesville, Georgia, to Omaha, Nebraska, and they were "routed" by the shippers over the Central of Georgia, then the Western & Atlantic, then the Nashville, Chattanooga, & St. Louis, then the Louisville & Nashville, and then the Wabash Railroads. The initial carrier, the plaintiff in error, issued to the shippers, A. O. Murphey and Hunt, a bill of lading for the carload of grapes, which showed the routing as above stated, and the bill was signed by Murphey and Hunt, as the contract between the plaintiff in error and themselves. It contained a promise "to carry (the grapes) to said destination, if on its road, or to deliver to another carrier on the route to said destination, subject, in either instance, to the conditions named below, which are agreed to in consideration of the rate named." Omaha, Nebraska, is not on the road of the plaintiff in error. Paragraph 5 of the bill of lading, under which the shipment of grapes was made, reads as follows:

"5. That the responsibility, either as common carrier or warehouseman, of each carrier over whose line the property shipped hereunder shall be transported, shall cease as soon as delivery is made to the next carrier or to the consignee; and the liability of the said lines contracted with is several, and not joint; neither of the said carriers shall be responsible or liable for any act, omission, or negligence of the other carriers over whose lines said property is or is to be transported."

The grapes were carried under the contract contained in the bill of lading, and arrived at Omaha, in the state of Nebraska, in a damaged condition.

The law under which the action was brought is found in * §§ 2317 and 2318 of the Code of Georgia of 1895. Those sections are set forth in full in the margin.† [195]

On the 20th day of August, 1897, the

†Sec. 2317. When any freight that has been shipped, to be conveyed by two or more common carriers to its destination, where, under the contract of shipment or by law, the responsibility of each or either shall cease upon the delivery to the next "in good order," has been lost, damaged, or destroyed, it shall be the duty of the initial or any connecting carrier, upon application by the shipper, consignee, or their assigns, within thirty days after application, to trace said freight, and inform said applicant, in writing, when, where, and how, and by which carrier said freight was lost, damaged, or de-

shippers availed themselves of these provisions of the statute, and duly demanded of the plaintiff in error that it should trace the grapes, and inform the shippers, in writing, when, how, and by which carrier the grapes were damaged, and the names of the parties and their official position, if any, by whom the truth of the facts set out in the information could be established. They also demanded that the information should be furnished within thirty days from the date of the application. The plaintiff in error, although it endeavored so to do, failed to furnish the information within the time mentioned in the statute. It offered to prove on the trial that the car in which the grapes were originally shipped at Barnesville, on the road of the plaintiff in error, reached Atlanta, Georgia, the end of the line of the plaintiff in error, in due time, and that the grapes were then in good order, and the car was promptly delivered to the next connecting line, that is, the Western & Atlantic Railroad, and by that road it was delivered to the Nashville, Chattanooga, & St. Louis Railroad Company, at Nashville, Tennessee, with the grapes in like good order and condition. The evidence was rejected, the court holding that the

[198] plaintiff in error had failed to comply with the conditions of the statute, and that it was therefore liable for the amount of the damage sustained by the petitioners on whatsoever road the damage actually occurred.

Mr. John I. Hall argued the cause, and, with Messrs. Henry C. Cunningham, Lloyd Cleveland, and Robert L. Berner, filed a brief for plaintiff in error:

Such legislation as that in question imposes a burden upon the carrier, and interferes with its full freedom to contract with the shipper with respect to confining its liability to its own line, and when applied to interstate shipments, as in this case, it is an interference with the right to contract for carrying interstate traffic, and is void.

Vance v. W. A. Vandercook Co. 170 U. S. 438, 455, 42 L. ed. 1100, 1106, 18 Sup. Ct. Rep. 674; *Welton v. Missouri*, 91 U. S. 282, 23 L. ed. 350; *Hall v. De Cuir*, 95 U. S. 485, 24 L. ed. 547; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 558, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 472, 24 L. ed. 527, 530; *Western U. Teleg. Co. v. Pendleton*, 122 U. S. 347, 30 L.

ed. 1187, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126; *Fargo v. Michigan (Fargo v. Stevens)* 121 U. S. 230, 243, 244, 30 L. ed. 888, 893, 894, 1 Inters. Com. Rep. 51, 7 Sup. Ct. Rep. 857.

The legislation in this case is an unreasonable interference with the rights of carriers engaged in interstate commerce, and is, for that reason, void.

Cleveland, C. C. & St. L. R. Co. v. Illinois, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722.

Mr. William Wallace Lambdin argued the cause, and, with Mr. Hoke Smith, filed a brief for defendants in error:

Doubts are always resolved in favor of the constitutionality of the statute. The violation must be clear and palpable in order that the statute be held unconstitutional.

Cooley, Const. Lim. 6th ed. pp. 216, 220; *Odgen v. Saunders*, 12 Wheat. 213, 270, 6 L. ed. 606, 625; *Munn v. Illinois*, 94 U. S. 113, 125, 24 L. ed. 77, 84; *Cooper v. Telfair*, 4 Dall. 14, 19, 1 L. ed. 721, 723; *Plumley v. Massachusetts*, 155 U. S. 461, 479, 39 L. ed. 223, 229, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; *Carey v. Giles*, 9 Ga. 253.

The statute in question merely sets up a rule of evidence, and establishes a legal presumption to be deduced from the failure of the carrier to trace the freight and give the required information. This the state legislature may do without violating the Federal Constitution.

Central R. Co. v. Murphey, 116 Ga. 863, 60 L. R. A. 817, 43 S. E. 265; *Jones v. Brim*, 165 U. S. 180, 41 L. ed. 677, 17 Sup. Ct. Rep. 282; *Southern R. Co. v. Ragsdale*, 119 Ga. 773, 47 S. E. 179.

The contract under which the goods were shipped in this case was made in Georgia, and is governed by the laws of that state.

Liverpool & G. W. Steam Co. v. Phenix Ins. Co. 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469.

The defendant railroad company, being affected with a public interest, and being a Georgia corporation, and being clothed with special privileges, is therefore subject to legislative control in the interest of the public.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47; *Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car Co.* 139 U. S. 79, 90, 35 L. ed. 97, 101, 11 Sup. Ct. Rep. 490; *Smyth v.*

stroyed, and the names of the parties and their official position, if any, by whom the truth of the facts set out in said information can be established.

Sec. 2318. If, the carrier to which application is made shall fail to trace said freight and

give said information, in writing, within the time prescribed, then said carrier shall be liable for the value of the freight lost, damaged, or destroyed, in the same manner and to the same amount as if said loss, damage, or destruction occurred on its line.

Ames, 169 U. S. 466, 544, 42 L. ed. 819, 848, 18 Sup. Ct. Rep. 418.

The statute under consideration does not violate the commerce clause of the Federal Constitution, nor does it attempt to regulate interstate commerce. States may, in the exercise of their reserved powers, enact laws which, although they incidentally relate to and affect commerce between the states, yet are not to be considered as regulations of that commerce, within the meaning of the Constitution of the United States.

Sherlock v. Alling, 93 U. S. 99, 103, 23 L. ed. 819, 820; *Peik v. Chicago, & N. W. R. Co.* 94 U. S. 164, 24 L. ed. 97; *Bagg v. Wilmington, C. & A. R. Co.* 109 N. C. 279, 14 L. R. A. 596, 3 Inters. Com. Rep. 803, 26 Am. St. Rep. 569, 14 S. E. 79; *Kidd v. Pearson*, 128 U. S. 1, 16, 32 L. ed. 346, 348, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; *Fry v. State*, 63 Ind. 552, 30 Am. Rep. 238; *Williams v. Fears*, 179 U. S. 270, 45 L. ed. 186, 21 Sup. Ct. Rep. 128; *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 100, 32 L. ed. 352, 354, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 626, 42 L. ed. 878, 882, 18 Sup. Ct. Rep. 488; *New York, N. H. & H. R. Co. v. New York*, 165 U. S. 628, 631, 632, 41 L. ed. 853, 854, 17 Sup. Ct. Rep. 418; *Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 133, 137, 42 L. ed. 688, 692, 18 Sup. Ct. Rep. 289; *Richmond & A. R. Co. v. R. A. Patterson Tobacco Co.* 169 U. S. 311, 42 L. ed. 759, 18 Sup. Ct. Rep. 335; *St. Joseph & G. I. R. Co. v. Palmer*, 38 Neb. 463, 22 L. R. A. 335, 4 Inters. Com. Rep. 494, 56 N. W. 957; *Hart v. Chicago & N. W. R. Co.* 69 Iowa. 485, 29 N. W. 597; *McCann v. Eddy*, 133 Mo. 59, 35 L. R. A. 110, 33 S. W. 71; *Missouri, K. & T. R. Co. v. McCann*, 174 U. S. 580, 43 L. ed. 1093, 19 Sup. Ct. Rep. 755.

The statute in question comports with sound public policy, and with the responsibility placed upon carriers by the common law and by the statutes and decisions of the various states and of the United States. The shipper and the carrier are on an unequal footing, and the carrier is therefore held to rigid responsibility.

Central R. Co. v. Hasselkus, 91 Ga. 382, 44 Am. St. Rep. 37, 17 S. E. 838; *Pennsylvania R. Co. v. Hughes*, 191 U. S. 477, 489, 48 L. ed. 268, 272, 24 Sup. Ct. Rep. 132; *Baltimore & O. S. W. R. Co. v. Voigt*, 176 U. S. 498, 505, 507, 44 L. ed. 560, 564, 565, 20 Sup. Ct. Rep. 385; *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627; *Bank of Kentucky v. Adams Exp. Co.* 93 U. S. 174, 23 L. ed. 874; *Grand Trunk R. Co. v. Stevens*, 95 U. S. 655, 24 L. ed. 535; *Missouri*, 196 U. S.

K. & T. R. Co. v. McCann, 174 U. S. 580, 43 L. ed. 1093, 19 Sup. Ct. Rep. 755; *Brockway v. American Exp. Co.* 168 Mass. 257, 47 N. E. 87; *Ohio & M. R. Co. v. Tabor*, 98 Ky. 503, 34 L. R. A. 685, 32 S. W. 168, 36 S. W. 18; *Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; *Central R. Co. v. Lippman*, 110 Ga. 665, 50 L. R. A. 673, 36 S. E. 202.

In construing a statute of Virginia somewhat similar to the one in question, this court said that the concluding sentence of the statute, imposing upon the carrier a duty, where the loss has not happened on the carrier's own line, to inform the shipper of this fact, is but a regulation manifestly within the power of the state to adopt.

Richmond & A. R. Co. v. R. A. Patterson Tobacco Co. 169 U. S. 311, 316, 42 L. ed. 759, 761, 18 Sup. Ct. Rep. 335.

The United States Supreme Court will generally adopt the construction placed upon a statute of a state by the court of last resort of such state.

Sioux City, O. N. & W. R. Co. v. Manhattan Trust Co. 172 U. S. 642, 43 L. ed. 1180, 19 Sup. Ct. Rep. 879; *Postal Teleg. Cable Co. v. Adams*, 155 U. S. 688, 39 L. ed. 311, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360; *Geer v. Connecticut*, 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep. 600; *Railroad Tax Cases (Taylor v. Secor)* 92 U. S. 575, 23 L. ed. 663.

The statute under consideration facilitates the safe transportation of goods, and is therefore constitutional.

Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 635, 42 L. ed. 878, 885, 18 Sup. Ct. Rep. 488; *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 297, 299, 43 L. ed. 702, 706, 707, 19 Sup. Ct. Rep. 465; *Com. v. Alger*, 7 Cush. 53; *Cooley*, Const. Lim. 6th ed. p. 715.

Mr. Justice **Peckham**, after making the foregoing statement of facts, delivered the opinion of the court:

The supreme court of Georgia has held in this case that the statute applies to shipments of freight destined to points outside, as well as to those inside, the state, and we must accept that construction of the state statute. The question for us to decide is whether the statute, when applied to an interstate shipment of freight, is an interference with, or a regulation of, interstate commerce, and therefore void.

We think the imposition upon the initial or any connecting carrier, of the duty of tracing the freight, and informing the shipper, in writing, when, where, how, and by which carrier the freight was lost, damaged,

or destroyed, and of giving the names of the parties and their official position, if any, by whom the truth of the facts set out in the information can be established, is, when applied to interstate commerce, a violation of the commerce clause of the Federal Constitution. The supreme court of Georgia has held that a carrier has, in that state, the right to make a contract with the shipper to limit its liability, as a carrier, to damage or loss occurring on its own line. *Central R. & Bkg. Co. v. Avant*, 80 Ga. 195, 5 S. E. 78; *Richmond & D. R. Co. v. Shomo*, 90 Ga. 500, 16 S. E. 220.

[203] Whether the state would have the right to prohibit such a *contract with regard to interstate commerce need not therefore be considered. It has not done so, but, on the contrary, its highest court has recognized the validity of such a contract. Without the provisions of the statute in question, the plaintiff in error would not be liable to the shippers in this case, if, without negligence, they delivered the consignment in good condition to the succeeding carrier. This they offered to prove was the case. But if this statute be valid, this limitation of liability can only be availed of by the railroad company by complying with its provisions. In other words, before it can avail itself of the exemption from liability beyond its own line, provided for by its valid contract, the initial or any connecting carrier must comply with the terms of the statute, and must, within thirty days after notification, obtain and give to the shipper the information provided for therein. This is certainly a direct burden upon interstate commerce, for it affects most vitally the law in relation to that commerce, and prevents the exemption provided by a legal contract between the parties from taking effect except upon terms which we hold to be a regulation of interstate commerce. It is said that the reason for the passage of such an act lies in the fact that, as a general rule, shippers under such a contract as the one in question are very much inconvenienced in obtaining evidence of the loss or damage, where it occurred on another road than that of the initial carrier. It is contended that, under such contracts, there being great difficulty in identifying the particular carrier upon whose road the loss occurred, it is reasonable to make the initial or other connecting carrier liable therefor, unless such carrier furnish the information provided for in the statute.

We can readily see that a provision, such as is contained in the statute in question, would be a very convenient one to shippers of freight through different states. And a provision making the initial or any connecting carrier liable in any event for any

loss or damage sustained by the shipper, on account of the negligence of any one of the connecting lines, would also *be convenient [204] for the shippers; but it would hardly be maintained, when applied to the interstate shipment of freight, that a state statute to that effect would not violate the commerce clause of the Federal Constitution. The provision of this statute, while not quite so onerous, is yet a very plain burden upon interstate commerce. It is also said that it is so much easier for the initial or other connecting carrier to obtain the information provided for in the statute than it is for the shipper, that a statute requiring such information to be obtained, under the penalty of such carrier being liable for the damage sustained, ought to be upheld for that very reason.

Assuming the fact that the carrier might more readily obtain the information than the shipper, we do not think it is material upon the question under consideration. We are not, however, at all clear in regard to the fact. The loss or damage might occur on the line of a connecting carrier, outside the state where the shipment was made (as was the case here), and we do not perceive that the initial carrier has any means of obtaining the information desired, not open to the shipper. The railroad company receiving the freight from the shipper has no means of compelling the servants of any connecting carrier to answer any question in regard to the shipment, or to acknowledge its receipt by such carrier, or to state its condition when received. And when it is known by the servants of the connecting company that the object of such questions is to place in the hands of the shipper information upon which its liability for the loss or damage to the freight is to be based, it would seem plain that the information would not be very readily given, and the initial or other carrier could not compel it. The effect of such a statute is direct and immediate upon interstate commerce. It directly affects the liability of the carrier of freight destined to points outside the state, with regard to the transportation of articles of commerce; it prevents a valid contract of exemption from taking effect except upon a very onerous condition, and it is not of that class of state legislation which has been held to be rather an aid to *than a burden [205] upon such commerce. The statute in question prevents the carrier from availing itself of a valid contract unless such carrier comply with the provisions of the statute by obtaining information which it has no means of compelling another carrier to give, and yet, if the information is not obtained, the carrier is to be held liable for the negligence of another carrier over whose conduct

it has no control. This is not a reasonable regulation in aid of interstate commerce, but a direct and immediate burden upon it.

The case of *Richmond & A. R. Co. v. Patterson Tobacco Co.* 169 U. S. 311, 42 L. ed. 759, 18 Sup. Ct. Rep. 335, is not an authority against these views, but, on the contrary, it supports and exemplifies them. The section of the Virginia Code (1295 of 1887) was held not to be a regulation of interstate commerce, because it simply established a rule of evidence ordaining the character of proof by which a carrier might show that, although it received goods for transportation beyond its own line, nevertheless, by agreement, its liability was limited to its own line. The statute left the carrier free to make any limitation as to its liability on an interstate shipment beyond its own line as it might deem proper, provided, only, the evidence of the contract was in writing and signed by the shipper. The provision of the Virginia statute that, although the contract in writing provided for therein was made in fact, yet "if such thing be lost or injured, such common carrier shall himself be liable therefor, unless, within a reasonable time after demand made, he shall give satisfactory proof to the consignor that the loss or injury did not occur while the thing was in his charge," is a materially different provision from the one under consideration. A provision in a statute may be deemed a reasonable one, and not a regulation of interstate commerce, where the statute simply imposes a duty upon the carrier, when the loss has not happened on the carrier's own line, to inform the shipper of that fact within a reasonable time, and this court has said in the above case that such a provision is manifestly within the power of the state to adopt. This is very different

[206] from the duty imposed upon the carrier by the statute in question here, which is much more onerous, and imposes a liability unless the detailed information provided for in the statute is obtained and given to the shipper.

The case of *Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289, holds the same general principle as that involved in the case just cited. To the same effect are the cases referred to in the opinion of Mr. Justice Gray in the *Solan Case*. It is idle to attempt to comment upon the various cases decided by this court relating to this clause of the Federal Constitution. We are familiar with them, and we are certain that our decision in this case does not run counter to the principles decided in any of those cases. The statute here considered we think plainly imposes a burden upon the carrier of

interstate commerce, and is not an aid to it, but, in its direct and immediate effect, it is quite the contrary.

The power to regulate the relative rights and duties of all persons and corporations within the limits of the state cannot extend so far as to thereby regulate interstate commerce. The police power of the state does not give it the right to violate any provision of the Federal Constitution. Being of the opinion that the statute in question, when applied to an interstate shipment, is a regulation of interstate commerce, we must hold the statute, so far as it affects such shipments, to be void on that account. The judgment of the Supreme Court of Georgia is reversed and the case remanded for such further proceedings as may be consistent with this opinion.

Reversed.

*UNITED STATES, Appt.,

[207]

v.

UNITED VERDE COPPER COMPANY.

(See S. C. Reporter's ed. 207-217.)

Public lands—use of timber for domestic purposes—effect of regulations of Secretary of Interior.

The use of timber taken from unsurveyed mineral land in the territory of Arizona in roasting ore at a mine in that territory, whether roasting ore be considered a part of mining or of smelting, is authorized by the permission given by the act of June 3, 1878 (20 Stat. at L. 88, chap. 150, U. S. Comp. Stat. 1901, p. 1528), § 1, to fell and remove such timber for "building, agricultural, mining, or other domestic purposes," notwithstanding a regulation of the Secretary of the Interior, promulgated under the supposed authority of that statute, that no timber can be used for smelting purposes, since the words of the statute, that the felling and use of the timber shall be "subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes," cannot confer upon him the power to take from the industries designated the permission given by Congress.

[No. 68.]

Argued December 2, 1904. Decided January 9, 1905.

APPEAL from the Supreme Court of the Territory of Arizona to review a judgment which affirmed the judgment of the District Court of the Fourth Judicial District of that Territory, sustaining a de-

murrer to a complaint in an action to recover the value of timber cut and removed from the public lands, and entering judgment for defendant upon plaintiff's refusal to amend. *Affirmed.*

See same case below, 71 Pac. 954.

The facts are stated in the opinion.

Mr. Marsden C. Burch argued the cause and filed a brief for appellant:

The regulation promulgated by the Secretary of the Interior, that no timber cut from unsurveyed mineral lands can be used for smelting purposes, is within the authority granted to him by the act of June 3, 1878.

Northern P. R. Co. v. Lewis, 162 U. S. 376, 40 L. ed. 1006, 16 Sup. Ct. Rep. 831; *United States v. Williams*, 6 Mont. 379, 12 Pac. 851. See *Williams v. United States*, 138 U. S. 514, 524, 34 L. ed. 1026, 1031, 11 Sup. Ct. Rep. 457; *Marshall Field & Co. v. Clark*, 143 U. S. 649, 680, 692, 36 L. ed. 294, 306, 309, 12 Sup. Ct. Rep. 495; *Caha v. United States*, 152 U. S. 211, 218, 220, 38 L. ed. 415, 417, 418, 14 Sup. Ct. Rep. 513; *Re Kollock*, 165 U. S. 526, 41 L. ed. 813, 17 Sup. Ct. Rep. 444; *United States v. Ormsbee*, 74 Fed. 207; *United States v. Moline*, 82 Fed. 592; *Wilkins v. United States*, 37 C. C. A. 588, 96 Fed. 837; *Dastervignes v. United States*, 58 C. C. A. 346, 122 Fed. 30; *Cincinnati, W. & Z. R. Co. v. Clinton County*, 1 Ohio St. 77; *Locke's Appeal*, 72 Pa. 491, 13 Am. Rep. 716; *State ex rel. Port Royal Min. Co. v. Hagood (Port Royal Min. Co. v. Hagood)*, 30 S. C. 519, 3 L. R. A. 841, 9 S. E. 686.

The construction of an act of Congress by those charged with its execution should not be disregarded by the judiciary, unless the construction be clearly wrong.

United States v. Johnston, 124 U. S. 236, 31 L. ed. 389, 8 Sup. Ct. Rep. 446; *Heath v. Wallace*, 138 U. S. 573, 34 L. ed. 1063, 11 Sup. Ct. Rep. 380; *Hawley v. Diller*, 178 U. S. 476, 44 L. ed. 1157, 20 Sup. Ct. Rep. 986.

If there be a doubt as to the meaning of Congress, the construction given by the executive department should control.

Pennoyer v. McConaughy, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. Rep. 699; *United States v. Hill*, 120 U. S. 169, 30 L. ed. 627, 7 Sup. Ct. Rep. 510; *United States v. Philbrick*, 120 U. S. 52, 30 L. ed. 559, 7 Sup. Ct. Rep. 413.

Roasting ore is not a mining purpose.

Standard Dict. *Smelt*; Century Dict. *Smelt*.

"Mining," in its general sense, comprehends and includes the digging and searching

for precious and economic metals and minerals.

1 Snyder, Mines, § 134.

Statutes which grant property privileges are to be construed most strictly in favor of the government, and a use not unequivocally authorized by the language of the act must be excluded.

Sutherland, Stat. Constr. § 378; *Slidell v. Grandjean*, 111 U. S. 412, 437, 28 L. ed. 321, 329, 4 Sup. Ct. Rep. 475; *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 24, 49, 35 L. ed. 55, 64, 11 Sup. Ct. Rep. 478; *United States v. Dastervignes*, 118 Fed. 199; Endlich, Interpretation of Statutes, § 354.

Mr. Alfred B. Cruikshank argued the cause and filed a brief for appellee:

The phrase "domestic purposes," in the act, means the same as "local purposes."

United States v. Richmond Min. Co. 40 Fed. 415; *United States v. Copper Queen Consol. Min. Co.* 185 U. S. 495, 46 L. ed. 1008, 22 Sup. Ct. Rep. 761.

The roasting of ore is a mining purpose within the meaning of the act.

Encyclopedia Britannica, *Mining*.

The difference between roasting and smelting is not merely technical, but substantial. In smelting, a chemical change in the ore itself is produced; in roasting, there is no such process or result. Smelting includes fusion; roasting does not.

Webster, *Smelt*; *roast*; Worcester Dict. *Smelt*, *Roast*.

Mr. Justice McKenna delivered the opinion of the court:

Action brought by the United States against the appellee, which we shall call the copper company, for the sum of \$38,976.75, the value of timber cut and removed from certain unsurveyed mineral land in the territory of Arizona.

The timber or wood was alleged to have been cut by one Rafael Lopez, a resident and citizen of Arizona, and amounted to 6,496½ cords, of the value of \$6 per cord, or the sum of \$38,976.75.

It is alleged that the timber belonged to the United States, and "was used and consumed by the said defendant for the purpose of roasting ore at the United Verde Copper mines, said mines being the property of defendant herein, at Jerome, Yavapai county, Arizona territory, in violation of the act of Congress of June 3, 1878 [20 Stat. at L. 88, chap. 150, U. S. Comp. Stat. 1901, p. 1528], and of the rules and regulations of the Secretary of the Interior, promulgated under the authority of said act of Congress."

The copper company demurred to the complaint. The demurrer was sustained. The United States refused to amend, and judgment was entered for the copper company. It was affirmed by the supreme court of the territory.

Section 1 of the act of June 3, 1878, upon which the action is based, is as follows:

[211] "That all citizens of the United States, and other persons, bona fide residents of the state of Colorado or Nevada, or either of the territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, or Montana, and all other mineral districts of the United States, shall be, and are hereby, authorized and *permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States except for mineral entry, in either of said states, territories, or districts of which such citizens or persons may be at the time bona fide residents, subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes: *Provided*, The provisions of this act shall not extend to railroad corporations."

Section 2 makes it the duty of registers and receivers to ascertain whether any timber is being cut in violation of the provisions of the act, and, if so, to notify the Commissioner of the General Land Office thereof.

Section 3 makes violations of the act or of the rules and regulations made by the Secretary of the Interior misdemeanors, punishable by fine, not exceeding \$500, "to which may be added imprisonment for any term not exceeding six months."

Among the regulations promulgated by the Secretary of the Interior were the following:

"4. The uses for which the timber may be felled or removed are limited by the wording of the act to 'building, agricultural, mining, or other domestic purposes.'

"5. No timber is permitted to be felled or removed for purposes of sale or traffic, or to manufacture the same into lumber, or for any other use whatsoever, except as defined in § 4 of these rules and regulations.

"7. No timber is permitted to be used for smelting purposes, smelting being a separate and distinct industry from that of mining.

"10. These rules and regulations shall take effect February 15, 1900, and all existing rules and regulations heretofore *pre-
[212] 196 U. S.

scribed under said act by this Department are hereby rescinded."

The contention of the United States is that roasting ore is smelting, and that smelting is not a purpose permitted by the act of Congress, and is besides forbidden by the regulations of the Secretary of the Interior.

Roasting ore is defined by the supreme court of the territory in its opinion as follows:

"It is a matter of common knowledge that in this territory the roasting of ore at the mines from which it is taken is ordinarily accomplished by piling the ore and the wood mingled with it in piles in the open air, and by igniting the wood the fire is communicated to the sulphurous or other combustible ingredients in the ore, and thus, by the heat generated by its own combustion and that of the wood mingled with it, the volatile substances are driven off in vapor, smoke, and gases from the ore thus treated. By this treatment the ores that are extremely sulphid or highly charged with other volatile substances are relieved from a large portion thereof, and are the more readily treated by smelting or other processes of reduction, and besides require less fluxing material for such reduction, and are also lighter in weight, and for that reason, when shipped to other points for smelting or further treatment of any kind, cost less for freight."

The court distinguished this process from smelting, and decided that it is, in practice, a part of mining. It is a step, the court reasoned, in the extraction of the ore from the mine, and the separation of the ore from the rock enclosing it. Roasting ore, therefore, is preparation for smelting, but not smelting, which, according to all of the definitions, is something more than melting,—it is obtaining the metal by heat and such reagents as develop it. Roasting is done crudely in the open air by burning wood and ore mingled in a pile. Smelting is the function of an organized plant. But roasting ore, regarding the production of metal only, is a preliminary step to smelting, and counsel for the government makes much of *that circumstance. If this were [213] all that is necessary to consider, the deduction would be easy that wood used for roasting ores is used for smelting purposes.

But the dependence of industries, one upon another, does not make them the same, and the division of labor between them is not as marked in new as in old communities, having a more varied industrial development. Regarding, therefore, the conditions which existed in the mining states and territories, roasting ore was more

naturally a part of mining than of smelting. The assignment, however, is unimportant in the view we take of the statute, and whether roasting ore be considered a part of mining or of smelting, the use of timber for it has the sanction of the statute.

The statute provides "that all citizens of the United States . . . shall be and are hereby authorized and permitted to fell and remove for building, agricultural, mining, or other *domestic* purposes, any timber." The special enumeration of industries is "building, agricultural, and mining." But the permission of the statute is not confined to these. It extends to "other domestic purposes." The limitation of the other purposes is in the word "domestic."

Counsel for the government recognizes this, and substitutes for "domestic" the word "household," and contends that the word "other" should be treated as an intruder, and eliminated from the statute, and making the latter read that timber may be felled for "building, agricultural, mining, or *domestic* purposes." But we are not permitted to take such liberty with the statute if "domestic" has a meaning consistent with the intentional use of the word "other." It has such meaning. It may relate, it is true, to the household. But, keeping its idea of locality, it may relate to a broader entity than the household. We may properly and accurately speak of domestic manufactures, meaning not those of the household, but those of a county, state, or nation, according to the object in contemplation. So in the statute the word "domestic" applies to the locality to which the statute is

[214]directed, and *gives permission to the industries there practised to use the public timber. This definition of "domestic" gives the word an apt and sensible meaning, and we must regard the association of the word "other" with it as designed, not as accidental.

The statute was passed on in *United States v. Richmond Min. Co.* 40 Fed. 415, in 1889. In that case the United States sued in replevin for 10,000 bushels of charcoal made from wood which was cut on mineral land in the state of Nevada. The Richmond Mining Company was engaged in the business of mining, purchasing, and reduction of ores, and bought the charcoal "to be used in the reduction of ores and refining the product thereof." The court held that such use was a domestic purpose within the meaning of the statute. The court said that if reducing ores by melting or furnace process, and refining the bullion, is not properly a part of mining, "it is certainly incident to it, and closely connected with it." The court, however, did not dwell on

that point, but put its judgment in favor of the mining company upon the ground that reducing ores was "a domestic industry of the highest importance to the miner and to the public," and was within "the benefits conferred by the statute." It will be observed that the industry which was given the benefits of the statute was more than smelting in the strictest sense, and the decision was acquiesced in for eleven years by the Interior Department. It was a rule of rights and conduct for that time, and its overturn might involve civil liability for acts which were done under the sanction of the statute as judicially construed. We should hesitate, therefore, to reverse that construction, even if it were more doubtful than it is.

But the government relies on the rules and regulations of the Secretary of the Interior, promulgated under, as it is contended, the authority of the statute since *United States v. Richmond Min. Co.* was decided. No. 7 of those regulations provides that "no timber is permitted to be used for smelting purposes, smelting being a separate and distinct industry from that of mining." By this the Secretary of the Interior may *have intended to supersede the [215] ruling in *United States v. Richmond Min. Co.*, but to which industry the roasting of ore shall be assigned the Secretary does not say, and the considerations which we have expressed apply as well to the regulation as to the statute. But there is a more absolutely fatal objection to the regulation. The Secretary of the Interior attempts by it to give an authoritative and final construction of the statute. This, we think, is beyond his power. Smelting may be a separate industry from mining, but that does not deprive it of the license given by the statute. As we have already said, the general clause, "*other domestic purposes*," is as much a grant of permission to the industries designated by it to use timber as though they had been especially enumerated, and their rights are as inviolable as the rights of the industries which are enumerated. The industries meant by the general clause may receive indeed limitation from those enumerated; in other words, be limited to the conditions existing in the mining states and territories when the statute was enacted; but there can be no doubt that smelting has such relation. If rule 7 is valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. If he can define one term, he can another. If he can abridge, he can enlarge. Such power is not regulation: it is legislation. The power of legislation was certainly not intended to be conferred upon the Secretary. Congress has selected the industries to which its license is

given, and has intrusted to the Secretary the power to regulate the exercise of the license, not to take it away. There is, undoubtedly, ambiguity in the words expressing that power, but the ambiguity should not be resolved to take from the industries designated by Congress the license given to them, or invest the Secretary of the Interior with the power of legislation. The words of the statute are that the felling and use of timber by the industries designated shall be "subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such [216] lands, and for other purposes." *The ambiguity arises from the words which we have italicized. They express a purpose different from the protection of the timber and undergrowth, but they cannot, we repeat, be extended to grant a power to take from the industries designated, whether by the general clause or the specific enumeration, the permission given by Congress.

Judgment affirmed.

Mr. Justice **Brown**, dissenting:

I am unable to concur in the construction put by the court upon the statute of June 3, 1878. Bearing in mind that the policy of the government has been to preserve its rapidly diminishing areas of forest lands for the benefit of the whole people, any statute which permits timber to be cut by individuals should be narrowly construed.

In my view, the license given to citizens of the United States and residents of the states and territories named, "to fell and remove, for building, agricultural, mining, or other domestic purposes," timber and trees growing upon the public lands, should be confined to timber intended to be used for structural or household purposes, and not be extended so far as to authorize the consumption of timber in manufacturing or other business operations. The word "building" explains itself. "Agriculture" would include timber used for houses, barns, tools, furniture, and fences. The word "mining" was doubtless intended to include not only the buildings necessary for mining operations, but such timber as is used in shoring up the walls of the mine, and perhaps, also, in operating the hoisting engines; but not that used for consumption in the treatment of ores.

It is true the words "other domestic purposes" are susceptible of two constructions. The word "domestic," when used in connection with the words "commerce, manufactures, or industries," is significant of locality, and is contradistinguished from "foreign;" but when used in connection with the

gous to "household." The difficulty with the former construction is that it practically liberates the word from all restrictions. If it be construed as referring to locality, what is the locality to which it should be confined? Is it the immediate neighborhood, township, county, or state, or may it be given the same construction as given to it in connection with the words commerce or manufacturing, and be extended to the whole United States? If either of these constructions were possible, it would result in the destruction of all timber standing upon public mineral lands, as well as in an unfair discrimination against those less favorably situated, who are compelled to pay for the fuel consumed in the treatment of ores. I do not think the word "other" can be used as an enlargement of the word "domestic," and that it should be confined, as are the preceding words, to timber used for other analogous structural purposes and for household consumption,—in short, to other purposes domestic in their character.

For these reasons I am constrained to dissent from the opinion of the court.

I am authorized to state that Mr. Justice **Harlan** and Mr. Justice **Peckham** concur in this dissent.

UNION STOCK YARDS COMPANY OF OMAHA

v.

CHICAGO, BURLINGTON, & QUINCY RAILROAD COMPANY.

(See S. C. Reporter's ed. 217-228.)

Negligence — contribution among wrongdoers.

A terminal company whose negligence toward one of its employees in failing, by a proper inspection, to discover a defective brake on a car delivered to it by a railroad company has been established by a competent tribunal, cannot enforce contribution or recover indemnity from the railroad company because of the latter's like neglect of duty.

[No. 100.]

Argued December 14, 15, 1904. Decided January 9, 1905.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Eighth Circuit, presenting a question as to the liability of a railroad company which

NOTE.—As to contribution between wrongdoers—see notes to *Smith v. Ayrault*, 1 L. R. A. 313; *Memphis & C. R. Co. v. Greer*, 4 L. R. A. 859; and *Boston v. Simmons*, 6 L. R. A. 630.

has delivered a car in bad order to a terminal company, to indemnify the latter for damages which it has been compelled to pay to one of its employees because of its negligence in failing properly to inspect the car. *Answered in the negative.*

Statement by Mr. Justice Day:

This case comes here on the certificate of the United States circuit court of appeals for the eighth circuit. The facts embodied therein are: The circuit court of the United States, sitting at Omaha, Neb., sustained a demurrer to the petition of the plaintiff in error against the defendant in error. The facts stated in the petition, in substance, are as follows:

"The plaintiff, the stock yards company, is a corporation which owns stock yards at South Omaha, Nebraska, railroad tracks appurtenant thereto, and motive power to operate cars for the purpose of switching them to their ultimate destinations in its yards from a transfer track which connects its tracks with the railways of the defendant, the Burlington company. The Burlington company is a railroad corporation engaged in the business of a common carrier of freight and passengers. The defendant places the cars destined for points in the plaintiff's yards on the transfer track adjacent to the premises of the plaintiff, and the latter hauls them to their points of destination in its yards for a fixed compensation, which is paid to it by the defendant. The plaintiff receives no part of the charge to the shipper for the transportation of the cars, but the defendant contracts with the shipper to deliver the cars to their places of ultimate destination in the plaintiff's yards, and receives from the shipper the compensation therefor. The defendant delivered to the plaintiff upon the transfer track a refrigerator car of the Hammond Packing Company, used by the defendant to transport the meats of that company, to be delivered to that company by the plaintiff in its stock yards. This car was in bad

[219] order, in that the nut above the wheel upon the brake staff was not fastened to the staff, although it covered the top of the staff, and rested on the wheel as though it was fastened thereto, and this defect was discoverable upon reasonable inspection. The plaintiff undertook to deliver the car to the Hammond company, and sent Edward Goodwin, one of its servants, upon it for that purpose, who, by reason of this defect, was thrown from the car and injured while he was in the discharge of his duty. He sued the plaintiff, and recovered a judgment in one of the district courts of Nebraska for the damages which he sustained by his fall, on the ground that it was caused by the

negligence of the stock yards company in the discharge of its duty of inspection to its employee. This judgment was subsequently affirmed by the supreme court of Nebraska (*Union Stock-Yards Co. v. Goodwin*, 57 Neb. 138, 77 N. W. 357), and was paid by the plaintiff."

Upon this certificate the circuit court of appeals propounds the following question:

"Is a railroad company which delivers a car in bad order to a terminal company, that is under contract to deliver it to its ultimate destination on its premises for a fixed compensation, to be paid to it by the railroad company, liable to the terminal company for the damages which the latter has been compelled to pay to one of its employees on account of injuries he sustained while in the customary discharge of his duty of operating the car, by reason of the defect in it, in a case in which the defect is discoverable upon reasonable inspection?"

Mr. Frank T. Ransom argued the cause and filed a brief for the stock yards company:

Where one of several persons answerable for a negligent act or condition which he has not joined in or created has been compelled to respond in damages for such act or condition, he may have redress against the others.

Gray v. Boston Gaslight Co. 114 Mass. 149, 19 Am. Rep. 324; *Lowell v. Boston & L. R. Corp.* 23 Pick. 24, 34 Am. Dec. 33; *Cooley*, Torts, 1st ed. p. 144; *Bishop*, Non-Contract Law, § 535; *Carterville v. Cook*, 16 Am. St. Rep. 254, note, 129 Ill. 152, 4 L. R. A. 721, 22 N. E. 14; *Acheson v. Miller*, 2 Ohio St. 202, 59 Am. Dec. 663; *Adamson v. Jarvis*, 4 Bing. 66; *Betts v. Gibbins*, 2 Ad. & El. 57; *Farwell v. Becker*, 129 Ill. 261, 6 L. R. A. 400, 16 Am. St. Rep. 267, 21 N. E. 792; *Minneapolis Mill Co. v. Wheeler*, 31 Minn. 121, 16 N. W. 698.

The rule that wrongdoers cannot have contribution or redress against each other is confined to cases where the plaintiff is presumed to have known he was doing a wrongful act.

Bishop, Non-Contract Law, 56, 535; *Vandiver v. Pollak*, 97 Ala. 467, 19 L. R. A. 628, 12 So. 473; *Block v. Estes*, 92 Mo. 318, 4 S. W. 731; *Scofield v. Gaskill*, 60 Ga. 277; *Owen v. McGehee*, 61 Ala. 440; *Armstrong County v. Clarion County*, 66 Pa. 218, 5 Am. Rep. 368; *Jacobs v. Pollard*, 10 Cush. 287, 57 Am. Dec. 105; *Cooley*, Torts, 148; *Pollock*, Torts, 171; *Horbach v. Elder*, 18 Pa. 33; *Farwell v. Becker*, 129 Ill. 261, 6 L. R. A. 400, 16 Am. St. Rep. 267, 21 N. E. 792.

Nor does the rule apply to a person made a wrongdoer by inference of law.

See *Merryweather v. Nixon*, 2 Smith, Lead.

Cas. 456-460; *Pearson v. Skelton*, 1 Mees. & W. 504; *Adamson v. Jarvis*, 4 Bing. 66.

Where the neglect is joint,—as, where it consists of the omission of a duty which each of the parties was equally bound, both in law and in good conscience, to discharge,—each is entitled to contribution from the other.

Carterville v. Cook, 16 Am. St. Rep. 257, note, 129 Ill. 152, 4 L. R. A. 721, 22 N. E. 14; *Armstrong County v. Clarion County*, 66 Pa. 218, 5 Am. Rep. 368; *Ankeny v. Moffett*, 37 Minn. 109, 33 N. W. 320.

In Nebraska the rule has been declared to be that, in determining whether one joint wrongdoer is entitled to contribution from another, the test is whether the former knew, at the time of the commission of the act for which he has been compelled to respond, that such act was wrongful.

Johnson v. Torpy, 35 Neb. 604, 37 Am. St. Rep. 447, 53 N. W. 575; *Ankeny v. Moffett*, 37 Minn. 109, 33 N. W. 320.

Mr. Charles J. Greene argued the cause and filed a brief for the Chicago, Burlington, & Quincy Railroad Company.

Mr. Justice Day delivered the opinion of the court:

We take it that this inquiry must be read, in the light of the statement accompanying it. While instruction is asked broadly as to the liability of the railroad company to the terminal company, for damages which the latter has been compelled to pay to one of its own employees on account of injuries sustained, it is doubtless meant to limit the inquiry to cases wherein such recovery was had because of the established negligence of the terminal company in the performance of the specific duty stated, and which it owed to the employee. For it must be taken as settled that the terminal company was guilty of negligence after it received the car in question, in failing to perform the duty of inspection required of it as to its own employee. The case referred to in the certificate (*Union Stock-Yards Co. v. Goodwin*, 57 Neb. 138, 77 N. W. 357) is a final adjudication between the terminal [223] company and the employee, *and it therein appears that the liability of the company was based upon the defective character of the brake, which defect a reasonably careful inspection by a competent inspector would have revealed, and it was held that in permitting the employee to use the car without discovering the defect the company was rendered liable to him for the damages sustained. We have, therefore, a case in which the question of the plaintiff's negligence has been established by a competent tribunal, and the inquiry here is, may the terminal company recover contribution, or, more

strictly speaking, indemnity, from the railroad company because of the damages which it has been compelled to pay under the circumstances stated?

Nor is the question to be complicated by a decision of the liability of the railroad company to the employee of the terminal company, had the latter seen fit to bring the action against the railroad company alone, or against both companies jointly. There seems to be a diversity of holding upon the subject of the railroad company's liability under such circumstances, in courts of high authority.

In *Moon v. Northern P. R. Co.* 46 Minn. 106, 24 Am. St. Rep. 194, 48 N. W. 679, and *Pennsylvania R. Co. v. Snyder*, 55 Ohio St. 342, 60 Am. St. Rep. 700, 45 N. E. 559, it was held that a railroad company was liable to an employee of the receiving company who had been injured on the defective car while in the employ of the latter company when, under a traffic arrangement between the companies, the delivering company had undertaken to inspect the cars upon delivery, and, as in the *Moon Case*, where there was a joint inspection by the inspectors of both companies. This upon the theory that the negligence of the delivering company, when it was bound to inspect before delivery, was the primary cause of the injury, notwithstanding the receiving company was also guilty of an omission to inspect the car before permitting an employee to use the same.

A different view was taken in the case of *Glynn v. Central R. Co.* 175 Mass. 510, 78 Am. St. Rep. 507, 56 N. E. 698, in which the opinion was delivered by Mr. Justice Holmes, then chief justice of Massachusetts, *in which it was held that, as the car, after [224] coming into the hands of the receiving company, and before it had reached the place of the accident, had crossed a point at which it should have been inspected, the liability of the delivering company for the defect in the car, which ought to have been discovered upon inspection by the receiving company, was at an end. A like view was taken by the supreme court of Kansas in the case of *Missouri, K. & T. R. Co. v. Merrill*, 65 Kan. 436, 59 L. R. A. 711, 93 Am. St. Rep. 287, 70 Pac. 358, reversing its former decision in the same case reported in 61 Kan. 671, 60 Pac. 819. But we do not deem the determination of this question necessary to a decision of the present case.

Coming to the very question to be determined here, the general principle of law is well settled that one of several wrongdoers cannot recover against another wrongdoer, although he may have been compelled to pay all the damages for the wrong done. In many instances, however, cases have been

taken out of this general rule, and it has been held inoperative in order that the ultimate loss may be visited upon the principal wrongdoer, who is made to respond for all the damages, where one less culpable, although legally liable to third persons, may escape the payment of damages assessed against him by putting the ultimate loss upon the one principally responsible for the injury done. These cases have, perhaps, their principal illustration in that class wherein municipalities have been held responsible for injuries to persons lawfully using the streets in a city, because of defects in the streets or sidewalks caused by the negligence or active fault of a property owner. In such cases, where the municipality has been called upon to respond because of its legal duty to keep public highways open and free from nuisances, a recovery over has been permitted for indemnity against the property owner, the principal wrongdoer, whose negligence was the real cause of the injury.

[225] Of this class of cases is *Washington Gaslight Co. v. District of Columbia*, 161 U. S. 316, 40 L. ed. 712, 16 Sup. Ct. Rep. 564, in which a resident of the city of Washington had been injured by an open gas box, placed and *maintained on the sidewalk by the gas company, for its benefit. The District was sued for damages, and, after notice to the gas company to appear and defend, damages were awarded against the District, and it was held that there might be a recovery by the District against the gas company for the amount of damages which the former had been compelled to pay. Many of the cases were reviewed in the opinion of the court, and the general principle was recognized that, notwithstanding the negligence of one, for which he has been held to respond, he may recover against the principal delinquent where the offense did not involve moral turpitude, in which case there could be no recovery, but was merely *malum prohibitum*, and the law would inquire into the real delinquency of the parties, and place the ultimate liability upon him whose fault had been the primary cause of the injury. The same principle has been recognized in the court of appeals of the state of New York in *Oceanic Steam Nav. Co. v. Compañia Transatlantica Española*, 134 N. Y. 461, 30 Am. St. Rep. 635, 31 N. E. 897, the second proposition of the syllabus of the case being:

"Where, therefore, a person has been compelled, by the judgment of a court having jurisdiction, to pay damages caused by the negligence of another, which ought to have been paid by the wrongdoer, he may recover of the latter the amount so paid, unless he

was a party to the wrong which caused the damage."

In a case cited and much relied upon at the bar (*Gray v. Boston Gaslight Co.* 114 Mass. 149, 19 Am. Rep. 324), a telegraph wire was fastened to the plaintiff's chimney without his consent, and, the weight of the wire having pulled the chimney over into the street, to the injury of a passing traveler, an action was brought against the property owner for damages, and notice was duly given to the gas company, which refused to defend. Having settled the damages at a figure which the court thought reasonable, the property owner brought suit against the gas company, and it was held liable. In the opinion the court said:

*"When two parties, acting together, com-[226] mit an illegal or wrongful act, the party who is held responsible in damages for the act cannot have indemnity or contribution from the other, because both are equally culpable or *participes criminis*, and the damage results from their joint offense. This rule does not apply when one does the act or creates the nuisance, and the other does not join therein, but is thereby exposed to liability and suffers damage. He may recover from the party whose wrongful act has thus exposed him. In such case the parties are not in *pari delicto* as to each other, though, as to third persons, either may be held liable."

In a later case in Massachusetts (*Boston Woven Hose & Rubber Co. v. Kendall*, 178 Mass. 232, 51 L. R. A. 781, 86 Am. St. Rep. 478, 53 N. E. 657), it was held that a manufacturer of an iron boiler known as a vulcanizer, which had been furnished upon an order which required a boiler which would stand a pressure of 100 pounds to the square inch, which order was accordingly accepted, the manufacturer undertaking to make the boiler in a good and workmanlike manner, but which, because of a defect, in that the hinge of the door was constructed in such a way that it did not press tight enough against the face of the boiler to stand a pressure of 75 pounds, at which pressure the packing blew out and allowed the naphtha vapor to escape, was liable for the damages which the hose company had been compelled to pay to one of its employees, injured by the accident, although the defect might have been discovered upon reasonable inspection by the hose company. In that case the boiler was sold upon a warranty. As was said by Mr. Chief Justice Holmes, delivering the opinion of the court:

"The very purpose of the warranty was that the boiler should be used in the plain-

tiff's works with reliance upon the defendants' judgment in a matter as to which the defendants were experts and the plaintiff presumably was not. Whether the false warranty be called a tort or a breach of contract, the consequences which ensued must be taken to have been contemplated and were not too remote. The fact that the reliance *was not justified as toward the men does not do away with the fact that the defendants invited it, with notice of what might be the consequences if it should be misplaced, and there is no policy of the law opposed to their being held to make their representations good."

Other cases might be cited which are applications of the exception engrafted upon the general rule of noncontribution among wrongdoers, holding that the law will inquire into the facts of a case of the character shown, with a view to fastening the ultimate liability upon the one whose wrong has been primarily responsible for the injury sustained. In the present case there is nothing in the facts as stated to show that any negligence or misconduct of the railroad company caused the defect in the car which resulted in the injury to the brakeman. That company received the car from its owner, the Hammond Packing Company, whether in good order or not the record does not disclose. It is true that a railroad company owes a duty of inspection to its employees as to cars received from other companies as well as to those which it may own. *Baltimore & P. R. Co. v. Mackey*, 157 U. S. 73, 39 L. ed. 624, 15 Sup. Ct. Rep. 491. But in the present case the omission of duty for which the railroad company was sought to be held was the failure to inspect the car with such reasonable diligence as would have discovered the defect in it. It may be conceded that, the railroad company having a contract with the terminal company to receive and transport the cars furnished, it was bound to use reasonable diligence to see that the cars were turned over in good order, and a discharge of this duty required an inspection of the cars by the railroad company upon delivery to the terminal company. But that the terminal company owed a similar duty to its employees, and neglected to perform the same, to the injury of an employee, has been established by the decision of the supreme court of Nebraska, already referred to.

The case then stands in this wise: The railroad company and the terminal company have been guilty of a like neglect of duty in failing to properly inspect the car before [228] putting it in *use by those who might be injured thereby. We do not perceive that, because the duty of inspection was first re-

quired from the railroad company, that the case is thereby brought within the class which hold the one primarily responsible, as the real cause of the injury, liable to another less culpable, who may have been held to respond for damages for the injury inflicted. It is not like the case of the one who creates a nuisance in the public streets; or who furnishes a defective dock; or the case of the gas company, where it created the condition of unsafety by its own wrongful act; or the case of the defective boiler, which blew out because it would not stand the pressure warranted by the manufacturer. In all these cases the wrongful act of the one held finally liable created the unsafe or dangerous condition from which the injury resulted. The principal and moving cause, resulting in the injury sustained, was the act of the first wrongdoer, and the other has been held liable to third persons for failing to discover or correct the defect caused by the positive act of the other.

In the present case the negligence of the parties has been of the same character. Both the railroad company and the terminal company failed, by proper inspection, to discover the defective brake. The terminal company, because of its fault, has been held liable to one sustaining an injury thereby. We do not think the case comes within that exceptional class which permits one wrongdoer who has been mulcted in damages to recover indemnity or contribution from another.

For the reasons stated, *the question propounded will be answered in the negative.*

*LUTHER CLAY SLAVENS, *Appt.*, [229]
v.

UNITED STATES.

(See S. C. Reporter's ed. 229-238.)

Postoffice—mail contracts—right of Postmaster General to terminate—extra services.

1. The Postmaster General may cancel a mail contract, the service under which has been materially decreased by using street cars to carry mail, in the exercise of his authority under the contract and U. S. Postal Laws and Regulations, § 817, to increase, decrease, or extend the service contracted for without change of pay, and to discontinue the entire service whenever the public interests, in his judgment, require it.
2. A change of service under a mail contract by directing the carrying of the mails to and from street cars at certain street crossings is fairly within the power reserved by the contract in the Postmaster General to order, without additional compensation, any additional service caused by change of location of postoffice, stations, or landings, or by the

establishment of others than those existing at the time of the contract, or rendered necessary, in his judgment, from any cause, and to change the schedule, vary the routes, increase, decrease, or extend the service without change of pay.

3. A contractor for carrying the mails is not entitled to extra compensation for services outside the terms of his contract which were performed in compliance with the unauthorized demand of the local postmaster, where, upon protest to the Postmaster General, the contractor was promptly relieved from such services, and another contract was made for their performance.

[No. 228.]

Argued December 7, 8, 1904. Decided January 9, 1905.

A PPEAL from the Court of Claims to review a judgment dismissing a petition to recover for the alleged wrongful termination of certain mail contracts and for extra services performed in connection therewith. *Affirmed.*

See same case below, 38 Ct. Cl. 574.

Statement by Mr. Justice **Day**:

The appellant filed his petition in the court of claims to recover for the alleged wrongful termination of certain mail contracts in the cities of Boston, Brooklyn, and Omaha; and, also, for extra services performed in connection therewith. The court of claims, in disposing of the case, made separate findings of fact and conclusions of law. The findings of fact may be abridged for the purpose of this case, reference being made for fuller details to the findings in the court of claims. 38 Ct. Cl. 574. In pursuance of an advertisement for proposals for transporting the mails,—“covered regulation wag-
[230] on, mail, *messenger, and mail station service,”—the appellant entered into contracts for four years each for the cities of Boston and Brooklyn, and two years for the city of Omaha. The Boston and Brooklyn contracts began on July 1, 1893, and the Omaha contract on July 1, 1894. Compensation for the Boston contract was at the rate of \$49,516 per annum; for the Brooklyn contract, \$18,934 per annum; and for the Omaha contract at \$3,780 per annum. During the terms of the Boston and Brooklyn contracts the Postmaster General determined to carry certain of the mails within the district contracted for on electric street-railway lines. In both cases the appellant was offered the privilege of continuing the contract for the reduced service, but refused to do so in each case. The Postmaster General terminated the Boston and Brooklyn contracts, above referred to, the former on

February 1, 1896, the latter on March 1, 1896, acting, as he avers, under the authority vested in him by law and the contract between the parties, but not because of any negligence or default on the part of the contractor. He afterwards relet the same service, as thus reduced, to another contractor, for the remaining period of the contract of the seventeen months of the Boston contract, at the compensation of \$37,000 per annum. The difference between the contract price and the amount it would cost the appellant to furnish the service in Boston during said seventeen months would be \$18,884.14. The service of the Brooklyn contract for the remaining period of sixteen months was let to another contractor at a compensation of \$9,720 per annum. The court did not find the amount of the loss to the appellant by reason of the termination of this contract. The contracts contained certain stipulations, as set forth in the opinion.

The contracts covered certain specified stations, landings, and mail stations from which the contractor was required to carry the mail, and during the terms of such contracts he was required to perform certain services, which he alleges to be extra services, and for which he was entitled to extra compensation,—in the Boston contract, carrying the mails from the general *postoffice, [231] in the city of Boston, to the stopping places of the street-car lines of the railway company from May 1, 1895, until February 1, 1896. Also, carrying the mails between the Back Bay postoffice and the Brookline office, a distance of from 2½ to 3 miles, which services were not included in the terms of the contract, but which he was required to perform by the postmaster of the city of Boston, against his protest. The contractor did not protest to the Postmaster General or any officer of the Postoffice Department until August 14, 1894. Whereupon the Postmaster General dispensed with the service by the appellant, and entered into a contract with another contractor to perform the service.

Under the Brooklyn contract, which contained specifications as to the places between which the mail had to be carried during the term of the contract, the contractor was required to perform service between the Brooklyn postoffice and the mail routes established on the street-car lines, and between the motor routes and the mail stations. Under the Omaha contract appellant was required, in addition to the places specifically named in the contract, to carry the mail to and from street cars of the Omaha Street Railway at its crossings. It also appears that under the three contracts the new service required, in lieu of the service

specified in the contract, was much less in mileage required than was the service stipulated by the original contract. The court of claims dismissed the petition (38 Ct. Cl. 574), and the claimant appeals to this court.

Mr. A. A. Hoehling, Jr., argued the cause and filed a brief for appellant.

Mr. Joseph Stewart argued the cause, and, with *Assistant Attorney General Pradt*, filed a brief for appellee.

Mr. Justice Day delivered the opinion of the court:

From the foregoing statement of facts it is [232] evident that the *case resolves itself into three propositions: (1) Can the appellant recover for the alleged wrongful termination of his contracts by the Postmaster General? (2) Under the contracts were the services performed in carrying mails from street cars, at the places designated, extra services, for which compensation outside of the contract should be awarded? (3) Under the Boston contract did the service required in carrying the mails to and from Brookline constitute extra service, for which compensation should be awarded?

To determine the first proposition it is essential to have in mind certain provisions of the statute, the preliminary notice to bidders, and, most important of all, the terms of the contract itself. In the notice to bidders it is said:

"There will be no diminution of compensation for partial discontinuance of service or increase of compensation for new, additional, or changed service that may be ordered during the contract term; but the Postmaster General may discontinue the entire service on any route whenever the public interest, in his judgment, shall require such discontinuance, he allowing, as full indemnity to the contractor, one month's extra pay."

In the contract it is stipulated:

"It is hereby stipulated and agreed by the said contractor and his sureties that the Postmaster General may change the schedule and termini of the route, vary the routes, increase, decrease, or extend the service thereon, without change of pay; and that the Postmaster General may discontinue the entire service whenever the public interest, in his judgment, shall require such discontinuance; but for a total discontinuance of service the contractor shall be allowed one month's extra pay as full indemnity."

Section 817, Postal Laws and Regulations, 1887, provides:

"The Postmaster General may discontinue or curtail the service on any route, in whole

or in part, in order to place on the route superior service, or whenever the public interests, *in his judgment, shall require such [233] discontinuance or curtailment for any other cause, he allowing as full indemnity to the contractor one month's extra pay on the amount or service dispensed with, and a *pro rata* compensation for the amount of service retained and continued."

Under the power supposed to be conferred upon him by the terms of the contract, made in pursuance of the preliminary advertisement and the authority vested in him by the Postal Laws and Regulations, above cited, the Postmaster General, having decreased the service under the contract, by reason of the introduction of the method of carrying the mails on the street railways, until the service required originally would be much more than paid for by the compensation agreed upon, discontinued the original service, and, the contractor declining to perform the work remaining at the lower compensation, put an end to the contract by an order of discontinuance, allowing the contractor one month's extra pay as full indemnity. It is contended by the appellant that this contract, properly construed, while it permits the Postmaster General to make changes in the schedule and termini of the route, to reduce the same, to increase, decrease, or extend the service, without change of pay, does not confer the right to cancel the contract except upon abandoning the entire service, which may be done with the allowance of one month's extra pay to the contractor. But, it is insisted, so long as any part of the service remains to be performed, it is not within the power of the Postmaster General to put an end to the service of the contractor, and relet a part of it to another, substituting a different character of service for a part of the field theretofore covered by the contract. In other words, it is contended that the total discontinuance of service, which only can terminate the contract, must not leave any service to be performed in the district covered.

We cannot accede to this narrow construction of the powers given the Postmaster General by the terms of this contract. He is given general power to increase, decrease, or extend the *service contracted for, [234] without change of pay. Furthermore, whenever the public interests in his judgment require it, he may discontinue the entire service. We think the advertisement and the regulations under which this contract was made and the contract, as entered into, were intended to permit the Postmaster General, when, in his judgment, the public interest requires it, to terminate the contract, and, if a service of a different character has be-

come necessary in his opinion, to put an end to the former service upon the stipulated indemnity of one month's extra pay being given to the contractor. It is not reasonable to hold that the power given to the Postmaster General for the public interest can only be exercised when the mail service in the district is to be entirely abandoned. In the present case the contract was for mail service in three cities of importance, two of them among the large cities of the country, and all of them thriving and growing communities. It is hardly possible that the parties, in making this contract, could have had in view a time when the mail service would be dispensed with. On the other hand, the condition which the contract contemplated, and which in fact arose, made it desirable to extend to this district the use of street railways to carry the mails, with which to improve the facilities for mail delivery.

The authority given to the Postmaster General is broad and comprehensive, requiring him to exercise his judgment to end the service, and thereby terminate the contract, whenever the public interest shall demand such a change. In that event the contractor takes the risk that the exercise of this authority might leave him only the indemnity stipulated for,—one month's extra pay. We are not called upon to say in this case that the Postmaster General, merely for the purpose of reletting the contract at a lower rate, may advertise and relet precisely the same service for the purpose of making a more favorable contract for the government, no change having arisen in the situation except the desire for a better bargain. And it may readily be conceived that, in some instances, there may be such a diminution of the service contracted for in the district, by reason of the substitution of new and improved methods, as will render the compensation agreed upon altogether disproportionate to the services left to be rendered, and thereby invoking the authority of the Postmaster General to exercise the power reserved to him to terminate the contract. In the present case the findings of fact do not disclose a case of the arbitrary exercise of power. A new means of service within the district by means of the street railway was deemed by the Postmaster General to be required in the public interest. This necessitated the cutting down of the former service to make way for the new, and the Postmaster General exercised the power given him under the contract, and put an end to the service and the contract. If the contention of the appellant is to be sustained, while in the present case the street-railway service was not a large proportion of the total service required, the same argument,

carried to its legitimate conclusion, would prevent the Postmaster General from taking advantage of this stipulation, although it was manifest that a large proportion, maybe practically all, of the service could be better rendered to the public by substituting the new method, leaving only a small part of the old service to be rendered. In this contingency, as construed by the appellant, the contract price must still be paid, notwithstanding the changed conditions. These contracts were made for a term of years,—two for four years and one for two years. It is insisted that the construction contended for by the government practically puts the contractor into the power of the Postmaster General, and makes the stipulation, in substance, an agreement upon his part to do whatever that officer may require. The obvious answer to this contention is that the contractor is not obliged to carry on the contract when the Postmaster General elects to cancel it. Such action puts an end to the obligations of the contractor as well as the government. Under the postal regulations, it appears that the contractor is given the opportunity to perform the reduced service at a lower rate. This he was not obliged *to do, and, in[236] the present case, declined to undertake. Our conclusion is that, acting in good faith, of which there is every presumption in favor of the conduct of so important a department of the government, the Postmaster General may, as was done in this case, discontinue the service, and thereby put an end to the contract, when the public interest, of which he is the sole judge, authorizes such action.

This view of the contract renders it unnecessary to consider at length the provisions of § 817 of the Postal Laws and Regulations, above quoted. It is urged that this section applies more particularly to star route and steamboat service, but the provisions of the law are broad and comprehensive, and not limited by the terms of the act to such specific service, but the power is given the Postmaster General whenever, in his judgment, the public interest shall require, to discontinue or curtail the same, giving the contractor as indemnity one month's extra pay. Speaking of the action authorized under § 263 of the former rules and regulations, this court, in *Garfield v. United States*, 93 U. S. 242-246, 23 L. ed. 779, said:

"There was reserved to the Postmaster General the power to annul the contract when his judgment advised that it should be done, and the compensation to the contractor was specified. An indemnity agreed upon as the amount to be paid for canceling a contract must, we think, afford the meas-

ure of damages for illegally refusing to award it."

And upon similar contract stipulations this court, in *Chicago & N. W. R. Co. v. United States*, 104 U. S. 680, 684, 26 L. ed. 891, 892, said:

"It is true that, under this reservation, the Postmaster General would be authorized to discontinue the entire service contemplated by the contract, and the practical effect of that would be to terminate the contract itself on making the indemnity specified."

As to the other claim for extra services: In the stipulation of the contracts, it appears that the contractor was required to perform all new or additional or changed [237] covered wagon *mail station service that the Postmaster General should order, without additional compensation, whether caused by change of location of postoffice, stations, or landings, or by the establishment of others than those existing at the time of the contract, or rendered necessary in the judgment of the Postmaster General from any cause, and that officer has the right to change the schedule, vary the routes, increase, decrease, or extend the service without change of pay. It is insisted that these stipulations, properly construed, permit the Postmaster General to require only additional service of the same kind as that stipulated for, and that the carrying of the mails from street cars, where the same might be ordered to be met at crossings, was a new and different kind of service, and was not a change caused by a different location of a postoffice, station, or landing within the meaning of the contract. But we think this is too narrow a construction of the terms of the agreement. Strictly speaking, the carrying of the mails from the street cars at the crossings is not taking them from the stations, but it practically amounts to the same thing. It imposes no additional burden upon the contractor; indeed, the findings of fact show that it greatly decreased his burden by lessening the number of miles of carrying required. We think this change of service was fairly within the power reserved to the Postmaster General, and the right given to him to designate such changes in the services as the public interest might require in the performance of this contract. It is true that if these services were not within the terms of the contract, and if they were of a different character, the fact that they greatly decreased the burden of the contractor might not require a disallowance of the claim for extra services. But we think the services were within the contract, fairly construed, and do not entitle the contractor to extra compensation.

In reference to the services rendered in 196 U. S.

Boston, required by the postmaster, between Back Bay station, in Boston, and the Brookline postoffice, outside the limits of the city of Boston, and not within the terms of the contract, it does not appear *that the [238] requirement of such service was made, except by the postmaster of the city of Boston, who had no authority, so far as we can discover, to require such service. When the claimant protested to the Postmaster General he was promptly relieved from the service, and another contract was made for the performance of the same.

It is said that this claim is in all respects like the one sustained by this court in *United States v. Otis*, 120 U. S. 115, 30 L. ed. 609, 7 Sup. Ct. Rep. 449, where the contractor was allowed extra compensation for carrying the mails across the Hudson river, from the Pennsylvania Railway depot at the foot of Cortlandt street, New York, to the depot of the same line in Jersey City, N. J., when the contract required him to carry the mails only to and from the depots in New York. In the opinion in that case Mr. Justice Blatchford said: "The United States directed the performance of this service." Presumably this was done by some one having the authority of the United States. In this case the court of claims has held, as we think rightly, that the postmaster, having no power or authority to contract in respect to the mail messenger service, was not the agent of the government for such service, and could not bind the government by his knowledge or acts in respect thereto. *Roberts v. United States*, 92 U. S. 41, 48, 23 L. ed. 646, 648; *Hume v. United States*, 132 U. S. 406, 33 L. ed. 393, 10 Sup. Ct. Rep. 134; *Whitsell v. United States*, 34 Ct. Cl. 5. As the additional service in this case was not required by the authorized agent of the government, we think the contractor is not entitled to extra compensation therefor.

Finding no error in the proceedings of the Court of Claims, its decision is affirmed.

*WESLEY E. TRAVIS, Appt.,
v.

[239]

UNITED STATES.

(See S. C. Reporter's ed. 239.)

Postoffice—mail contract—right of Postmaster General to terminate.

This case is governed by the decision in *Slavens v. United States*, ante, 457.

[No. 84.]

Argued December 7, 8, 1904. Decided January 9, 1905.

APPEAL from the Court of Claims to review a judgment dismissing a petition to recover for the alleged wrongful termination of a mail contract. *Affirmed.*

See same case below, 38 Ct. Cl. 590.

The facts are stated in the opinion.

Mr. A. A. Hoehling, Jr., argued the cause and filed a brief for appellant.

Mr. Joseph Stewart argued the cause, and, with *Assistant Attorney General Pradt*, filed a brief for appellee.

Mr. Justice Day delivered the opinion of the court:

This case was argued with *Slavens v. United States* (just decided), 196 U. S. 229, ante, 457, 25 Sup. Ct. Rep. 229. It involves the same question as to the right of the Postmaster General to terminate a mail contract. The court of claims dismissed the petition. 38 Ct. Cl. 590. For the reasons stated in the opinion in the *Slavens Case*, the judgment of the Court of Claims is affirmed.

MADISONVILLE TRACTION COMPANY,
Appt.,
v.

SAINT BERNARD MINING COMPANY.

(See S. C. Reporter's ed. 239-261.)

Courts — original jurisdiction of circuit court over eminent domain proceedings — removal of causes — time of removing.

1. A proceeding for the taking of land by eminent domain, authorized by Ky. Stat. §§ 835-839, to be begun in the courts of that state, is, where the requisite diversity of citizenship exists, a suit involving a controversy between citizens of different states, of which a Federal circuit court has original jurisdiction, and is therefore removable to that court when commenced in the state court.
2. The time for removing to a Federal circuit court, for diversity of citizenship, a proceeding for the taking of land by eminent domain, begun in a Kentucky county court, under the authority of Ky. Stat. §§ 835-839, is not postponed until after the case has been taken by appeal to a state circuit court, where

It can be tried *de novo*, inasmuch as under the state statute, the condemning party is entitled, even after such appeal, to pay into court the damages assessed in the county court, and, before the case is concluded in the higher court, to take possession of the land, and oust the owner.

[No. 362.]

Submitted November 28, 1904. Decided January 16, 1905.

APPEAL from the Circuit Court of the United States for the Western District of Kentucky to review a decree enjoining a further prosecution in the County Court of Hopkins county, in that state, of a condemnation proceeding in which a sufficient petition and bond had been filed to effect the removal of the case to a Federal circuit court for diversity of citizenship. *Affirmed.*

See same case below, 130 Fed. 794.

The facts are stated in the opinion.

Messrs. David W. Fairleigh and N. T. Crutchfield submitted the cause for appellant:

Condemnation proceedings prior to the judiciary act of 1887 were sometimes transferable from the state court in which they were pending into the circuit court of the United States. When the proceedings in the state court reached the point where nothing remained to be done but to inquire into and adjudge the amount of damages, then they became, at that time, a transferable controversy, and not before.

Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403, 25 L. ed. 206; *Searl v. School Dist. No. 2*, 124 U. S. 197, 31 L. ed. 415, 8 Sup. Ct. Rep. 460.

A cognate question arising out of the assessment of property for taxation was decided by this court in *Upshur County v. Rich*, 135 U. S. 467, 34 L. ed. 196, 10 Sup. Ct. Rep. 651.

The jurisdiction of the United States circuit courts on removal is now limited to suits of which they have original jurisdiction.

Tennessee v. Union & Planters' Bank, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654; *Mexican Nat. R. Co. v. Davidson*, 157 U. S. 201, 39 L. ed. 672, 15 Sup. Ct. Rep. 563.

NOTE.—As to diverse citizenship as ground of Federal jurisdiction—see *Shipp v. Williams*, 10 C. C. A. 247, and note; *Mason v. Dullaghan*, 27 C. C. A. 296, and note; *Scddon v. Virginia*, T. & C. Steel & I. Co. 1 L. R. A. 108, and note; and *Myers v. Murray, N. & Co.* 11 L. R. A. 216, and note. And see note to *Roberts v. Lewis*, 36 L. ed. U. S. 579.

On removal of causes generally from state to Federal courts, where the Constitution of the United States, or an act of Congress, or a treaty

comes in question—see note to *Little York Gold Washing & Water Co. v. Keyes*, 24 L. ed. U. S. 656. See also *Ferguson v. Ross*, 3 L. R. A. 322, and note, and *Austin v. Gagan*, 5 L. R. A. 476, and note.

As to when an application for the removal of a cause to the Federal court must be made—see notes to *Huskins v. Cincinnati, N. O. & T. P. R. Co.* 3 L. R. A. 546; *Bierbower v. Miller*, 9 L. R. A. 230; and *Brodhead v. Shoemaker*, 11 L. R. A. 569.

The right of eminent domain is distinctly and exclusively an attribute of government,—of sovereignty.

Kohl v. United States, 91 U. S. 371, 23 L. ed. 451.

Condemnation proceedings under the laws of Connecticut cannot be brought originally in the circuit court of the United States.

Hartford & C. W. R. Co. v. Montague, 94 Fed. 227.

Mr. **E. G. Sebree** submitted the cause for appellee.

Messrs. C. J. Waddill and Gordon & Gordon & Cox were on his brief:

Notwithstanding the prohibition of U. S. Rev. Stat. § 720, U. S. Comp. Stat. 1901, p. 581, a United States court has a right to enjoin a state court from interfering with its orders and decrees.

French v. Hay, 22 Wall. 253, 22 L. ed. 858; *Dietzsch v. Huidekoper* (*Kern v. Huidekoper*) 103 U. S. 494, 26 L. ed. 497.

When a case is removed to the United States circuit court, that court has a right to enjoin any further prosecution of it in the state court.

Wagner v. Drake, 31 Fed. 849.

The law has conferred on the county courts the right to act judicially in condemnation proceedings.

Portland & G. Turnp. Co. v. Bobb, 88 Ky. 230, 10 S. W. 794.

Where the other conditions prescribed by the Federal statutes exist, any action is removable in which a judicial question is pending before a state court authorized to exercise judicial function in such action.

Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403, 25 L. ed. 206; *Pacific Railroad Removal Cases* (*Union P. R. Co. v. Kansas*) 115 U. S. 1-25, 29 L. ed. 319-327, 5 Sup. Ct. Rep. 1113; *Searl v. School Dist. No. 2*, 124 U. S. 197, 31 L. ed. 415, 8 Sup. Ct. Rep. 460.

Mr. Justice **Harlan** delivered the opinion of the court:

The Madisonville Traction Company, a Kentucky corporation, having by its charter authority to construct an electric railroad, filed its application in the county court of Hopkins county, in that commonwealth, to condemn for its use certain lands belonging to the Saint Bernard Mining Company, a Delaware corporation engaged in mining coal,—the traction company being styled in the application as plaintiff, and the mining company as defendant.

The application was made under the Kentucky statutes relating to the condemnation of lands. The nature of those proceedings, whether judicial or not, appears from certain provisions of those statutes, which may be summarized as follows:

Any company authorized to construct a

railroad, if "unable to contract with the owner of any land or material necessary for its use for the purpose thereof," may file in the office of the clerk of the county court a description of such land or material, and have commissioners appointed to assess the damages which the owner is entitled to receive. Ky. Stat. § 835.

The commissioners are required to make their award of damages in writing, giving the names of the owners, and whether non-residents of the state, infants, of unsound mind, or married women. Ky. Stat. § 836.

It is made the duty of the clerk of the court, upon application *of the company, to [242] issue process against the owners, to show cause why the report should not be confirmed, and make such orders as to nonresidents and persons under disability as are required by the Civil Code of Practice in actions against them in the circuit court. Ky. Stat. § 837.

At the first regular term, "after the owners shall have been summoned the length of time prescribed by the Civil Code of Practice before an answer is required," the court must examine the report, and pass upon it. Ky. Stat. § 838.

If exceptions are filed by either party, a jury must be empaneled to try the issues of fact, and judgment rendered in conformity to the verdict, if sufficient cause to the contrary be not shown. Either party may appeal to the circuit court, the appeal to be tried *de novo*.

Upon the confirmation of the report of the commissioners or the assessment of damages by the court, as provided, and the payment to the owners of the amount due, as shown by the report of the commissioners when confirmed, or as shown by the judgment of the court when the damages are assessed by it, and all costs adjudged to the owner, the railroad company becomes entitled to take possession of the land and material, and to use the same for the purpose for which it was condemned as fully as if the title had been conveyed to it. But when an appeal is taken from the judgment of the county court by the company, it is not entitled to take possession of the land or material condemned until it pays into court the damages assessed and all costs. Ky. Stat. § 839.

The commissioners appointed by the county court, in the above proceeding, awarded \$100 as damages to be paid to the mining company.

Process having issued, the mining company, before any action was taken upon the report, filed its petition and bond for the removal of the case into the circuit court of the United States, alleging, among other things, that the value of the matter in dispute, exclusive of interest and costs, ex-

ceeded \$2,000. The petition for removal [243] distinctly alleged, as the *ground of removal, that the two companies were corporations of different states.

The sufficiency of the bond was not disputed. But the county court refused to recognize any right of removal, and the Kentucky corporation was about to proceed in the prosecution of its case in that court, despite the application for removal. Thereupon the Delaware corporation filed in the circuit court of the United States a complete transcript of the proceedings in the state court.

Subsequently the present original suit in equity was instituted in the Federal court by the mining company against the traction company. The bill, repeating the allegations in the petition for removal as to the diverse citizenship of the two corporations, showed that, notwithstanding what had been done to have the cause removed from the state court, the traction company was about to proceed to have the lands condemned in the case instituted in the county court. Among other things the bill alleged that plaintiff denied the right of the traction company to have the lands in question condemned, and averred that the report of the commissioners was insufficient in law; that the commissioners acted improperly, unfairly, and unfaithfully in their viewing of the land, in the preparation of their report, and in awarding damages; that \$100 was wholly inadequate as compensation, and was assessed and given under the influence of passion and prejudice, or some other illegal motive; that the land sought to be taken was worth, intrinsically, a great deal more than that amount; that the incidental damages done to the property of plaintiff in the construction of the road (which damages, under the laws of Kentucky, the said commissioners should have taken into consideration, and assessed, but did not, § 836) exceeded \$2,000; that the plaintiff's property and business will not be benefited in the least degree by the construction or prudent operation of the railroad; and that "it is proposed to deprive it of over 9 acres of its land, which, through its location, is valued at and is worth over \$2,500, and is so situ-

[244]ated that such *deprivation will irreparably injure and damage its remaining land."

The relief asked in the present suit was that the traction company be restrained and enjoined from further prosecuting the case in the county court, or taking any further steps therein.

The traction company demurred to the bill, one of the grounds of demurrer being that the circuit court was without jurisdiction or authority, under the Constitution and laws of the United States, to grant the

injunction asked for, or any other relief. The circuit court sustained its jurisdiction and overruled the demurrer. The traction company stood by its demurrer, and a final decree was entered, enjoining that company from any further prosecution of the case in the county court.

It has been observed that the parties to the proceeding in the county court are corporations, and therefore each is to be deemed, for the purpose of suing and being sued in the Federal court, a citizen of the state by whose laws it was created. The questions presented by the record are these: Was the proceeding in the state court a suit or controversy to which the judicial power of the United States extends? If a suit or controversy, was it removable to the circuit court of the United States? If removable, was it, in law, removed, and was it competent for that court, after the removal of the case, to enjoin the traction company from further proceeding in the state court?

We recognize the importance of these questions, and have given them the fullest consideration.

Certain principles, relating to the removal of cases, have been settled by former adjudications. They are:

1. If a case be a removable one, that is, if the suit, in its nature, be one of which the circuit court could rightfully take jurisdiction, then, upon the filing of a petition for removal, in due time, with a sufficient bond, the case is, in law, removed, and the state court in which it is pending will lose jurisdiction to proceed further, and all subsequent proceedings in that court will be void. *New Orleans, M. & F. R. Co. v. Mississippi*, 102 *U. S. 135, 141, 26 L. ed. 96, 98; *Baltimore & O. R. Co. v. Koontz*, 104 U. S. 5, 14, 26 L. ed. 643, 645; *National S. S. Co. v. Tugman*, 106 U. S. 118, 122, 27 L. ed. 87, 89, 1 Sup. Ct. Rep. 58; *St. Paul & C. R. Co. v. McLean*, 108 U. S. 212, 216, 27 L. ed. 703, 704, 2 Sup. Ct. Rep. 498; *Crehore v. Ohio & M. R. Co.* 131 U. S. 240, 243, 33 L. ed. 144, 145, 9 Sup. Ct. Rep. 692; *Kern v. Huidekoper*, 103 U. S. 485, 493, 26 L. ed. 354, 357; *Marshall v. Holmes*, 141 U. S. 589, 595, 35 L. ed. 870, 872, 12 Sup. Ct. Rep. 62.

2. After the presentation of a sufficient petition and bond to the state court in a removable case, it is competent for the circuit court, by a proceeding ancillary in its nature—without violating § 720 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 581) forbidding a court of the United States from enjoining proceedings in a state court—to restrain the party against whom a cause has been legally removed from taking further steps in the state court. *French v. Hay*, 22 Wall. 252, 22 L. ed. 857; *Dietzsch v. Huidekoper*, 103 U. S. 494, 496, 497, 26 L. ed. 497,

498; *Moran v. Sturgess*, 154 U. S. 256, 270, 38 L. ed. 981, 985, 14 Sup. Ct. Rep. 1019. See, also, *Sargent v. Helton*, 115 U. S. 352, 29 L. ed. 413, 6 Sup. Ct. Rep. 78; *Harkrader v. Wadley*, 172 U. S. 165, 43 L. ed. 405, 19 Sup. Ct. Rep. 119; *Gates v. Bucki*, 4 C. C. A. 116, 12 U. S. App. 69, 53 Fed. 969; *Texas & P. R. Co. v. Kuteman*, 4 C. C. A. 503, 13 U. S. App. 99, 54 Fed. 551; *Re Whitelaw*, 71 Fed. 733, 738; *Iron Mountain R. Co. v. Memphis*, 37 C. C. A. 410, 96 Fed. 131; *James v. Central Trust Co.* 39 C. C. A. 126, 98 Fed. 489.

3. It is well settled that if, upon the face of the record, including the petition for removal, a suit does not appear to be a removable one, then the state court is not bound to surrender its jurisdiction, and may proceed as if no application for removal had been made. *Stone v. South Carolina*, 117 U. S. 430, 432, 29 L. ed. 962, 963, 6 Sup. Ct. Rep. 799; *Carson v. Hyatt*, 118 U. S. 279, 281, 30 L. ed. 167, 168, 6 Sup. Ct. Rep. 1050; *Burlington, C. R. & N. R. Co. v. Dunn*, 122 U. S. 513, 515, 30 L. ed. 1159, 1160, 7 Sup. Ct. Rep. 1262.

So that the fundamental question here is whether the case, brought in the county court, was a removable one. If it was, then the decree of the circuit court, restraining the traction company from taking further steps in the local court after the removal of the case to the Federal court, was right; but if the case was not a removable one, then the decree was erroneous.

The rule is now settled that, under the judiciary act of 1887, 1888 [24 Stat. at L. 552, chap. 373, U. S. Comp. Stat. 1901, p. 508, 25 Stat. at L. 433, chap. 866, U. S. Comp. Stat. 1901, p. 508] a suit cannot be [246] removed from a state court unless *it could have been brought originally in the circuit court of the United States. *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654; *Mexican Nat. R. Co. v. Davidson*, 157 U. S. 201, 39 L. ed. 672, 15 Sup. Ct. Rep. 563; *Metcalf v. Watertown*, 128 U. S. 586, 32 L. ed. 543, 9 Sup. Ct. Rep. 173; *Minnesota v. Northern Securities Co.* 194 U. S. 48, 48 L. ed. 870, 24 Sup. Ct. Rep. 598.

Why could not the proceeding instituted in the county court have been brought originally in the Federal court? The case, as made in the county court, was, beyond question, a judicial proceeding; it related to property rights; the parties are corporate citizens of different states; and the value of the matter in dispute exceeded the amount requisite to give jurisdiction to the circuit court. It was, therefore, a proceeding embraced by the very words of the Constitution of the United States, which declares that the "judicial power shall extend . . . to controversies . . . between citizens of different

states," as well as by the act of 1887 (§ 1), which declares "that the circuit courts of the United States shall have *original* cognizance, concurrent with the courts of the several states, of *all* suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000, . . . in which there shall be a controversy between citizens of different states." In view of these explicit provisions it is clear that the proceeding in the county court was a suit or controversy within the meaning both of the Constitution and of the judiciary act. We could not hold otherwise without overruling former decisions of this court. Let us see whether this be not so.

Referring to the clause of the Constitution defining the judicial power of the United States, Chief Justice Marshall, speaking for the court in *Osborn v. Bank of the United States*, 9 Wheat. 738, 819, 6 L. ed. 204, 223, said: "This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party *who [247] asserts his rights in the form prescribed by law. It then becomes a case, and the Constitution declares that the judicial power shall extend to all cases arising under the Constitution, laws, and treaties of the United States."

In *Kohl v. United States*, 91 U. S. 367, 376, 23 L. ed. 449, 452, which was a suit in the circuit court of the United States to condemn lands for a public building, this court, speaking by Mr. Justice Strong, said: "It is difficult, then, to see why a proceeding to take land in virtue of the government's eminent domain, and determining the compensation to be made for it, is not, within the meaning of the statutes, a suit at common law, when initiated in a court. It is an attempt to enforce a legal right."

Two cases very much in point are *Mississippi & R. River Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206, and *Searl v. School Dist. No. 2*, 124 U. S. 197, 31 L. ed. 415, 8 Sup. Ct. Rep. 460.

Mississippi & R. River Boom Co. v. Patterson was a case of condemnation under a statute authorizing a county district court to appoint commissioners to appraise the value of the property to be taken. The local statute provided that if the appraisal was not satisfactory, the matter could be brought before the court, where the issues of fact would be tried by a jury, unless a jury was waived. It was a case of diverse citizenship, and, upon the petition of the defendant, a citizen of another state, it was removed from the inferior local court to the

circuit court of the United States. One question was whether the case was, in its nature, excluded from the jurisdiction of the Federal court. Referring to the contention that the proceeding to take private property for public use was an exercise by the state of its sovereign right of eminent domain, and with its exercise the United States, a separate sovereignty, had no right to interfere by any of its departments, this court, speaking by Mr. Justice Field, said: "But notwithstanding the right is one that appertains to sovereignty, when the sovereign power attaches conditions to its exercise, the inquiry whether the conditions have been observed is a proper matter for judicial cognizance. If that inquiry take the form of a proceeding before the courts between parties,—the owners of the land on the one side and *the company seeking the appropriation on the other,—there is a controversy which is subject to the ordinary incidents of a civil suit, and its determination derogates in no respect from the sovereignty of the state." Again, in the same case: "It has long been settled that a corporation will be treated, where contracts or rights of property are to be enforced by or against it, as a citizen of the state under the laws of which it is created, within the clause of the Constitution extending the judicial power of the United States to controversies between citizens of different states. *Paul v. Virginia*, 8 Wall. 177, 19 L. ed. 359. And in *Gaines v. Fuentes*, 92 U. S. 20, 23 L. ed. 524, it was held that a controversy between citizens is involved in a suit whenever any property or claim of the parties, capable of pecuniary estimation, is the subject of litigation, and is presented by the pleadings for judicial determination. Within the meaning of these decisions, we think the case at bar was properly transferred to the circuit court, and that it had jurisdiction to determine the controversy."

Searl v. School Dist. No. 2 was also a proceeding for the condemnation of private property to public use for school purposes. It was commenced by petition filed in a county court, a subordinate tribunal of one of the counties of Colorado. The local statute authorized the compensation to be fixed by a jury of six freeholders, with a right of appeal. The question in the case was as to the removability of the case from the county court to the Federal court. This court, speaking by Mr. Justice Matthews, said: "Such a proceeding, according to the decision of this court in *Kohl v. United States*, 91 U. S. 367, 23 L. ed. 449, is a suit at law within the meaning of the Constitution of the United States and the acts of Congress conferring jurisdiction upon the courts of the United States." After referring to prior

cases, including *Mississippi & R. River Boom Co. v. Patterson*, the opinion proceeds: "The fact that the Colorado statute provides for the ascertainment of damages by a commission of three freeholders, unless, at the hearing, a defendant shall demand a jury, does not make the proceeding from its commencement any the *less a suit at law[249] within the meaning of the Constitution and acts of Congress and the previous decisions of the court. . . . It is an adversary judicial proceeding from the beginning. The appointment of commissioners to ascertain the compensation is only one of the modes by which it is to be determined. The proceeding is, therefore, a suit at law from the time of the filing of the petition and the service of process upon the defendant." 124 U. S. 199, 31 L. ed. 416, 8 Sup. Ct. Rep. 461.

It will be observed, from an examination of the *Searl Case*, that this court cited with approval *Colorado Midland R. Co. v. Jones*, 29 Fed. 193, and the *Mineral Range R. Co. v. Detroit & L. S. Copper Co.* 25 Fed. 515. Those cases fully sustain the proposition that the case brought in the state court was a suit within the meaning of the Constitution and the judiciary act.

In the first one named, which was a proceeding under a local statute in an inferior state tribunal for the condemnation of lands for the use of a railway company, Mr. Justice Brewer, then circuit judge, after referring to the local statute under which the company proceeded, and to *Mississippi & R. River Boom Co. v. Patterson*, and *Searl v. School Dist. No. 2*, held the case to be removable, although the proceedings for condemnation were somewhat different from those in an ordinary trial, saying: "I do not suppose that a state can, by making special provisions for the trial of any particular controversy, prevent the exercise of the right of removal. If there was no statutory limitation, the legislature could provide for the trial of many cases by less than a common-law jury, or in some other special way. But the fact that it had made such different and special provisions would not make the proceeding any the less a trial, or such a suit as, if between citizens of two states, could not be removed to the Federal courts. If this were possible, then the only thing the legislature of a state would have to do to destroy the right of removal entirely would be to simply change and modify the details of procedure."

In *Mineral Range R. Co. v. Detroit & L. S. Copper Co.* Mr. Justice Brown, then district judge, after referring to *Mississippi & R. River Boom Co. v. Patterson*, and many other adjudged cases, said: "But conceding that if the only question in this case were the amount of damages to be paid by

the railroad company, the jurisdiction of this court would be sustained by the authorities above cited, it is insisted that these cases are inapplicable, because, by the statute of this state, the jury or commissioners must pass upon the question of the necessity for taking the property, as well as the amount of damages to be awarded. But we think that, in this particular, counsel overlook the distinction between the *power* to condemn, which confessedly resides in the state, and *proceedings* to condemn, which the state has delegated to its courts. The proceeding is certainly not deprived of its character as a suit by reason of its taking cognizance of this additional question; and *if it be a suit*, the right of removal attaches. Whenever a right is given by the law of a state, and the courts of such state are invested with the power of enforcing such right, the proceeding may be removed to a Federal court if the other requisites of removability exist." 25 Fed. 520.

In the more recent case of *Smith v. Adams*, 130 U. S. 167, 173, 32 L. ed. 895, 897, 9 Sup. Ct. Rep. 566, 568, Mr. Justice Field, speaking for the court, and referring to the clauses of the Constitution and the statutes relating to the judicial power and the courts of the United States, said: "By those terms are intended the claims or contentions of litigants brought before the courts for adjudication by regular proceedings established for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim or contention of a party takes such a form that the judicial power is capable of acting upon it, then it has become a case, or controversy."

It may be here said that the provisions of the local statutes of condemnation, referred to in the above cases, are substantially the same as those in the Kentucky statutes.

We cannot doubt, in view of the authorities, that the case presented in the county [251] court was a "suit" or "controversy *between citizens of different states," within the meaning of the Constitution and the laws of the United States. It was, as already said, a judicial proceeding initiated in a tribunal which constitutes a part of the judicial establishment of Kentucky, as ordained by its Constitution (Ky. Const. § 140); and the court, although charged with some duties of an administrative character, is a judicial tribunal and a court of record. *Fletcher v. Leight*, 4 Bush, 303; *Pennington v. Woolfolk*, 79 Ky. 13.

Are the above cases inapplicable by reason of their having been decided prior to the passage of the judiciary acts of 1887, 1888, limiting the right of removal to suits of which the circuit courts of the United States could take original cognizance? Clearly not. The difference between that act and

the act of 1875 [18 Stat. at L. 470, chap. 137, U. S. Comp. Stat. 1901, p. 508] is wholly apart from the present discussion; for both acts gave the circuit courts *original* jurisdiction of *all* suits having the requisite amount in dispute, and in which there was a controversy between citizens of different states. So that what was a suit or controversy to which, by reason of diverse citizenship, the judicial power of the United States extended under the act of 1875, must be deemed a suit under the acts of 1887, 1888. The only effect of the latter act, so far as the present question is concerned, was to restrict the right of removal from the state court to cases of which the circuit court could take original cognizance. And the present case, being a suit involving a controversy between citizens of different states, is manifestly of that character.

It is said, however, that when it is proposed to take private property for public purposes, the question of appropriation is one primarily and exclusively for the state to determine.

There ought not to be any dispute, at this day, in reference to the principles which must control in all cases of the condemnation of private property for public purposes. It is fundamental in American jurisprudence that private property cannot be taken by the government, national or state, except for purposes which are of a public character, although such *taking be accompanied by [252] compensation to the owner. That principle, this court has said, grows out of the essential nature of all free governments. *Citizens Sav. & L. Asso. v. Topeka*, 20 Wall. 655, 22 L. ed. 455; *Cole v. LaGrange*, 113 U. S. 1, 6, 28 L. ed. 896, 897, 5 Sup. Ct. Rep. 416. If the purpose be public, the taking may be outright, provided reasonable, certain, and adequate provision is made, at the time of appropriation, to ascertain and secure the compensation to be made to the owner. *Cherokee Nation v. Southern Kansas R. Co.* 135 U. S. 641, 659, 34 L. ed. 295, 303, 10 Sup. Ct. Rep. 965; *Sweet v. Rechel*, 159 U. S. 380, 399, 40 L. ed. 188, 196, 16 Sup. Ct. Rep. 43; *Western Union Teleg. Co. v. Pennsylvania R. Co.* (the present term) 195 U. S. 540, *ante*, 312, 25 Sup. Ct. Rep. p. 133. Any state enactment in violation of these principles is inconsistent with the due process of law prescribed by the 14th Amendment. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 754, 43 L. ed. 1154, 1160, 19 Sup. Ct. Rep. 804; *Smyth v. Ames*, 169 U. S. 466, 525, 42 L. ed. 819, 841, 18 Sup. Ct. Rep. 418. The position taken by the highest court of Kentucky on this general subject appears from *Tracy v. Elizabethtown, L. & B. S. R. Co.* 80 Ky. 259, 269.

It was there said: "It is erroneous to suppose that the legislature is beyond the control of the courts in exercising the power of eminent domain, either as to the nature of the use or the necessity to the use of any particular property. For if the use be not public, or no necessity for the taking exists, the legislature cannot authorize the taking of private property against the will of the owner, notwithstanding compensation may be required."

Speaking generally, it is for the state, primarily and exclusively, to declare for what local public purposes private property within its limits may be taken upon compensation to the owner, as well as to prescribe a mode in which it may be condemned and taken. But the state may not prescribe any mode of taking private property for a public purpose, and of ascertaining the compensation to be made therefor, which would exclude from the jurisdiction of a circuit court of the United States a condemnation proceeding which, in its essential features, is a suit involving a controversy between citizens of different states. "A state cannot," this court has said, *"*tie up a citizen of another state, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts.*" *Reagan v. Farmers' Loan & Trust Co.* 154 U. S. 362, 391, 38 L. ed. 1014, 1021, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047.

Now, it is true that the circuit court could not have the property in question condemned for local public purposes if the state had not previously, by statute, authorized its condemnation. After the removal of a case of condemnation from a state court, the Federal court would proceed under the sanction of state legislation. It would enforce the state law, unless that law authorized the appropriation of private property for purposes that were not really of a public nature. So far as authority to take the property for local public purposes was concerned, the circuit court could not enforce any other than the state law. It would respect the sovereign power of the state to define the legitimate public purposes for which private property may be taken, upon compensation to the owner being made or secured. But, at the same time, it could enforce, as of course it must, the authority of the supreme law of the land, which expressly extends the judicial power of the United States to all suits involving controversies between citizens of different states, and which also, by statute, gives the circuit courts of the United States, without qualification, jurisdiction of such controversies. A state cannot, by any statutory provisions, withdraw from the cognizance of the Federal courts a suit or judicial proceeding in which there is such a

controversy. Otherwise the purpose of the Constitution in extending the judicial power of the United States to controversies between citizens of different states would thereby be defeated. If the judiciary act of Congress admitted of the case in the county court being brought within the original cognizance of the circuit court, that is an end of the matter, although it be a case of the appropriation of private property to public uses under the authority of the state. Under any other view a state, by its own tribunals, could deprive citizens of other states of their property by condemnation, *without giving them an opportunity to protect themselves, in a national court, against local prejudice and influence.

It may, however, be urged that the Delaware corporation can be fully protected by the state court in its rights of property, because, if any Federal right be denied it, the authority of this court can be invoked upon writ of error to the highest court of the state. But the question whether the property is authorized by the local statute to be condemned, as well as the question of the amount of compensation to the owner, could not come here by writ of error from the state court. Such questions would not ordinarily involve a Federal right. In the present case the commissioners reported the damages to be only \$100; whereas, the owner alleges that the amount awarded was grossly inadequate, practically confiscatory. That question, as well as the question whether the statute authorized the traction company to take the property, the Delaware corporation is constitutionally entitled, as between it and the Kentucky corporation, by reasons of the diverse citizenship of the parties, to have determined upon their merits in a court of the United States, in which, presumably, it will be protected against local prejudice or influence. The circuit court, recognizing the right of the traction company to appropriate the land in question, if necessary for its purposes, could do all that is required by the Kentucky statute, and meet fully the ends of justice. Besides, a court always looks to substance, and not to mere forms. Mere forms are not of vital consequence in cases of condemnation. *Kohl v. United States*, 91 U. S. 367, 375, 23 L. ed. 449, 452; *United States v. Jones*, 109 U. S. 514, 519, 27 L. ed. 1015, 1017, 3 Sup. Ct. Rep. 346.

It is suggested that the state legislature might have consummated the taking of the property of the Delaware corporation by means of a nonjudicial tribunal, and thus left open simply the question of compensation to the owner of the property taken. We do not perceive that this suggestion is at all material in the present discussion; for the state has *chosen to provide for the tak-

ing by means of what is conceded to be a suit in one of its judicial tribunals. It is, in effect, conceded that the circuit court may be given jurisdiction of the question of compensation. But the contention is, that in no case can the judicial power of the United States be invoked until the question of taking is consummated by a proceeding in the particular local tribunal designated by the state. This view, it is supposed, finds support in the cases in which it has been held that an original suit directly against a state, or a suit against an officer of the state, which, by reason of the particular relief sought, is, in effect, a suit against the state, may be limited by the state to suits brought in one of its own courts. *Smith v. Reeves*, 178 U. S. 436, 44 L. ed. 1140, 20 Sup. Ct. Rep. 919. This illustration is wide of the mark; for the mandate of the Constitution of the United States (11th Amendment) is that "the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state;" whereas, the judicial power of the United States and the original jurisdiction of the circuit courts, whatever may be ordained by state legislation, extends to suits in which there is a controversy between citizens of different states. The exercise by the circuit courts of the United States of the jurisdiction thus conferred upon them is pursuant to the supreme law of the land, and will not, in any proper sense, entrench upon the dignity, authority, or autonomy of the states; for each state, by accepting the Constitution, has agreed that the courts of the United States may exert whatever judicial power can be constitutionally conferred upon them. In the exercise of that power a circuit court of the United States, sitting within the limits of a state, and having jurisdiction of the parties, is, for every practical purpose, a court of that state. Its function, under such circumstances, is to enforce the rights of parties according to the law of the state, taking care, always, as the state courts must take care, not to infringe any right secured by the Constitution and the laws of the United States. It should, however, be remarked that there is nothing in the Kentucky statute which indicates any purpose on the part of the legislature of that commonwealth to fly in the face of the above cases, or to evade the principles announced in them. It is not to be implied from the statute in question that the state intended to exclude, or supposed that it could exclude, from the Federal courts, jurisdiction of any suit to which the judicial power of the United States extended.

[256]

It was said that if the case was a removable one, the time for removal was after it was taken by appeal to the state circuit court, where it could be tried *de novo*. There is nothing in the acts of 1887, 1888, which sustains this view. Was the case, as it was in the county court, a suit in which there was a controversy between corporations of different states? If so, the right of removal was perfect under the acts of 1887, 1888. Under the Kentucky statute the condemning party was entitled, even after appeal to the circuit court, to pay into court the damages assessed in the county court, and, before the case was concluded in the circuit court, to take possession of the land, and oust the owner. Ky. Stat. § 839; 80 Ky. 259, 269. Clearly, the owner was not bound to wait until the proceedings in the county court were concluded, or until he was put out of possession, before exercising his right of removal, if the case was a removable one.

We hold that, as the proceeding in the county court was a suit involving a controversy between corporate citizens of different states, it was one of which the circuit court of the United States could have taken original cognizance, under the judiciary act, and it was, therefore, a removable case. And being a removable case, it is to be regarded as having been removed upon the filing of the petition and accompanying bond for removal; in which event, it was competent for the circuit court, having thus acquired jurisdiction of the subject-matter, and of the parties, to enjoin the traction company from proceeding further in the state court.

*For the reasons stated, *the decree of the* [257] *Circuit Court awarding the injunction must be affirmed.*

It is so ordered.

Mr. Justice **Holmes**, dissenting:

I regret that I am unable to agree with the decision of the court. The question on which I differ is whether a proceeding for the taking of land by eminent domain, authorized by the state of Kentucky to be begun in the courts of Kentucky, can be begun in the circuit court of the United States, whenever one of the parties is a citizen of another state. Of course, I am speaking of the proceeding for the taking of the land, not of that for compensation, to which I shall refer later. The argument which does not command my assent, stated in a few words, is that such a proceeding in such a case is a controversy between citizens of different states, and therefore, by the very words of the Constitution, must be within the jurisdiction of the United States courts. It seems to me that this is rather too literal a reading, and, on the whole, is a sacrifice of substance to form.

The fundamental fact is that eminent domain is a prerogative of the state, which, on the one hand, may be exercised in any way that the state thinks fit, and, on the other, may not be exercised except by an authority which the state confers. The taking may be direct, by an act of the legislature. It may be delegated to a railroad company, with a certain latitude of choice with regard to the land to be appropriated. It may be delegated subject to the approval of a legislative committee or of a board other than a court. When the state makes use of a court, instead, for instance, of a railroad commission, the character of the proceeding is not changed. The matter still is wholly within its sovereign control. The state may intervene after the proceedings have been begun, and take the land. It may direct the entry of a decree of condemnation. An illustration of its continuing power may be seen in *Re Northampton*, *158 Mass. 299, 33 N. E. 568. The matter of grade crossings had been referred by the legislature of Massachusetts to the courts, and a petition was pending for the abolition of certain grade crossings in Northampton. The case had been sent to commissioners, and they had reported. Pending a motion to confirm their report the legislature passed an act forbidding a change in that case without the consent of the city council. It was held that, as the whole subject was originally within the control of the legislature, it did not cease to be so by being referred to the courts, and the act was sustained.

A further illustration, and one in which substance has prevailed over form, is to be found in the case of suits by citizens of another state against officers of a state. In form such suits are controversies between citizens of different states, and within the jurisdiction of the United States courts. But if, in substance, they have the effect of suits against a state, the jurisdiction is denied. And the decisions do not stop there, but when the state has waived its immunity, as it may, and has given permission to a suit against the officer in a state court, it still is held that, although there is a controversy between citizens of different states which thus has become subject to litigation, that litigation must be confined to the courts which the state has named. Yet, there is no doubt that, with the state's consent, its officers, or the state itself, could be sued in the courts of the United States. *Smith v. Reeves*, 178 U. S. 436, 44 L. ed. 1140, 20 Sup. Ct. Rep. 919; *Chandler v. Dix*, 194 U. S. 590, 48 L. ed. 1129, 24 Sup. Ct. Rep. 766.

It seems to me that, if a state authorizes a taking to be accomplished by certain ma-

chinery, the United States has no constitutional right to intervene and to substitute other machinery because the state has chosen to use its law courts rather than a legislative committee, and thus to give to the exercise of its sovereign power the external form of a suit at law. It seems to me plain that the exercise of that power depends wholly on the state, may be limited as the state chooses, and cannot be carried further than the state has authorized in terms. Suppose that a proceeding for taking land is removed *to the United States court, contrary to the legislation of the state,—by whose authority, I ask myself, is a subsequent taking to be decreed? It is open to anyone who can think it to say that the attempt to use the state courts to the exclusion of the United States courts makes the taking void; but I cannot understand how a taking unauthorized by the state can be good. If I am right in supposing that the state has an absolute right to limit the exercise of eminent domain as it sees fit, then, so far as the construction of the Kentucky statute is concerned, I need only invoke the cases last cited, to show that the statute imports that the state meant to confine the proceedings to its own courts. Certainly it does not purport to authorize them elsewhere, and that is enough. *Smith v. Reeves*, 178 U. S. 436, 44 L. ed. 1140, 1145, 20 Sup. Ct. Rep. 919; *Chandler v. Dix*, 194 U. S. 590, 592, 48 L. ed. 1129, 1131, 24 Sup. Ct. Rep. 766. The difference between myself and the majority is not merely on the construction of the Kentucky statutes. If that were all, I should not express my dissent. But the difference as to construction is a consequence and incident of a difference on the far more important question of power. Of course, what I have said is without prejudice to the possibility that, in case a question of rights under the Constitution of the United States should arise and be carried to the highest court of the state, it might be brought here by writ of error, as was said by Mr. Justice Harlan in *Smith v. Reeves*. I do not go into that, as it is immaterial now.

It is said that the question which I am discussing has been settled by the adjudications of this court. I do not think so. The only cases that have any bearing are *Mississippi & R. River Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206, and *Searl v. School Dist. No. 2*, 124 U. S. 197, 31 L. ed. 415, 8 Sup. Ct. Rep. 460. In the former of these cases Mr. Justice Field states, in the most explicit way, that, at the stage the case had reached when it was removed from the state court, the compensation to be paid the own-

er of the land was the only question open. I have no criticism to make on that case. It seems to me to favor my views throughout. I think it very possible that, after the title to property has been taken, if the question [260] of compensation *still is unsettled, that may be a controversy within the meaning of the Constitution. The sovereign power of the state is at an end, and the former owner has a right, under the 14th Amendment of the Constitution of the United States, to get his pay.

Mississippi & R. River Boom Co. v. Patterson was followed by *Searl v. School Dist. No. 2*, seemingly without noticing the distinction that, in the latter case, the property had not yet been appropriated. There was no serious reasoning in the case, and I should think it a most inadequate justification for trenching upon the powers of the states, even if it were strictly in point. It arose, however, under the former statute as to removals, which did not limit them to cases which could have been begun in the United States courts. Whether I should think that a sufficient distinction if that case were before me now I shall not consider; but I feel warranted in believing that no one who took part in that decision imagined that he was establishing the doctrine now laid down or any principle broad enough to cover the present case. I cannot think that even Mr. Justice Matthews would have denied that the day after removal the state could have withdrawn the power to condemn the land, and left the court in the air, or could have condemned the land pending the proceedings, without paying them the slightest regard. If the state did retain those powers, I think it no less retained the *delectus personarum* and the right to confine its authority, while it left it outstanding, to the persons of its choice.

I wish to add only that I am not aware of any limitations in the Constitution of the United States upon a state's power to condemn land within its borders, except the requirements as to compensation. All that was decided in *Citizens' Sav. & L. Asso. v. Topeka*, 20 Wall. 655, 22 L. ed. 455, and *Cole v. LaGrange*, 113 U. S. 1, 28 L. ed. 896, 5 Sup. Ct. Rep. 416, was that the Constitutions of certain states did not authorize the taking of private property for a private use. But if those decisions had been rested on the 14th Amendment, which they were not, and [261] in my opinion could not have been, *I do not perceive that they have any bearing upon what I have said or upon the case at bar.

I am authorized to say that the CHIEF JUSTICE, Mr. Justice **Brewer**, and Mr. Justice **Peckham** concur in this dissent.

196 U. S.

CHARLES P. COOK *et al.*, Plffs. in Err.,
v.

COUNTY OF MARSHALL, Iowa.

(See S. C. Reporter's ed. 261-275.)

Commerce—state regulation—original package—cigarette boxes—equal protection of the laws.

1. The tax imposed on cigarette selling by Iowa Code, § 5007, is not an invalid regulation of commerce as applied to sales at retail of packages of ten cigarettes in small pasteboard boxes, sealed and stamped with the revenue stamp, which had been shipped loose to the retailer from another state by an express company which merely issued a receipt in duplicate, showing the number of packages and the name of the consignee, the packages not being separately or otherwise addressed, since such a box can in no just sense be considered an original package.
2. The equal protection of the laws is not denied a retail tobacco dealer by the tax imposed on cigarette selling by Iowa Code, § 5007, because sales by jobbers and wholesalers, in doing an interstate business with customers outside of the state, are excepted from its provisions.

[No. 98.]

Argued December 9, 12, 1904. Decided January 16, 1905.

IN ERROR to the Supreme Court of the State of Iowa to review a judgment which affirmed a judgment of the District Court of Marshall County, in that State, sustaining a demurrer to, and dismissing, a petition for the remission of a tax imposed on cigarette selling. *Affirmed.*

See same case below, 119 Iowa, 384, 93 N. W. 372.

Statement by Mr. Justice **Brown**:

This was a petition by the owner and ten-

NOTE.—On state regulation of interstate or foreign commerce—see notes to *Norfolk & W. R. Co. v. Com.* 13 L. R. A. 107; *McCanna & F. Co. v. Citizens' Trust & Surety Co.* 24 C. C. A. 13; *Ratterman v. Western U. Teleg. Co.* 32 L. ed. U. S. 229; *Harmon v. Chicago*, 37 L. ed. U. S. 216; *Cleveland, C. C. & St. L. R. Co. v. Backus*, 38 L. ed. U. S. 1041; and *Postal Teleg. Cable Co. v. Adams*, 39 L. ed. U. S. 311. As to police power as affecting commerce—see notes to *People v. Budd*, 5 L. R. A. 559; *State ex rel. Corwin v. Indiana & O. Oil, Gas, & Mln. Co.* 6 L. R. A. 579.

On importations in original packages—see notes to *Re Wilson*, 12 L. R. A. 624; *State ex rel. Cochran v. Winters*, 10 L. R. A. 616; *Pittsburg & S. Coal Co. v. Bates*, 39 L. ed. U. S. 539.

As to validity of class legislation—see *State v. Goodwill*, 6 L. R. A. 621, and note; *State v. Loomis*, 21 L. R. A. 789, and note.

As to constitutional equality of privileges, immunities, and protection—see *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* 14 L. R. A. 579, and note.

[262]ant of a certain *room in the city of Marshalltown, Iowa, addressed to the board of supervisors, for the remission of a tax of \$300, imposed upon the business of selling cigarettes, which business was carried on by Charles P. Cook, one of the plaintiffs in error. The petition being denied, an appeal was taken to the district court, where a demurrer was interposed, which was sustained by that court, and an appeal taken to the supreme court, where the judgment of the district court was affirmed. 119 Iowa, 384, 93 N. W. 372.

Mr. Junius Parker argued the cause, and, with *Messrs. W. W. Fuller* and *Frank S. Dunshee*, filed a brief for plaintiffs in error:

It cannot now be contended that the immunity given to original packages, or, rather, to sellers of original packages, from interference or regulation by state legislation, is to wholesalers of such packages who sell to retailers, and not to retailers of such packages who sell directly to consumers.

Schollenberger v. Pennsylvania, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757.

If the test, as intimated in the prevailing opinion in *Austin v. Tennessee*, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132, and also as intimated in the opinion of the supreme court of Iowa in *Cook v. Marshall County*, 119 Iowa, 384, 93 N. W. 372, is to be the ordinary package of shipment, and the position of the court is to be that immunity will be given to the ordinary package of shipment, and such package be considered an original package, and that no immunity shall be given to an extraordinarily sized package, and such extraordinarily sized package shall not be regarded as an original package, courts will be involved in a maze of inquiry arising out of each individual case.

The manufacturer of cigarettes has been sometimes criticized, if not denounced, because he has attempted to evade a state statute. It is undoubtedly true that the manufacturer of cigarettes in the case at bar intended and hoped that the consignee of these cigarettes would be able to sell them without making himself liable to state regulation. Can anyone suppose that the party, manufacturer or otherwise, who shipped oleomargarine into Pennsylvania (*Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757), or that the brewer or distiller who shipped liquors into Iowa (*Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681), did not intend and hope for the same immunity?

Under all the adjudications of this court, including *Austin v. Tennessee*, 179 U. S.

343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132; *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Vance v. W. A. Vandercook Co.* 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674; *Rhodes v. Iowa*, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; and *Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757,—cigarettes that are manufactured without the state of Iowa are, from the time they are put in transit until the importer in Iowa breaks the original package, or until after he has himself disposed of such original package, under the exclusive regulation of Congress.

This power of regulation includes the power absolutely to prohibit this interstate traffic in them (*Lottery Case [Champion v. Ames]* 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321). While this status continues and this authority of Congress may be exercised, the legislature of Iowa is as utterly powerless to regulate such transit and first disposition—if made before breaking of original package—as it would be powerless to regulate affairs in Illinois or Nebraska or any other adjacent or nonadjacent state.

Congress has not by statute spoken and said that commerce in cigarettes shall be free; it has not said that the importer who receives them from without the state may sell them in the original package in which he received them, and shall not be forbidden or regulated in such act by state legislation, but by this silence it has, under the decisions of this court, said just those things as emphatically and authoritatively as it could do even by the passage of the most solemn statute.

Vance v. W. A. Vandercook Co. 170 U. S. 438, 444, 42 L. ed. 1100, 1103, 18 Sup. Ct. Rep. 674; *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 493, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Leisy v. Hardin*, 135 U. S. 100, 109, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681.

The statute under which the tax in these cases is sought to be levied and collected is invalid because in contravention of the Constitution of the United States in that it denies persons within the state the equal protection of the laws.

Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431.

The procedure involved is not due process of law in that it makes provision for fixing a lien and a personal judgment upon the owner of real estate without any sort of notice, actual or constructive, to such owner

that his real estate is becoming subject to a lien, and he subject to personal judgment.

McBride v. State, Revenue Agent, 70 Miss. 716, 12 So. 699.

Mr. F. E. Northup argued the cause and filed a brief for defendant in error.

It seems to have been in contemplation of the mind of the courts who have followed the long line of "original package" decisions, that it was such a bale, package, cask, or collection as would be likely to assume proportions with an idea of convenience in shipment and safety in transit, and bearing through all the stages of its transition from the manufacturer to the dealer a separate and distinct identity.

Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; *Woodruff v. Parham*, 8 Wall. 123, 19 L. ed. 382; *Keith v. State*, 91 Ala. 2, 10 L. R. A. 430, 8 So. 353; *State ex rel. Gelpi Board of Assessors*, 46 La. Ann. 146, 49 Am. St. Rep. 318, 15 So. 10; *Austin v. State*, 101 Tenn. 563, 50 L. R. A. 478, 70 Am. St. Rep. 703, 48 S. W. 305; *McGregor v. Cone*, 104 Iowa, 465, 39 L. R. A. 484, 65 Am. St. Rep. 522, 73 N. W. 1041.

Objections to the policy of a legislative enactment have no place in the consideration of this case, so long as it is free from objection on constitutional grounds.

People v. Jackson & M. Pl. Road Co. 9 Mich. 285; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; *Black, Constitutional Prohibitions*, § 62.

Police regulations may be passed and be valid in restricting and preventing the sale of articles deleterious to public health, or for the public safety or public morals, even to the extent of requiring the discontinuance of the manufacturing or traffic, and even though a corporation might thereby suffer inconvenience and loss of property rights.

Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132; *Bartemeyer v. Iowa*, 18 Wall. 129, 21 L. ed. 929; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Foster v. Kansas*, 112 U. S. 201, 28 L. ed. 629, 5 Sup. Ct. Rep. 8, 97; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; *Plumley v. Massachusetts*, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154.

In *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678, it was conceded that, so long as the packages remained in their original case,

they were not subject to taxation, but this exemption immediately ceased as soon as the boxes were opened.

The same rule was followed in the case of *May v. New Orleans*, 178 U. S. 496, 44 L. ed. 1165, 20 Sup. Ct. Rep. 976, holding that where a mode of putting up a package is not adopted to meet the requirements of the state of commerce, but the requirements of an unlawful retail trade, the dealer will not be protected on the ground that he is selling a thing in an original package.

In *Com. v. Bishman*, 138 Pa. 639, 21 Atl. 12, it was held that where the defendant engaged in the sale of liquors at retail in pint bottles enclosed within pasteboard boxes which were shipped in barrels, his claim that he was selling "original packages" was little better than a burlesque.

Wherever the enactment is a bona fide exercise of the police power, dictated by conscientious regard for the public health or safety in prohibiting the sale of obnoxious products, such legislation has been respected, although it may interfere directly with interstate commerce.

Robbins v. Shelby County Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Vanderbilt v. Adams*, 7 Cow. 349; *Willson v. Black Bird Creek Marsh Co.* 2 Pet. 245, 7 L. ed. 412; *Sherlock v. Alling*, 93 U. S. 99, 23 L. ed. 819.

The power to prescribe regulations to protect the health of the community and prevent the spread of disease is incident to all local municipal authority, however much these regulations may interfere with the movements of commerce.

Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *Missouri P. R. Co. v. Finley*, 38 Kan. 550, 16 Pac. 951; *Kimnish v. Ball*, 129 U. S. 217, 32 L. ed. 695, 2 Inters. Com. Rep. 407, 9 Sup. Ct. Rep. 277; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527; *Salzenstein v. Mavis*, 91 Ill. 391; *Urton v. Sherlock*, 75 Mo. 247; *State, Waterbury, Prosecutor, v. Newton*, 50 N. J. L. 534, 2 Inters. Com. Rep. 63, 14 Atl. 604; *McGregor v. Cohn*, 104 Iowa, 465, 39 L. R. A. 484, 65 Am. St. Rep. 522, 73 N. W. 1041.

*Mr. Justice **Brown** delivered the opinion [268] of the court:

This case involves the constitutionality of § 5007 of the Iowa Code, imposing a tax of \$300 per annum upon every person, and also upon the real property and the owner thereof, whereon cigarettes are sold

or kept for sale. The section is printed in full in the margin.†

The facts of the case were that the plaintiff, Charles P. Cook, carried on a retail cigar and tobacco store upon premises leased by him from his co-plaintiff. Cook ordered his cigarettes of the American Tobacco Company, at St. Louis. They were delivered to an express company, and brought by such company from St. Louis, or other places outside of the state of Iowa, directly to the place of business of the plaintiff, in small pasteboard boxes, containing ten cigarettes each, each package being sealed and stamped with the revenue stamp. These packages were shipped absolutely loose, and were not boxed, baled, wrapped, or covered, nor were they in any way attached together. Nothing appears in the record to indicate the means used in transporting these cigarettes from the factory of the manufacturer to the place of business of the retail dealer, and we are left to infer that they were shoveled into and out of a car, and delivered to plaintiffs [269] in that condition. The packages *were not separately or otherwise addressed, but at the time they were delivered to the express company the driver gave a receipt showing the number of packages and the name of the person to whom they were to be sent, retaining a duplicate himself.

The constitutionality of the act as applied to the plaintiffs was attacked upon two grounds:

(1) That it was an attempt to interfere with the power of Congress to regulate commerce between the states.

(2) That it denied to the plaintiffs the equal protection of the laws.

The argument of the plaintiffs is the same as that which was pressed upon our attention a few years ago in *Austin v. Tennessee*, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132, that the packages of ten cigarettes were each the original packages in which these cigarettes were imported from other states, and that, under the decisions of this court in *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678, *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681, and *Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757, they were entitled to the immuni-

ties attaching to original packages. We reviewed these and a large number of other cases in our opinion, and, came to the conclusion that these boxes were in no just sense original packages within the spirit of the prior cases, and that their shipment in this form was not a bona fide transaction, but was merely a convenient subterfuge for evading the law forbidding the sale of cigarettes within the state. This case differs from that only in the fact that in the *Austin Case* the packages were thrown loosely into baskets, which were shipped on board the train, and carried to Austin's place of business. These baskets, it is argued, might have been considered as the original packages.

This difference, however, was not insisted upon as distinguishing the two cases in principle. Indeed, it was admitted to be one not of "great magnitude or seeming legal significance." The main argument of the plaintiffs was frankly addressed to a reconsideration of the principle involved in the *Austin Case*, and a reinsistence upon the position there taken, *that the packages in [270] which the cigarettes were actually shipped must govern, and that we cannot look to the motives which actuated such shipment, or to the fact that ordinary importations of cigarettes were made in boxes containing a large number of these so-called original packages. We have carefully reconsidered the principle of that case, and, without repeating the arguments then used in the opinions, we have seen no reason to reverse or change the views there expressed.

The term "original package" is not defined by any statute, and is simply a convenient form of expression adopted by Chief Justice Marshall in *Brown v. Maryland*, to indicate that a license tax could not be exacted of an importer of goods from a foreign country who disposes of such goods in the form in which they were imported. It is not denied that, in the changed and changing conditions of commerce between the states, packages in which shipments may be made from one state to another may be smaller than those "bales, hogsheads, barrels, or tierces," to which the term was originally applied by Chief Justice Marshall, but, whatever the form or size employed,

†Sec. 5007. *Tax on sale*.—There shall be assessed a tax of \$300 per annum against every person, partnership, or corporation, and upon the real property and the owner thereof, within or whereon any cigarettes, cigarettes wrapper, or any paper made or prepared for the use in making cigarettes, or for the purpose of being filled with tobacco for smoking, are sold or given way, or kept with the intent to be sold, bartered, or given away, under any pretext whatever. Such tax shall be in addition to all other taxes and penalties, shall be assessed, col-

lected, and distributed in the same manner as the mulct liquor tax, and shall be a perpetual lien upon all property, both personal and real, used in connection with the business; and the payment of such tax shall not be a bar to prosecution under any law prohibiting the manufacturing of cigarettes or cigarettes paper, or selling, bartering, or giving away the same. But the provisions of this section shall not apply to the sales by jobbers and wholesalers in doing an interstate business with customers outside of the state.

there must be a recognition of the fact that the transaction is a bona fide one, and that the usual methods of interstate shipment have not been departed from for the purpose of evading the police laws of the states.

In *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681, quarter barrels, and even one-eighth barrels and cases of beer, were recognized as original packages or kegs, though the size of such packages and the usual methods of transporting beer do not seem to have been made the subject of discussion. There is nothing in the opinion to indicate that it was not legitimate to ship beer in kegs of this size. So, too, in *Schollenberger v. Pennsylvania*, oleomargarine transported and sold in packages of 10 pounds weight was recognized as bona fide, but it was expressly found by the jury in that case that the package was an original package, as required by the act of Congress, and was of such "form, size, and weight as is used by producers or shippers for the purpose of securing both convenience in handling and security in transportation *of merchandise between dealers in the ordinary course of actual commerce, and the said form, size, and weight were adopted in good faith, and not for the purpose of evading the laws of the commonwealth of Pennsylvania, said package being one of a number of similar packages forming one consignment, shipped by the said company to the said defendant." [271] While it may be impossible to define the size or shape of an original package, the principle upon which the doctrine is founded would not justify us in holding that any package which could not be commercially transported from one state to another as a separate importation could be considered as an original package.

But it is insisted with much earnestness that, in determining the lawfulness of sales in original packages, we are bound to consider that package as original in which the articles were actually shipped, particularly where Congress, for the purpose of taxation, has prescribed a certain size of package to be separately stamped, and that we have no right to look beyond the letter of the term, and inquire into the motives which dictated the size of the packages in each case. This argument was also made in the *Austin Case*, was considered at some length, and held to be unsound. In delivering the opinion we said (p. 359, L. ed. p. 232, Sup. Ct. Rep. p. 138): "The real question in this case is whether the size of the package in which the importation is actually made is to govern, or the size of the package in which bona fide transactions are carried on between the manufacturer and the wholesale dealer residing in different states. We hold to the

latter view. The whole theory of the exemption of the original package from the operation of state laws is based upon the idea that the property is imported in the ordinary form in which, from time immemorial, foreign goods have been brought into the country."

While it is doubtless true that a perfectly lawful act may not be impugned by the fact that the person doing the act was impelled thereto by a bad motive, yet, where the lawfulness or unlawfulness of the act is made an issue, the intent of the *actor may have a [272] material bearing in characterizing the transaction. We have had frequent occasions to treat of this subject in passing upon the validity of legislative acts or municipal ordinances. So, where the lawfulness of the method used for transporting goods from one state to another is questioned, it may be shown that the intent of the party concerned was not to select the usual and ordinary method of transportation, but an unusual and more expensive one, for the express purpose of evading or defying the police laws of the state. If the natural result of such method be to render inoperative laws intended for the protection of the people, it is pertinent to inquire whether the act was not done for that purpose, and to hold that the interstate commerce clause of the Constitution is invoked as a cover for fraudulent dealing, and is no defense to a prosecution under the state law.

The power of Congress to regulate commerce among the states is perhaps the most benign gift of the Constitution. Indeed, it may be said that without it the Constitution would not have been adopted. One of the chief evils of the confederation was the power exercised by the commercial states of exacting duties upon the importation of goods destined for the interior of the country or for other states. The vast territory to the west of the Alleghanies had not yet been developed or subdivided into states, but the evil had already become so flagrant that it threatened an utter dissolution of the confederacy. The article was adopted that all of states of the Union might have the benefit of the duties collected at the maritime ports, and to relieve them from the embarrassing restrictions imposed upon the internal commerce of the country. But the same policy which authorizes the use of this power as a shield to protect commerce from the vexatious interference of the states forbids its employment as a sword to assail measures designed for the preservation of the public health, morals, and comfort. States may differ among themselves as to the necessity and scope of such measures, but so long as they are adopted in good faith, with an eye single to the *public wel-[273]

fare, they are as much entitled to the recognition of the general government as if they were uniformly adopted by all the states.

While this court has been alert to protect the rights of nonresident citizens, and has felt it its duty, not always with the approbation of the state courts, to declare the invalidity of laws throwing obstacles in the way of free intercommunication between the states, it will not lend its sanction to those who deliberately plan to debauch the public conscience and set at naught the laws of a state. The power of Congress to regulate commerce is undoubtedly a beneficent one. The police laws of the state are equally so, and it is our duty to harmonize them. Undoubtedly a law may sometimes be successfully and legally avoided if not evaded; but it behooves one who stakes his case upon the letter of the Constitution not to be wholly oblivious of its spirit. In this case we cannot hold that plaintiffs are entitled to its immunities without striking a serious blow at the rights of the states to administer their own internal affairs.

2. The argument that § 5007 of the Iowa Code denies to the plaintiffs the equal protection of the laws is based upon an alleged discrimination arising from the final sentence that "the provisions of this section shall not apply to the sales by jobbers and wholesalers in doing an interstate business with customers outside of the state."

We are referred in this connection to a series of well-known cases arising under the anti-trust laws of the several states, to the effect that laws against combinations in trade must be uniform in their application as applied to all persons within the same general class. The leading case upon this point is *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431, where a law of Illinois against combinations to regulate prices and productions, and create restrictions, was held to be invalid by reason of the exemption of agricultural productions or live stock while in the hands of the producer or raiser.

A similar case is that of *Cotting v. [274] Kansas City Stock Yards Co.* 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30, wherein a statute of Kansas regulating the prices to be paid for the use of public cattle stock yards was held invalid by reason of the fact that it was intended to apply only to the stock yards of Kansas City, and not to other companies or corporations engaged in like business in other portions of the state.

These cases, however, have but limited application to laws imposing taxes, where the right of classification is held to permit of discrimination between different trades and callings when not obviously exercised in a

spirit of prejudice or favoritism. *Kentucky Railroad Tax Cases*, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *American Sugar Ref. Co. v. Louisiana*, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533.

This distinction was recognized by Mr. Justice Harlan in *Connolly v. Union Sewer Pipe Co.* on page 562, (L. ed. p. 690, Sup. Ct. Rep. p. 440) wherein it is said: "A state may, in its wisdom, classify property for purposes of taxation, and the exercise of its discretion is not to be questioned in a court of the United States, so long as the classification does not invade rights secured by the Constitution of the United States." It can scarcely be doubted that, if the *Connolly Case* had dealt with the subject of taxation, a discriminative tax upon producers of agricultural products, either greater or less than that imposed upon other manufacturers or producers, might have been held valid without denying to either party the equal protection of the laws. The holding in that case was simply that, considering that the object of the statute was to prevent combinations of capital or skill for certain purposes, the exemption of farmers was based upon no sound distinction, and rendered the law invalid as to other classes included within it.

There is a clear distinction in principle between persons engaged in selling cigarettes generally or at retail, and those engaged in selling by wholesale to customers without the state. They are two entirely distinct occupations. One sells at retail, the other at wholesale; one to the public generally, *and the other to a particular class; one [275] within the state, the other without. From time out of mind it has been the custom of Congress to impose a special license tax upon wholesale dealers different from that imposed upon retail dealers. A like distinction is observed between brewers and rectifiers, wholesale and retail dealers in leaf tobacco and liquors, manufacturers of tobacco and manufacturers of cigars, as well as peddlers of tobacco. It may be difficult to distinguish these several classes in principle, but the power of Congress to make this discrimination has not, we believe, been questioned.

Why the legislature should have made the distinction found in § 5007 is not entirely clear, but it probably arose from the belief that the imposition of a license tax upon wholesale exporters of cigarettes would be as much an interference with interstate commerce as the imposition of a similar tax upon importers from abroad was

held to be in *Brown v. Maryland*. We are satisfied the section is not open to the objection of denying to the dealers in cigarettes the equal protection of the laws.

The judgment of the Supreme Court is, therefore, affirmed.

Mr. Justice **White**, concurring:

The only difference between this and the *Austin Case* is that in this no basket was used to hold the many small packages shipped at one and the same time to the same person. In my opinion, such fact is not sufficient to take the case out of the reach of the reasoning stated by me for concurring in the decree in the *Austin Case*. For the reasons given for my concurrence in that case I concur in the judgment rendered in this.

The CHIEF JUSTICE, Mr. Justice **Brewer**, and Mr. Justice **Peckham** dissented.

[276]*ROBERT E. HODGE *et al.*, *Plffs. in Err.*,
v.

MUSCATINE COUNTY *et al.*

(See S. C. Reporter's ed. 276-282.)

Federal courts—when decisions of state courts will be followed—due process of law in tax on cigarette selling—error to state court—questions of local law.

1. The construction by the Iowa supreme court of the annual charge imposed by Iowa Code, § 5007, upon cigarette dealers and "upon the real property and the owner thereof" whereon cigarettes are sold, the payment of which is not to bar criminal proceedings, as being a tax upon the traffic, and not a penalty, is not so clearly erroneous as to justify the Federal Supreme Court in adopting a different construction on a writ of error to the state court, in which such statute is asserted to deny due process of law.
2. Due process of law does not require that, as to a person actually carrying on the business of selling cigarettes, notice be given of the assessment or levy of the tax imposed by Iowa Code, § 5007, upon the traffic, there being no discretion as to the amount of the tax.
3. An owner of real property is not denied due process of law by Iowa Code, § 5007, making the tax imposed thereby on the business of cigarette selling a lien upon the property where the business is carried on.
4. Sufficient provision for notice and hearing

to constitute due process of law is afforded the owner of real property who is made personally liable, and his property impressed with a lien, under Iowa Code, § 5007, for the tax imposed thereby on cigarette selling on the premises, by §§ 2441, 2442, which permit him to make application to the board of supervisors to remit the tax, and, in case of a denial of the petition, to appeal to the district court for a judicial determination of his liability.

5. Whether the Iowa Constitution is violated by Iowa Code, § 5007, imposing a tax on cigarette selling, because the statute does not distinctly state the tax and the object to which it is applied, is a purely local question, which cannot be considered by the Federal Supreme Court on writ of error to a state court.

[No. 150.]

Argued December 9, 12, 1904. Decided January 16, 1905.

IN ERROR to the Supreme Court of the State of Iowa, to review a judgment which affirmed a judgment of the District Court of Muscatine County, in that State, sustaining demurrers to, and dismissing, a bill to enjoin the assessment and collection of the tax on cigarette selling. *Affirmed.*

See same case below, 121 Iowa, 482, 96 N. W. 968.

Statement by Mr. Justice **Brown**:

This was a petition in the district court by the owner and tenant of certain real estate in Muscatine, used for a tobaccoconist's shop, to enjoin the defendants from assessing and collecting a tax of \$240, upon the ground of the unconstitutionality of the law.

Demurrers were interposed to the petition and to certain amendments thereto, which were sustained, the bill dismissed, and an appeal taken to the supreme court of Iowa, which affirmed the judgment of the court below. 121 Iowa, 482, 96 N. W. 968.

Mr. **Junius Parker** argued the cause, and, with Messrs. W. W. Fuller and Frank S. Dunshee, filed a brief for plaintiffs in error:

For contentions of these counsel see their brief as reported in *Cook v. Marshall County*, ante, 471.

Mr. **Ed. P. Ingham** argued the cause, and, with Mr. Henry Jayne, filed a brief for defendants in error:

Whatever article of commerce is recog-

NOTE.—As to what constitutes due process of law—see *Kuntz v. Sumption*, 2 L. R. A. 655, and note; *Re Gannon*, 5 L. R. A. 359, and note; *Uiman v. Baltimore*, 11 L. R. A. 224, and note; and *Gilman v. Tucker*, 13 L. R. A. 304, and note. And see notes to *People v. O'Brien*, 2 L. R. A. 255; *Pearson v. Yewdall*, 24 L. ed. U. S. 436; and *Wilson v. North Carolina*, 42 L. ed. U. S. 865.

196 U. S.

On notice and hearing required to constitute due process of law—see notes to *Kuntz v. Sumption*, 2 L. R. A. 657; *Chauvin v. Valiton*, 3 L. R. A. 194; and *Uiman v. Baltimore*, 11 L. R. A. 225.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to *Missouri ex rel. Hill v. Dockery*, 63 L. R. A. 571.

nized as fit for barter or sale, when its manufacture is made subject to Federal regulation and taxation, must be regarded as a legitimate article of commerce, although it may be within the police power of the states.

Re Rahrer (Wilkerson v. Rahrer) 140 U. S. 559, 35 L. ed. 575, 11 Sup. Ct. Rep. 865; *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Austin v. State*, 101 Tenn. 563, 50 L. R. A. 478, 70 Am. St. Rep. 703, 48 S. W. 305.

And if Congress authorizes its importation, no state has a right to prohibit its introduction.

License Cases (Thurlow v. Massachusetts) 5 How. 504, 12 L. ed. 256.

However, a state is not bound to furnish a market for such articles, or abstain from passing any law which may be necessary or advisable to guard the health or morals of its citizens, although such law may discourage importations or diminish profits of the importer.

Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Foster v. Kansas*, 112 U. S. 201, 28 L. ed. 629, 5 Sup. Ct. Rep. 8, 97.

A state cannot prohibit the sale of articles of lawful commerce imported by the importer, when such articles do not become a part of the common mass of property within the state, and so long as they remain in the original packages in which they are imported.

Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *State ex rel. Cochran v. Winters*, 44 Kan. 723, 10 L. R. A. 616, 25 Pac. 237; *May v. New Orleans*, 178 U. S. 496, 44 L. ed. 1165, 20 Sup. Ct. Rep. 976; *License Cases (Thurlow v. Massachusetts)* 5 How. 504, 12 L. ed. 256; *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678.

An original package has been defined to be such form and size of package as is used by producers or shippers for the purpose of securing both convenience in handling and security in transportation of merchandise between dealers in the ordinary course of actual commerce.

Com. use of Philadelphia v. Schollenberger, 156 Pa. 201, 22 L. R. A. 155, 4 Inters. Com. Rep. 488, 36 Am. St. Rep. 32, 27 Atl. 30; *McGregor v. Cone*, 104 Iowa, 465, 39 L. R. A. 484, 65 Am. St. Rep. 522, 73 N. W. 1043.

The rule is that where the mode of put-

ting up a package is not adopted to meet the requirements of interstate commerce, but the requirements of an unlawful domestic retail trade, the dealer will not be protected on the ground that he is selling an original package.

Austin v. State, 101 Tenn. 563, 50 L. R. A. 478, 70 Am. St. Rep. 703, 48 S. W. 305. See also *Com. v. Bishman*, 138 Pa. 639, 21 Atl. 12; *Haley v. State*, 42 Neb. 556, 47 Am. St. Rep. 718, 60 N. W. 962; *Com. v. Paul*, 170 Pa. 284, 30 L. R. A. 396, 5 Inters. Com. Rep. 506, 33 Atl. 82; *State v. Chapman*, 1 S. D. 414, 10 L. R. A. 432, 47 N. W. 411.

The size of the package is immaterial where bona fide transactions are carried on.

License Cases (Thurlow v. Massachusetts) 5 How. 608, 12 L. ed. 303; *Com. v. Zelt*, 138 Pa. 615, 11 L. R. A. 602, 21 Atl. 7; *Austin v. State*, 101 Tenn. 563, 50 L. R. A. 478, 70 Am. St. Rep. 703, 48 S. W. 305.

The police power may be lawfully resorted to for the purpose of preserving public health, safety, or morals, or abating public nuisances. A large discrimination is necessarily vested in the legislature to determine what public interests require and what measures are necessary for the protection of such interests.

Holden v. Hardy, 169 U. S. 366, 392, 42 L. ed. 780, 791, 18 Sup. Ct. Rep. 383; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Foster v. Kansas*, 112 U. S. 201, 28 L. ed. 629, 5 Sup. Ct. Rep. 8, 97; *Austin v. State*, 101 Tenn. 563, 50 L. R. A. 478, 70 Am. St. Rep. 703, 48 S. W. 305.

The cigarette tax, in and of itself, is in the nature of an additional penalty under police regulation to protect the public from the evils arising from the use of cigarettes, and an occupation charge for the purpose of revenue.

Hodge v. Muscatine County, 121 Iowa, 482, 96 N. W. 969.

The power to tax is inherent in the government. It is a legislative power, and is limited only by constitutional provisions; subject thereto, it extends to everything and everybody as the legislature may see fit to apply it. Courts cannot control its exercise, unless such exercise conflicts with constitutional limitations.

25 Am. & Eng. Enc. Law, p. 18, and cases cited; *Ferry v. Deneen* (Iowa) 82 N. W. 424; *Hanson v. Vernon*, 27 Iowa, 28, 1 Am. Rep. 215; *Porter v. Rockford, R. I. & St. L. R. Co.* 76 Ill. 561; *Wisconsin C. R. Co. v. Taylor County*, 52 Wis. 53, 8 N. W. 833; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663.

The power to impose privilege and occupation taxes exists independently and concur-

rently in the state and Federal government, subject to constitutional restrictions. The only direct limitation therein contained is that no tax shall be laid on articles exported from any state. Being in the discretion of the legislature, it may select some for this purpose and exempt others, and select the mode in which taxes shall be levied.

25 Am. & Eng. Enc. Law pp. 21, note, 479, 481, 492; *Ward v. Maryland*, 12 Wall. 418, 20 L. ed. 449; *License Cases* (*Thurlow v. Massachusetts*) 5 How. 504, 12 L. ed. 256; *License Tax Cases*, 5 Wall. 462, 18 L. ed. 497; *Munn v. People*, 69 Ill. 80; U. S. Const. art. 1, § 9, ¶ 5; *People v. Coleman*, 4 Cal. 46, 60 Am. Dec. 581; *Connecticut Mut. L. Ins. Co. v. Com.* 133 Mass. 161; *Durach's Appeal*, 62 Pa. 491; *Weaver v. State*, 89 Ga. 639, 15 S. E. 840; *Singer Mfg. Co. v. Wright*, 33 Fed. 121.

It may be said that the demand made for money under the police power is secondary to the police regulation out of which the demand grows; while in the case of taxation the principal object is revenue. This distinction is not to be lost sight of, even though the procedure for collection may be similar in both cases.

25 Am. & Eng. Enc. Law, p. 20; *Van Horn v. People*, 46 Mich. 183, 41 Am. Rep. 159, 9 N. W. 246; *East St. Louis v. Wehrung*, 46 Ill. 392; Cooley, Taxn. 2d ed. p. 586; *Re New York*, 11 Johns. 77; *License Tax Cases*, 5 Wall. 462, 18 L. ed. 497.

That a tax is imposed for the double purpose of regulation and revenue is no reason for declaring it invalid.

Hodge v. Muscatine County, 121 Iowa, 482, 96 N. W. 968; 2 Desty, Taxn. 1384.

An occupation charge is different from a general tax, and the constitutional provisions that all taxes shall be equal and uniform apply only to general taxation. It is sufficient if all in the same class are taxed alike.

25 Am. & Eng. Enc. Law, pp. 480, 481, 489; *Ex parte Hurl*, 49 Cal. 557; *Higgins Ferry Co. v. East St. Louis*, 102 Ill. 560; *Baker v. Cincinnati*, 11 Ohio St. 534; *Standard Underground Cable Co. v. Atty. Gen.* 46 N. J. Eq. 270, 19 Am. St. Rep. 394, 19 Atl. 733; *Durach's Appeal*, 62 Pa. 491; *Weaver v. State*, 89 Ga. 639, 15 S. E. 840; *Singer Mfg. Co. v. Wright*, 33 Fed. 121; *State v. Stephens*, 4 Tex. 137; *Society for Savings v. Coite*, 6 Wall. 606, 18 L. ed. 902; *Ferry v. Deneen* (Iowa) 82 N. W. 424; *Hale v. Kenosha*, 29 Wis. 599; *Auburn v. Paul*, 84 Me. 215, 24 Atl. 817; *Richmond & A. R. Co. v. Lynchburg*, 81 Va. 473; *Smith v. Skow*, 97 Iowa, 640, 66 N. W. 893.

The difference between a general tax and an occupation charge or tax is that the general tax is assessed solely for revenue;

while the occupation tax or charge may be assessed under police regulations to protect public health and morals or public safety,—the regulation of the object specified, and not for revenue.

25 Am. & Eng. Enc. Law, p. 20; Cooley, Taxn. 2d ed. 586.

The tax imposed was for indemnity and protection to the public against evils resulting from the nature and character of the business, and is also in the nature of a police regulation, but is not to be wholly so regarded.

Hodge v. Muscatine County, 121 Iowa, 482, 96 N. W. 968.

Such tax was a charge for carrying on the business, and acted the same upon all persons and property coming within its provisions; and as the law is general in its scope and provisions, all persons liable thereunder must appear and pay the tax without notice; and notice is no more necessary to the property owner than in cases of taxes generally.

Re Smith, 104 Iowa, 199, 73 N. W. 605; *Smith v. Skow*, 97 Iowa, 640, 66 N. W. 893.

The tax imposed is also a penalty, and the rules governing ordinary taxes should not govern.

Ferry v. Deneen (Iowa) 82 N. W. 424.

The supreme court of Iowa has determined that the tax provided in Code, § 5007, is a penalty and occupation charge.

Hodge v. Muscatine County, 121 Iowa, 482, 96 N. W. 968.

Being a penalty and occupation charge, the legislature, inherently possessing that power incidental to sovereignty, may, in its discretion, and so long as there is no conflict with constitutional limitations, impose such tax upon any certain occupation for the protection of public health and morals, and provide and select the mode in which such tax may be assessed and levied.

Society for Savings v. Coite, 6 Wall. 606, 18 L. ed. 902; *Ferry v. Deneen* (Iowa) 82 N. W. 424.

As usual, the administrative officers are empowered to collect taxes without the aid of any judicial process, and yet "due process of law" has not been violated.

Glidden v. Harrington, 189 U. S. 255, 47 L. ed. 798, 23 Sup. Ct. Rep. 574.

The meetings of the board of revision are fixed by law, and of these all persons must take notice.

Hodge v. Muscatine County, 121 Iowa, 482, 96 N. W. 968; *Palmer v. McMahon*, 133 U. S. 662, 33 L. ed. 772, 10 Sup. Ct. Rep. 327; *Glidden v. Harrington*, 189 U. S. 255, 47 L. ed. 798, 23 Sup. Ct. Rep. 574.

The intention of §§ 2441 *et seq.* is to provide, and they do provide, such measures as take the liquor tax law from under the pro-

hibition of taking property without due process of law. Such sections certainly save the law from that objection, and consequently no notice to the owner of the property assessed and levied upon is necessary.

Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616.

Nor is it necessary that the person who conducts the business be present, or have an opportunity to be present, when the assessment is made.

McMillen v. Anderson, 95 U. S. 37, 24 L. ed. 335.

Mr Justice **Brown** delivered the opinion of the Court:

This case involves the same questions as those just disposed of in *Cook v. Marshall County*, 196 U. S. 261, ante, 471, 25 Sup. Ct. Rep. 233, and in addition thereto the point is made that the laws of Iowa deny to the owner of property leased for the sale of cigarettes due process of law.

To answer satisfactorily the question thus presented, it is necessary to consider the laws of Iowa respecting the tax upon cigarette dealers, and the methods of enforcing the same.

By § 5006 a fine and imprisonment are imposed for selling cigarettes.

By § 5007, printed in full in the *Marshall County Case*, a tax of \$300 per annum is assessed "against every person . . . and upon the real property and the owner thereof," whereon cigarettes, etc., are sold, or kept with intent to be sold, with a provision that "such tax shall be in addition to all other taxes and penalties, shall be assessed, collected, and distributed in the same manner as the mulct liquor tax, and shall be a perpetual lien upon all property, both personal and real, used in connection with the business; and the payment of such tax shall not be a bar to prosecution under any law prohibiting" the selling of cigarettes.

This assessment is made collectible as is a similar charge made upon dealers in liquor as follows:

By § 2433 the assessor makes quarterly returns to the auditor of the persons liable to the tax, a description of the real property whereon the business has been carried.

[278] *By § 2436 the charge is made payable in quarterly instalments, and shall be a lien upon the real property.

By § 2437 the auditor certifies quarterly to the county treasurer a list of the names returned to him by the assessor, with a description of the names of the tenant and owner.

By § 2438 the county treasurer enters upon the mulct tax book a quarterly instalment of the tax as a lien and charge upon the real property.

By § 2439, if the tax is not paid within a month, it shall be considered delinquent, and be collectible as other delinquent taxes.

By § 2440 the treasurer may collect the same after it has become delinquent, by seizing and selling any personal property.

By § 2441 application may be made to the board of supervisors to remit the tax by petition duly verified and filed with the county auditor eight days before the time set for the consideration of the case, notice of which must be served upon the county attorney.

By § 2442 the owner of the property may be heard in support of his application. A majority of the board determines whether the tax shall stand or be remitted, and either party may take an appeal to the district court.

These are all of the provisions of the law material to be considered.

We do not deem it necessary to affix a definition to the charge imposed by § 5007. It is certainly not an ordinary license tax, as the payment of such tax is no bar to a prosecution for selling cigarettes under § 5006. In *Smith v. Skow*, 97 Iowa, 640, 66 N. W. 893, it is said, in speaking of the mulct liquor tax, to which this is analogous, that though called a tax in the statute, it is not in fact a tax as we usually use the word. "It is in reality a charge or license for carrying on the business of vending liquors, which charge is made a lien upon all property used or connected with the business." In *Ferry v. Deneen* (Iowa) 82 N. W. 424, it is *observed by the same court, "it is ap-[279] parent, taking all the provisions of this act together, that the amount imposed, while called a 'tax,' is, at the same time, a penalty."

But, in the opinion of the court in the case under consideration, the charge imposed by § 5007 is said to be "clearly not a license, for it does not grant permission to do an act which, without such permission, would be invalid, . . . [that] it is manifestly a tax upon the traffic which the legislature saw fit to impose, not for the purpose of giving countenance to the business, but as a deterrent against engaging therein. . . . Indeed, we think it may be fairly said to be a tax upon the business. That a tax is imposed for the double purpose of regulation and revenue is no reason for declaring it invalid. . . . Being a tax, it was competent for the legislature to prescribe the proceedings and processes for its collection."

This being the latest expression of opinion of the supreme court of Iowa, we accept it for the purposes of this case. If it be not a construction binding upon us, it is, at least, a construction which we ought to follow.

unless we are clearly of opinion that it is wrong.

In the case of *McBride v. State Revenue Agent*, 70 Miss. 716, 12 So. 699, cited by plaintiffs, it was held that a statute providing that a person selling liquor unlawfully should be subject to pay, "where the offense is committed," the sum of \$500, and should also be liable to a "criminal prosecution," imposed a penalty, and not a tax, and that a proceeding to collect such penalty by distress was unconstitutional; but a distinction was drawn in that case between a penalty and a tax, and it was intimated that a proceeding by distress to collect a tax would not be open to a like objection.

It is not easy to draw an exact line of demarcation between a tax and a penalty, but, in view of the fact that the statute denominates the assessment a "tax," and provides proceedings appropriate for the collection of a tax, but not for the enforcement of a penalty, and does not contemplate a criminal prosecution, we cannot go far afield in [280] treating it as a tax *rather than a penalty.

Section 5006 does, indeed, impose a penalty, but § 5007 imposes a tax, with an additional provision that the payment of the tax shall not absolve the party from the penalty. It would be a distortion of the words employed to speak of § 5007 as imposing an additional penalty. The act itself provides in terms that such a tax shall be an addition to all other taxes and penalties, and elaborate provision is made for its enforcement. The mere fact that the charge, whatever it may be, is made a lien upon the real estate, and a personal claim against the landlord, indicates that it is in the nature of a tax rather than a penalty.

There is no conflict between the two sections, the state reserving to itself an election to proceed under the one or the other. If Congress may provide that a license granted by it to sell liquors shall not be construed to authorize the sale of such liquors when prohibited by the laws of the state, as was held by this court in *McGuire v. Massachusetts*, 3 Wall. 387, 18 L. ed. 164, *License Tax Cases*, 5 Wall. 463, 18 L. ed. 497, *Com. v. Crane*, 158 Mass. 218, 33 N. E. 388, *Parvear v. Massachusetts*, 5 Wall. 475, 18 L. ed. 608, we see no reason why the state itself may not exercise the same power, and reserve to itself the right to tax or prohibit, as in individual cases it may see fit.

2. Coming now to the provisions for its enforcement, it is entirely clear that, as to the person actually carrying on the business, no notice of the assessment or levy of the tax is necessary. If the person carries on

the business, the imposition of the tax follows as a matter of course. There is no discretion as to the amount. *McMillen v. Anderson*, 95 U. S. 37, 24 L. ed. 335; *Hager v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *Turpin v. Lemon*, 187 U. S. 51, 47 L. ed. 70, 23 Sup. Ct. Rep. 20; *Re Smith*, 104 Iowa, 199, 73 N. W. 605.

It was within the power of the legislature to make the tax a lien upon the property whereon the business was carried. If general taxes upon real estate and specific taxes for improvements thereto, including pavements, sidewalks, sewers, the opening of streets and keeping them clean, may be made liens upon the property affected, it is difficult to see why a tax *upon the business [281] carried on upon such property may not be made a lien as well as a claim against the owner. The owner is not only chargeable with a knowledge of the law in respect thereto, but he is presumed to know the business there carried on, and to have let the property with knowledge that it might become encumbered by a tax imposed upon such business. *Sheldon v. Van Buskirk*, 2 N. Y. 473; *Brown Shoe Co. v. Hunt*, 103 Iowa, 586, 39 L. R. A. 291, 64 Am. St. Rep. 198, 72 N. W. 765; *Polk County v. Hierb*, 37 Iowa, 367; *State v. Snyder*, 34 Kan. 425, 8 Pac. 860; *Hardten v. State*, 32 Kan. 637, 5 Pac. 212; *Sears v. Cottrell*, 5 Mich. 251; *Waldron v. Lee*, 5 Pick. 323; *Spencer v. McGowen*, 13 Wend. 256; *Simpson v. Serwiss*, 3 Ohio C. C. 433.

Acts of Congress impressing liens upon real estate for taxes or penalties arising from business illegally carried on there have been the frequent subject of controversy in this court.

Conceding that the landowner is entitled to notice before he can be personally liable, or before his property can be impressed with a lien, we are of opinion that he is protected by §§ 2441 and 2442, which permit him to make application at the meeting of the board of supervisors next following the listing of the property, the sessions of which board are fixed by law (Iowa Code, § 412), to remit the tax. This application may be made at any time after the property has been assessed, upon eight days' notice being given to the county attorney. Witnesses are examined under oath before the board, which determines by a majority vote whether the tax shall stand or be remitted. If the petition be denied, the owner of the property can appeal to the district court for a judicial determination of his liability. This is sufficient. If the taxpayer be given an opportunity to test the validity of the

tax at any time before it is made final, whether the proceedings for review take place before a board having a quasi judicial character, or before a tribunal provided by the state for the purpose of determining such questions, due process of law is not denied. It was held by this court in *Pittsburgh, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 421, 426, 38 L. ed. 1031, 1036, 14 Sup.

[282] Ct. Rep. 1114, that a hearing before *judgment, with full opportunity to present the evidence and the arguments which the party deems important, is all that can be adjudged vital. See also *King v. Mullins*, 171 U. S. 404, 43 L. ed. 214, 18 Sup. Ct. Rep. 925.

In the amendment to the petition in this case the landowner states that she had no knowledge whatever that her real estate was being used for the sale of cigarettes until after the assessment was levied, and never consented to the same; that she resides in Illinois, and rented the property through an agent, who had had no knowledge himself of the sale of cigarettes upon the premises. There is no allegation, however, that she did not have knowledge within ample time to make application to the board of supervisors for the remission of the tax. If such application had been made, it would have been the duty of the board to take the matter into consideration, and determine whether her want of knowledge would justify the remission of the tax. It is not for us to determine whether the defense be a valid one, since, having the opportunity to make it, she declined to do so.

The question is made whether § 5007 violates the Constitution of Iowa in not stating distinctly the tax and the object to which it is to be applied; but as this is purely a local question, we are not called upon to consider it.

Affirmed.

The CHIEF JUSTICE, Mr. Justice **Brewer**, and Mr. Justice **Peckham** dissented.

[283] *JOSEPH RALPH BURTON, *Plff. in Err.*,
v.

UNITED STATES.

(See S. C. Reporter's ed. 283-310.)

Direct appeal from district court—criminal law—sufficiency of indictment—evidence—requested instructions.

1. A question respecting an alleged privilege of

freedom from arrest as a United States senator, under U. S. Const. art. 1, § 6, is one involving the construction, and application of the Federal Constitution, which will sustain a writ of error from the Federal Supreme Court to review a conviction in a district court.

2. An indictment charges an offense under U. S. Rev. Stat. § 1782 (U. S. Comp. Stat. 1901, p. 1212), making it a misdemeanor for a United States senator to receive compensation for services rendered before any department, in relation to any proceedings in which the United States is interested, where it avers that the accused, being such a senator, received compensation for services rendered before the Postoffice Department for the purpose of inducing a decision favorable to his client in a fraud order inquiry pending before that Department.

3. An averment in an indictment, charging a United States senator with having received certain checks at St. Louis, Missouri, as compensation for services rendered before the Postoffice Department, in violation of U. S. Rev. Stat. § 1782 (U. S. Comp. Stat. 1901, p. 1212), and alleging the payment to him of the money thereon at that place, is not supported by evidence that the checks, drawn on a St. Louis trust company, were received by him in the city of Washington, and were by him there indorsed and deposited with a local bank, and were afterwards paid at St. Louis, and that the amount of each check was, immediately upon deposit, credited by the Washington bank to the account of defendant, who had the right to draw against the account without waiting for payment at St. Louis.

4. The refusal to charge the jury in a criminal case, on their return into court for further instructions because of their inability to agree, that certain applicable requests to charge, given by the court at defendant's request, were material to the case then on trial, is reversible error where such requests, when originally made, were received as abstract propositions of law, which the court gave in connection with the charge, saying that he was willing to give them inasmuch as they were asked, and as they contained general propositions of law.

5. The trial court ought not to inquire of the jury in a criminal case, when brought in to court because of their inability to agree, how the jury is divided, even though the scope of the question is confined to the proportions of the division, without reference to how the jury stands with respect to conviction or acquittal.

[No. 343.]

*Argued November 30, December 1, 1904.
Decided January 16, 1905.*

[N ERROR to the District Court of the United States for the Eastern District of Missouri, to review a conviction of the violation of U. S. Rev. Stat. § 1782 (U. S. Comp. Stat. 1901, p. 1212), making it a

NOTE.—On direct appeal to Federal Supreme Court from Federal district and circuit courts—see note to *Gwin v. United States*, 46 L. ed. U. S. 741.

On the province of court and jury in trials in the Federal courts—see note to *Vany v. Peirce*, 26 C. C. A. 528.

misdeemeanor for a United States senator to receive compensation for services rendered before any department, in relation to any proceeding in which the United States is interested. *Reversed* and remanded for a new trial.

See same case below, on demurrer to indictment, 131 Fed. 552.

Statement by Mr. Justice **Peckham**:

The plaintiff in error having been convicted in the district court of the United States for the eastern district of Missouri of a violation of the Revised Statutes of the United States, § 1782 (U. S. Comp. Stat. 1901, p. 1212), and set forth in the margin,[†] has brought the case here directly from that court by writ of error.

[285] *The defendant was a member of the Senate of the United States, representing the state of Kansas. The indictment under which he was tried contained nine counts. The first count, after averring that the defendant was a senator from the state of Kansas, averred that on the 26th day of March, 1903, he received, at St. Louis, Missouri, from the Rialto Grain & Securities Company, \$500 in money, as compensation for his services theretofore on November 22, 1902, and on divers other days between that day and the 26th day of March, 1903, rendered for the company before the Postoffice Department of the United States, in a certain matter then and there pending before that Department, in which the United States was directly interested, that is to say: Whether the company had violated the provisions of § 5480 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 3696), in that the company had, through its officers, devised a scheme and artifice to defraud, which was to be effected through correspondence by means of the postoffice establishment of the United States, and whether the correspondence of the company at St. Louis, Missouri, should not be returned with the word "fraudulent" plainly written or stamped upon the outside, as authorized by law. It is also averred that the services rendered by defendant to the company consisted in part of visits to the Postmaster General, the chief inspector, and other officers of the Postoffice Department, and of

statements made to the Postmaster General, the chief inspector, and other officers, which visits and statements made by the defendant were made with a view and for the purpose of inducing the Postmaster General, the chief inspector, and other officers to decide the question then pending before *the Post-[286] office Department in a way favorable to the Rialto Company. The second count of the indictment was the same as the first, except that it averred the United States was "indirectly," instead of "directly," interested in the question as to whether or not a "fraud" order should be issued. Upon the third count the jury rendered a verdict of not guilty. Upon the fourth and fifth counts the government entered a *nolle prosequi*. The third, fourth, and fifth counts concededly charged but one offense, which was the same as that charged in the first and second counts, and all of these counts were based upon the payment of \$500 in cash to defendant, at St. Louis, on the 26th of March, 1903. The sixth count averred the receipt by defendant, at the city of St. Louis, in the state of Missouri, of a check for the payment of \$500, which was received by the defendant on the 22d of November, 1902, the check being drawn upon the Commonwealth Trust Company, of St. Louis, payable to the order of the defendant, and by him duly indorsed, and such check was paid by the trust company to defendant at St. Louis, as compensation for his services to the company between the 22d of November, 1902, and the 26th of March, 1903, before the Postoffice Department, in a matter in which the United States was directly interested. The count then contained the same averments of the character of the question pending before the Postoffice Department as are set forth in the first count. The seventh count is the same as the sixth, except that it averred the making of a check and the payment thereof to the defendant on the 15th day of December, 1902, at the city of St. Louis, in the state of Missouri, for the sum of \$500; all other averments being the same as the sixth count. The eighth count averred the giving of a check for the sum of \$500 on the 22d day of January, 1903, at the city of St. Louis, in the state of Missouri, in payment of services of the same

[†]U. S. Comp. Stat. 1901, p. 1212.

Sec. 1782. No senator, representative, or delegate, after his election, and during his continuance in office, and no head of a department, or other officer or clerk in the employ of the government, shall receive or agree to receive any compensation whatever, directly or indirectly, for any services rendered, or to be rendered, to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United

States is a party, or directly or indirectly interested, before any department, court-martial, bureau, officer, or any civil, military, or naval commission whatever. Every person offending against this section shall be deemed guilty of a misdemeanor, and shall be imprisoned not more than two years, and fined not more than ten thousand dollars, and shall, moreover, by conviction therefor, be rendered forever thereafter incapable of holding any office of honor, trust, or profit under the government of the United States.

nature as stated in the sixth and seventh counts. The ninth count is the same as the sixth, seventh, and eighth, except that it averred the receipt of a check by the defendant, dated the 16th day of February, 1903, at the city of St. Louis, in the state [287] of Missouri, for the same *class of services and upon the same matter then pending before the Postoffice Department. The defendant demurred to the indictment on the ground that it stated no crime, and that it showed that the United States had no interest, direct or indirect, in the matter before the Postoffice Department, inasmuch as the interest of the United States, under the statute, must be either a pecuniary or property interest, which may be favorably or unfavorably affected by action sought or taken in the given matter pending before the Department. The demurrer was overruled, and the defendant then pleaded not guilty.

Messrs. John F. Dillon and Fred W. Lehmann argued the cause, and, with **Messrs. Harry Hubbard, John M. Dillon, and W. H. Rossington**, filed a brief for plaintiff in error:

Where a statute or other document enumerates several classes of persons or things, and, immediately following and classed with such enumeration, the clause embraces "other" persons or things, the word "other" will generally be read as "other such like," so that the persons or things therein comprised may be read as *ejusdem generis* with, and not of a quality superior to or different from, those specifically enumerated.

21 Am. & Eng. Enc. Law, p. 1012, and cases cited; *Alabama v. Montague*, 117 U. S. 602, 610, 29 L. ed. 1000, 1003, 6 Sup. Ct. Rep. 911.

Applying the principles of construction stated by Mr. Justice Miller in *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616, we maintain that the question of the issuance of a fraud order against the Rialto Grain & Securities Company is not included in this statute as a matter or thing in which the United States is directly or indirectly interested.

The interest which the United States must have in a matter or thing, in order to bring the matter or thing within the prohibition of U. S. Rev. Stat. § 1782 (U. S. Comp. Stat. 1901, p. 1212), must, under the ordinary rules and principles of law which must necessarily govern in cases of this kind, be, in the language of Mr. Chief Justice Shaw in the case of *Northampton v. Smith*, 11 Met. 390, one that is visible, demonstrable, and capable of precise proof; one in which the United States will gain or lose something by the decision.

The words "interest" or "interested," as

used in U. S. Rev. Stat. § 1782 (U. S. Comp. Stat. 1901, p. 1212), had a well-settled legal meaning well known to the lawyers who framed that section, which meaning is in direct conflict with the opinion and decision of the trial court in this case.

Northampton v. Smith, 11 Met. 390; *MeGrath v. People*, 100 Ill. 464; *Evans v. Eaton*, 7 Wheat. 356, 5 L. ed. 472; *State v. Sutton*, 74 Vt. 12, 52 Atl. 116; *Foreman v. Marianna*, 43 Ark. 324; *Taylor v. Highway Comrs.* 88 Ill. 526; *Chicago, B. & Q. R. Co. v. Kellogg*, 54 Neb. 138, 74 N. W. 403; *Sauls v. Freeman*, 24 Fla. 209, 12 Am. St. Rep. 190, 4 So. 525; *Bowman's Case*, 67 Mo. 146.

The statute, like any other statute, and especially a statute which makes an act a crime, or a statute denouncing fines, imprisonment, forfeiture of office, and perpetual infamy, must be strictly construed.

United States v. Wiltberger, 5 Wheat. 76, 5 L. ed. 37; *United States v. Sheldon*, 2 Wheat. 119, 4 L. ed. 199; *United States v. Morris*, 14 Pet. 464, 10 L. ed. 543; *United States v. Clayton*, 2 Dill. 219, Fed. Cas. No. 14,814.

The relation between Burton and the Riggs Bank was that of creditor and debtor immediately on the deposit being made and credit therefor given to Burton, and not that of principal and agent, or any other fiduciary relation.

Cragie v. Hadley, 99 N. Y. 131, 52 Am. Rep. 9, 1 N. E. 537; *St. Louis & S. F. R. Co. v. Johnston*, 133 U. S. 566, 576, 33 L. ed. 683, 686, 10 Sup. Ct. Rep. 390; *Metropolitan Nat. Bank v. Loyd*, 90 N. Y. 530; *National Bank v. Millard*, 10 Wall. 152, 19 L. ed. 897; *Thompson v. Riggs*, 5 Wall. 663, 18 L. ed. 704; *Phoenix Bank v. Risley*, 111 U. S. 125, 28 L. ed. 374, 4 Sup. Ct. Rep. 322; *Scammon v. Kimball*, 92 U. S. 362, 23 L. ed. 483.

Even if the Riggs National Bank of Washington was the agent of Burton to collect the four checks, yet the subsequent indorsees of such checks, if they were agents at all, were the agents of the Riggs National Bank, and were not the agents of Burton.

Hoover v. Wise, 91 U. S. 308, 23 L. ed. 393.

Burton was not present in St. Louis when these checks were paid; he was not there in person, and he was not there constructively through any agent. Hence the court clearly erred, on the undisputed facts in the case, in submitting to the jury the question whether or not the checks were collected by the Riggs National Bank, or by any subsequent indorsees as agents of Burton.

Exchange Nat. Bank v. Third Nat. Bank, 112 U. S. 276, 28 L. ed. 722, 5 Sup. Ct. Rep. 141; *Tradesman's Nat. Bank v. Third Nat.*

Bank, 112 U. S. 293, 28 L. ed. 728, 5 Sup. Ct. Rep. 149.

Solicitor General Hoyt argued the cause and filed a brief for defendant in error:

The inquiry pending before the Postoffice Department was a matter or thing in which the United States was "interested," within the purview of U. S. Rev. Stat. § 1782 (U. S. Comp. Stat. 1901, p. 1212).

United States v. Bunting, 82 Fed. 883; *United States v. Bates*, Sup. Ct. D. C. 18 Rep. Civ. Serv. Com. 141; *Palmer v. Colladay*, 18 App. D. C. 426; *Tyner v. United States*, 23 App. D. C. 324; *Curley v. United States*, 130 Fed. 1; *McGregor v. United States*, 134 Fed. 187.

It is impossible to sustain the view that the checks, the ordinary cash and demand items of banking transactions, were not actually and legally paid to Burton, the payee upon their face, at St. Louis and by the banking institution located there upon which they were drawn.

Ward v. Smith, 7 Wall. 447, 19 L. ed. 207; *Dodge v. Freedman's Sav. & T. Co.* 93 U. S. 379, 23 L. ed. 920; *Evansville Bank v. German American Bank (Old Nat. Bank v. German American Nat. Bank)* 155 U. S. 556, 39 L. ed. 259, 15 Sup. Ct. Rep. 221; *Scott v. Ocean Bank*, 23 N. Y. 289.

A criminal law, as much as any other, must be interpreted according to the fair and reasonable import of its words. The intent must be found in the language. To determine that a case is within the intention of a statute, its language must authorize us to say so.

United States v. Wiltberger, 5 Wheat. 76, 5 L. ed. 37.

But though penal laws are to be construed strictly, yet the intention of the legislature must govern in the construction of penal as well as other statutes; and they are not to be construed so strictly as to defeat the obvious intention of the legislature.

United States v. Lacher, 134 U. S. 624, 33 L. ed. 1080, 16 Sup. Ct. Rep. 625.

There is a hint to be borrowed here from customs law, in which frequently there is an enumeration followed by an omnibus clause, and where the word "including" is sometimes used to specify particularly that which belongs to the genus, and is sometimes used to add to the general class a species which does not naturally belong to it.

Hiller v. United States, 45 C. C. A. 229, 106 Fed. 74; *Re Merchandise*, 75 Fed. 998; *Hills Bros. Co. v. United States*, 39 C. C. A. 500, 99 Fed. 264.

Mr. Justice **Peckham**, after making the foregoing statement of facts, delivered the opinion of the court:

Counsel for defendant base their right to

obtain a direct review by this court of the judgment of conviction in the district court of Missouri upon the contention that the case involves the construction and application of the Constitution of the United States in several particulars. They insist that under article 3, § 2, of the Constitution, and also under the 6th Amendment of the same, the defendant was entitled to be tried by a jury of the state or district in which the crime alleged against him in the indictment was committed. This question arises by reason of those counts of the indictment which charge the receipt by defendant of various checks therein set forth, at St. Louis, in the state of Missouri, while the evidence in the case shows, without contradiction, that the checks were received in the city of Washington, D. C., and payment thereof made to defendant by one of the banks of that city. Counsel contended that if any crime were committed by the receipt of these checks and the payment thereof to the defendant (which is denied), that crime was committed in Washington, and not in Missouri, and that it did not come within § 731 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 585), providing *that when an offense against the [295] United States is begun in one judicial circuit, and completed in another, it shall be deemed to have been committed in either, and may be dealt with, etc., in either district, in the same manner as if it had been actually and wholly committed therein. Counsel for defendant also contend that the case involves the construction and application of § 6 of article 1 of the Constitution of the United States, providing that senators and representatives shall, in all cases except treason, felony; and breach of the peace, be privileged from arrest during their attendance at the sessions of their respective houses, and in going to and returning from the same. These questions were raised in the court below. Whether the defendant waived his alleged privilege of freedom from arrest as senator would probably depend upon the question whether the offense charged was in substance a felony, and if so, was that privilege a personal one only, and not given for the purpose of always securing the representation of a state in the Senate of the United States. However that may be, the question is not frivolous, and in such case the statute grants to this court jurisdiction to issue the writ of error directly to the district court, and then to decide the case without being restricted to the constitutional question. *Horner v. United States*, 143 U. S. 570, 36 L. ed. 266, 12 Sup. Ct. Rep. 522. It is not the habit of the court to decide questions of a constitutional nature unless absolutely neces-

sary to a decision of the case. Having jurisdiction to decide all questions in the case on this writ of error, we deny the motion for a certiorari, and proceed to an examination of the record.

First. The question of the construction of the statute upon which this indictment was framed is the first to arise. Upon that question a majority of the court (Mr. Justice Harlan, Mr. Justice Brown, Mr. Justice McKenna, Mr. Justice Holmes, and Mr. Justice Day, concurring) are of opinion that the facts alleged in the indictment show a case that is covered by the provisions of the statute, while the Chief Justice, Mr. Justice Brewer, Mr. Justice White, and the

[296]writer of this opinion *dissent from that view, and are of opinion that the statute does not cover the case as alleged in the indictment.

Second. Assuming that the statute applies to the facts stated in the indictment, a further question arises upon the general merits of the case, whether there was sufficient evidence of guilt to be submitted to the jury, and a majority of the court (the same justices concurring) are of opinion that there was, or are not prepared to say there was not, and the same minority dissent from that view, and are of opinion that there was no evidence whatever upon which to found a verdict of conviction.

There are, however, other questions remaining, which we now proceed to discuss on the theory that the statute covers the case.

Third. The sixth, seventh, eighth, and ninth counts of the indictment aver the receipt by the defendant of the different checks described, at the city of St. Louis, in the state of Missouri, and the payment of the money thereon to the defendant at St. Louis, in that state, as compensation for services theretofore performed by the defendant for the Rialto Company. It may be assumed that, on the facts averred in these various counts in the indictment upon the checks, each of them was good. It turned out, however, on the trial that these averments of the place where the different checks were received and paid were not true; but, on the contrary, the evidence was wholly undisputed that each of them was received by the defendant in the city of Washington, D. C., and by him there indorsed and deposited with the Riggs National Bank, of Washington, D. C., and that they were afterwards duly paid by the Commonwealth Trust Company, at St. Louis, Missouri; that the amount of each was in each instance immediately credited by the Riggs National Bank to the account of the defendant with the bank, and the cashier testified that the defendant had the right, im-

mediately after the credit was made, to draw out the whole, or any portion thereof, without waiting for the payment of the check at St. Louis.

*There was no oral or special agreement[297] made between the defendant and the bank at the time when any one of the checks was deposited and credit given for the amount thereof. The defendant had an account with the bank, took each check when it arrived, went to the bank, indorsed the check, which was payable to his order, and the bank took the check, placed the amount thereof to the credit of the defendant's account, and nothing further was said in regard to the matter. In other words, it was the ordinary case of the transfer or sale of the check by the defendant, and the purchase of it by the bank, and upon its delivery to the bank, under the circumstances stated, the title to the check passed to the bank, and it became the owner thereof. It was in no sense the agent of the defendant for the purpose of collecting the amount of the check from the trust company upon which it was drawn. From the time of the delivery of the check by the defendant to the bank, it became the owner of the check; it could have torn it up or thrown it in the fire or made any other use or disposition of it which it chose, and no right of defendant would have been infringed. The testimony of Mr. Brice, the cashier of the Riggs National Bank, as to the custom of the bank when a check was not paid, of charging it up against the depositor's account, did not in the least vary the legal effect of the transaction; it was simply a method pursued by the bank of exacting payment from the indorser of the check, and nothing more. There was nothing whatever in the evidence showing any agreement or understanding as to the effect of the transaction between the parties,—the defendant and the bank,—making it other than such as the law would imply from the facts already stated. The forwarding of the check "for collection," as stated by Mr. Brice, was not a collection for defendant by the bank as his agent. It was sent forward to be paid, and the Riggs bank was its owner when sent. With reference to the jurisdiction of the court over the offense described in the sixth and following counts in the indictment, the court held that if the checks were actually received by the defendant in Washington, and *the money[298] paid to him by the bank in that city, and the title and ownership of the checks passed to the bank at that time, the court in Missouri had no jurisdiction to try the offenses set forth in those counts of the indictment already referred to. There was no question that such was the fact, and it was error to submit the matter to the jury to find some

other fact not supported by any evidence. The court said:

"The government claims that the compensation referred to in this count was sent to the accused by the Rialto Grain & Securities Company, in the form of a check, drawn by it on the Commonwealth Trust Company, payable to the order of the accused, by mail; that he received the check representing this compensation at Washington, in the District of Columbia, and then and there indorsed the check, deposited it to his own credit in the Riggs National Bank, at Washington; that the last-mentioned bank afterwards forwarded the check by and through its correspondents to St. Louis for payment by the Commonwealth Trust Company, upon which it was drawn, and that the Riggs bank and its correspondents in all this matter became and were the agents of the accused for securing this money, and when the money called for by the check was finally paid at St. Louis, Missouri, by the trust company on which it was drawn, it amounted to a payment of that money to the accused at St. Louis, Missouri. This suggests an important feature of the case, for the reason that, unless it be true that the accused received the money represented by and paid on this check at St. Louis, this court would have no jurisdiction to try the case.

"The Constitution of the United States confers upon the accused in every criminal case the right to be tried by an impartial jury of a state and district where the crime shall have been committed.

"The receipt of the money is the gist of the crime charged against the accused, and if he did not receive it in this district, in fact in St. Louis, where he is charged to have received it, he is not amenable to the law in this district, and cannot be convicted *in this court on this sixth count. Accordingly, it becomes your duty to ascertain and find from the evidence, what were the true relations between the accused and the Washington bank when he deposited the check in question with that bank, and what was the understanding between them as to their respective rights in relation to the check and the proceeds thereof. On this question the court charges you as follows:

"If it was the intent and understanding of the Washington bank and the accused, at the time the latter deposited the check in question with the former, that the bank should forward the same in the usual course, by and through its correspondents to St. Louis, for payment, and that in so doing it and its correspondents should act only as the agent of the accused for that purpose, then the final payment by the Commonwealth Trust Company, at St. Louis, of the check to the correspondents of the Wash-

ington bank, would amount in law to a payment in St. Louis, as charged in the sixth count, of the amount of the check to the accused. If, on the contrary, it was the understanding and intent of the Washington bank and the accused at the time the latter deposited the check in question with the former that the bank should become the purchaser of the check, and should thereafter be the absolute owner thereof, and not act as just indicated, as the agent of the accused in the collection of the check, then the payment at St. Louis by the Commonwealth Trust Company would amount in law to a payment to the Washington bank, and not to the accused. In the latter event no crime would have been committed by the accused in this district, by reason of the check referred to in the sixth count of the indictment.

"In order to find the accused guilty on the sixth count, you must find from the evidence, by the same measure of proof as is required in all criminal cases, that the check referred to in the sixth count was deposited by the accused in the Washington bank for collection, and that the bank was to act in collecting the same, as the agent of the accused, and not as the owner of the check in question.

*"In determining this issue, you are at [300] liberty to and should consider all the evidence adduced; the actual transaction as it occurred at the Riggs bank, where the check was deposited, the check itself, and all its indorsements, the rights and privileges which were immediately accorded the accused upon making the deposit, the actual conduct and purpose of the Riggs bank in forwarding the check to St. Louis for payment, the customary conduct and usage of that bank and all banks in Washington at the time, so far as shown by the proof. And if, from all these facts and all other facts disclosed by the proof, you find that the check in question was in fact deposited by the accused, with the intent and knowledge on his part, as well as on the part of the bank itself, that it should be forwarded to St. Louis for collection for account of the accused, the bank and its correspondents acting as agents for the accused to make such collection, you should find that when the same was actually paid to the last indorser on the check at St. Louis by the trust company upon which it was drawn, it was, in contemplation of law, paid to the accused himself.

"If, on the contrary, you find from the evidence that the accused and the Riggs bank, at the time of the deposit of the check in question, understood and intended that the bank should become the purchaser of the

check, and be its absolute owner, then the subsequent forwarding of it to St. Louis for payment was the act of the bank itself, and the final payment of the check by the trust company at St. Louis was a payment, not to the accused, but to the bank; and if such is the fact your verdict on the sixth count must be not guilty."

A careful scrutiny of the evidence with relation to this charge to the jury shows that there was no foundation for submitting to the jury the question of what was the understanding (other than such as arose from the transaction itself, as shown by uncontradicted evidence) between the defendant and the bank at the time when these various checks were deposited with the bank, and their proceeds placed to the credit of the defendant. There was no agreement [301] or understanding of any kind other *than such as the law makes from the transaction detailed, which was itself proved by uncontradicted evidence offered by the government itself. In the absence of any special agreement that the effect of the transaction shall be otherwise (and none can be asserted here), there is no doubt that its legal effect is a change of ownership of the paper, and that the subsequent action of the bank in taking steps to obtain payment for itself of the paper which it had purchased can in no sense be said to be the action of an agent for its principal, but the act of an owner in regard to its own property. The learned judge, in his charge to the jury, did not, indeed, deny the general truth of this proposition, but he left it to the jury to determine whether there was not an agreement or understanding made or arrived at by the parties at the time the checks were taken by the defendant to the bank, which altered the legal effect of the transaction actually proved. This, as we have said, there was not the slightest evidence of, and it was error to submit that question to the jury.

The general transaction between the bank and a customer in the way of deposits to a customer's credit, and drawing against the account by the customer, constitute the relation of creditor and debtor. As is said by Mr. Justice Davis, in delivering the opinion of the court in *National Bank of the Republic v. Millard*, 10 Wall. 152, 19 L. ed. 897, in speaking of this relationship (page 155, L. ed. p. 899):

"It is an important part of the business of banking to receive deposits; but when they are received, unless there are stipulations to the contrary, they belong to the bank, become part of its general funds, and can be loaned by it as other moneys. The banker is accountable for the deposits which he receives as a debtor, and he agrees to dis-

charge these debts by honoring the checks which the depositor shall, from time to time, draw on him. The contract between the parties is purely a legal one, and has nothing of the nature of a trust in it. This subject was fully discussed by Lords Cottenham, Brougham, Lyndhurst, and Campbell in the House of Lords in the case of **Foley* [302] v. *Hill*, 2 H. L. Cas. 28, and they all concurred in the opinion that the relation between a banker and customer, who pays money into the bank, or to whose credit money is placed there, is the ordinary relation of debtor and creditor, and does not partake of a fiduciary character, and the great weight of American authorities is to the same effect."

When a check is taken to a bank, and the bank receives it and places the amount to the credit of a customer, the relation of creditor and debtor between them subsists, and it is not that of principal and agent. This principle is held in *Thompson v. Riggs*, 5 Wall. 663, 18 L. ed. 704, and also in *Marine Bank v. Fulton Bank*, 2 Wall. 252, 17 L. ed. 785. See also *Scammon v. Kimball*, 92 U. S. 362, 369, 23 L. ed. 483, 485; *Davis v. Elmira Sav. Bank*, 161 U. S. 275, 288, 40 L. ed. 700, 702, 16 Sup. Ct. Rep. 502.

The case of *Cragie v. Hadley*, 99 N. Y. 131, 52 Am. Rep. 9, 1 N. E. 537, contains a statement of the rule as follows, per Andrews, Chief Judge:

"The general doctrine that upon a deposit made by a customer, in a bank, in the ordinary course of business, of money, or of drafts or checks received and credited as money, the title to the money, or to the drafts or checks, is immediately vested in, and becomes the property of, the bank, is not open to question. *Commercial Bank v. Hughes*, 17 Wend. 94; *Metropolitan Nat. Bank v. Loyd*, 90 N. Y. 530. The transaction, in legal effect, is a transfer of the money, or drafts, or checks, as the case may be, by the customer to the bank, upon an implied contract on the part of the latter to repay the amount of the deposit upon the checks of the depositor. The bank acquires title to the money, drafts, or checks on an implied agreement to pay an equivalent consideration when called upon by the depositor in the usual course of business."

In *Metropolitan Nat. Bank v. Loyd*, 90 N. Y. 530, one of the cases referred to by Judge Andrews, Judge Danforth, in speaking of the effect of placing a check to the credit of a depositor in his account with the bank, said that:

"The title passed to the bank, and they [the checks] were not again subject to his control. . . . *Scott v. Ocean Bank*, *23 [303]

N. Y. 289 [and other cases cited in the opinion].

"It is true no express agreement was made, transferring the check for so much money, but it was delivered to the bank, and accepted by it, and the bank gave Murray credit for the amount, and he accepted it. That was enough. The property in the check passed from Murray, and vested in the bank. He was entitled to draw the money so credited to him, for, as to it, the relation of debtor and creditor was formed, and the right of Murray to command payment at once was of the very nature and essence of the transaction. On the other hand, the bank, as owner of the check, could confer a perfect title upon its transferee, and, therefore, when, by its directions, the plaintiff received and gave credit for it upon account, it became its owner, and entitled to the money which it represented. . . . If, as the appellant insists, the check had been deposited for a specific purpose,—for collection,—the property would have remained in the depositor; but there is no evidence upon which such fact could be established, nor is it consistent with the dealings between the parties, or with any of the admitted circumstances.

"These show that it was the intention of both parties to make the transfer of the check absolute, and not merely to enable the bank to receive the money upon it as Murray's agent."

The same principle is set forth in *Taft v. Quinsigamond Nat. Bank*, 172 Mass. 363, 52 N. E. 387. In that case the court said: "So when, without more, a bank receives upon deposit a check indorsed without restriction, and gives credit for it to the depositor as cash in a drawing account, the form of the transaction is consistent with and indicates a sale, in which, as with money so deposited, the check becomes the absolute property of the banker."

In the case at bar the proof was not disputed. The checks were passed to the credit of defendant unconditionally, and without any special understanding. The custom of [304]the bank *to forward such checks for collection is a plain custom to forward for collection for itself. The only liability of defendant was on his indorsement. All this made a payment at Washington, and as a result there was a total lack of evidence to sustain the sixth, seventh, eighth, and ninth counts of the indictment. The court should have, therefore, directed a verdict of not guilty on those counts.

This is not a case of the commencement of a crime in one district and its completion in another, so that, under the statute, the court in either district has jurisdiction.

Rev. Stat. § 731, U. S. Comp. Stat. 1901, p. 585. There was no beginning of the offense in Missouri. The payment of the money was in Washington, and there was no commencement of that offense when the officer of the Rialto Company sent the checks from St. Louis to defendant. The latter did not thereby begin an offense in Missouri.

Fourth. The judgment must also be reversed because of the error in the refusal of the court to charge as requested when the jury came into court and announced an inability to agree. Previous to the retirement of the jury the defendant's counsel submitted to the court certain requests to charge the jury,—twelve in all. Those numbered seven, ten, and eleven were refused. Numbers ten and eleven referred to the checks and the effect of the transaction of depositing them with the Riggs bank. The other instructions referred to many of the questions arising in the case, and material upon the subject of the trial then before the court. After the court had concluded his main charge to the jury, he added that he had been "asked by counsel for the defendant to give certain declarations here, and while I think they have, in the main, been covered by the charge, yet I will give them to you." (They were the instructions requested by defendant, and above described.) "These are abstract propositions of law, which I give in connection with the charge, as perhaps more fully amplifying it. I am willing to give them, inasmuch as they are asked, and they contain general propositions of law." The jury then retired, *and after [305] being out from Saturday evening at 8 o'clock until the following Monday morning at 10 o'clock, without agreeing, returned into court, and were charged by the court in relation to their duty as jurors. In the course of that charge the court said to the jury as follows:

"I gather from this letter, Mr. Foreman, what I may be incorrect about. I would like to ask the foreman of the jury how you are divided. I do not want to know how many stand for conviction, or how many for acquittal, but to know the number who stand the one way and the number who stand another way. I would like the statement from the foreman.

"The Foreman: Eleven to one.

"The Court: The jury stand eleven to one. I gather that from the communication. In the light of that fact I feel constrained to make a statement to you, and in making it to use the language of the Supreme Court of the United States as found in *Allen v. United States*." 164 U. S. 492, 41 L. ed. 528, 17 Sup. Ct. Rep. 154.

The court then charged the jury in relation to its duty to agree if possible, and directed that the jury should, in the light of the comments of the court then made, retire and make a serious attempt to arrive at a verdict in the case. Counsel for the defendant then asked the court to indicate to the jury that the requests to charge theretofore asked by the defendant, and which were given by the court, constitute as much a part—

"The Court: If you will wait a moment the jury may retire.

"Mr. Krum: I beg your Honor to state to the jury—

"The Court: Stop a moment, and then I will hear your argument. I will, after the jury retire, hear counsel if they have anything to say, or any exceptions they may wish to take to the charge. The court here handed the foreman of the jury the charge and instructions heretofore referred to, and directed the jury to retire for further consideration of their verdict.

"Mr. Lehmann: I do not believe that the requests to charge, in the manner made by defendant, and given by the court to the jury, were given as they should have been, the suggestions being made by the court at the time, that they were mere abstract statements, which had the effect to deprive them of something of their force, when they were [306] not intended as mere abstractions, *and were believed by counsel to have specific reference to the case; and those instructions as well as others ought to be called to the attention of the jury. We must except here as earnestly as it is in our power to do, against the charge of the court made now.

"The Court: If you except, I will allow the exception.

"Mr. Krum: What I desire to do in the presence of the jury was to ask your Honor to indicate to the jury, as it was evident the jury did not understand, that it was a fact that the requests to charge which were recognized by the court, acquiesced in by the court, and given by the court, were just as much a part of your Honor's charge as that which the court read as emanating from the court itself.

"The Court: I did tell the jury so on Saturday.

"Mr. Krum: I submit it is apparent that they do not understand that they are just as much to be controlled by that part of the instructions as any other part. That is evident from the inquiry made.

"The Court: The court has endeavored to answer the only request made by the jury, and that is all I think should be done."

We think the court should have instructed

the jury as requested by counsel for the defendant, and that its refusal to do so was error. Here was a case of very great doubt in the minds of some of the jury. It had deliberated for more than thirty-six hours, and been unable to agree upon a verdict. The requests to charge originally made by counsel for defendant had, at that time, been received as abstract propositions of law, which the court gave in connection with the charge, saying that he was willing to give them inasmuch as they were asked, and as they contained general propositions of law. It does not appear from the bill of exceptions that defendant's counsel then excepted to those remarks by the court, but when the jury subsequently returned into court, and announced their *inability to [307] agree, counsel for defendant immediately saw the extreme importance of having the requests to charge made to the court regarded by the jury, not as abstract or general propositions of law, but as requests which affected the case then on trial with reference to the facts proved in the case; and so, before the jury again retired, they commenced to propound their requests upon the subject to the court, but the court, before listening to them, instructed the jury to retire, and then followed the colloquy above set forth between court and counsel.

Balanced as the case was in the minds of some of the jurors, doubts existing as to the defendant's guilt in the mind of at least one, it was a case where the most extreme care and caution were necessary in order that the legal rights of the defendant should be preserved. Considering the attitude of the case as it existed when the jury returned into court for further instructions, we think the defendant was entitled, as matter of legal right, to the charge asked for in regard to the previous requests to charge, which had been granted by the court under the circumstances stated, and it was not a matter of discretion whether the jury should, or should not, be charged as to the character of those requests. A slight thing may have turned the balance against the accused under the circumstances shown by the record, and he ought not to have longer remained burdened with the characterization of his requests to charge, made by the court, and when he asked for the assertion by the court of the materiality and validity of those requests which had already been made, the court ought to have granted the request.

We must say in addition, that a practice ought not to grow up of inquiring of a jury, when brought into court because unable to agree, how the jury is divided; not meaning by such question, how many stand for con-

viction or how many stand for acquittal, but meaning the proportion of the division, not which way the division may be. Such a practice is not to be commended, because [308] we cannot see how it may be material *for the court to understand the proportion of division of opinion among the jury. All that the judge said in regard to the propriety and duty of the jury to fairly and honestly endeavor to agree could have been said without asking for the fact as to the proportion of their division; and we do not think that the proper administration of the law requires such knowledge or permits such a question on the part of the presiding judge. Cases may easily be imagined where a practice of this kind might lead to improper influences, and for this reason it ought not to obtain.

Our conclusion is, that *the judgment must be reversed* and the cause remanded to the District Court of Missouri, with directions to grant a new trial.

So ordered.

Mr. Justice **Harlan**, dissenting:

I dissent from so much of the opinion and judgment as holds that the offenses charged against the defendant, based on the checks made at St. Louis, and mentioned in the sixth, seventh, eighth, and ninth counts, were committed in this district, where the checks were received by him, and not at St. Louis, where they were paid by the bank on which they were drawn for his benefit. I am of opinion that the Riggs National Bank, upon receiving the checks from the accused, became, in every substantial sense, his agent and representative to present the checks and receive the proceeds thereof; in which case, the offense of receiving, by means of those checks, compensation for services rendered in violation of the statute, was committed at St. Louis, not at Washington. In a strict sense, no title or ownership of the checks passed to the Riggs National Bank, as in the case of an unconditional sale, consummated by actual delivery, of tangible, personal property, for the recovery of the possession of which the owner could, of right, maintain an action in his own name; for, if the St. Louis bank on which the checks were drawn had refused to accept or honor [309] them, no *action on the checks, or at all, could have been maintained against it by the Riggs National Bank. *National Bank of the Republic v. Millard*, 10 Wall. 152, 156, 19 L. ed. 897, 899; *First Nat. Bank v. Whitman*, 94 U. S. 343, 344, 24 L. ed. 229, 230; *St. Louis & S. F. R. Co. v. Johnston*, 133 U. S. 566, 574, 33 L. ed. 683, 685, 10 Sup. Ct. Rep. 390; *Fourth Street Nat. Bank v.*

196 U. S.

Yardley, 165 U. S. 634, 643, 41 L. ed. 855, 861, 17 Sup. Ct. Rep. 439. The checks were made at St. Louis, and sent by mail from that city to the accused, in discharge of an obligation assumed by his client at that city, and, as between him and his client, in the absence of any special agreement on the subject, compensation for services rendered by him before the Department could only be deemed to have been really made when the checks were paid by the bank on which they were directly drawn. It is true that when the Riggs National Bank received the checks, and credited the account of the accused on its books with the amount thereof, there arose, as between that bank and him, only the relation of debtor and creditor. But when his account at that bank was so credited, he became liable, by implied contract,—if the St. Louis bank failed to accept or pay the check when presented,—to pay back to the bank an amount equal to the credit he received on the books of the Riggs National Bank. If the St. Louis bank had refused to accept or pay the checks when presented, and if the accused had then sued his client on its original contract with him, the latter could not have resisted recovery upon the ground that he received compensation by having his account at the Washington bank credited with the amount of the checks. Suppose the accused had been indicted in Washington on the day after the checks were indorsed to the Riggs National Bank, and the checks were not honored or paid when presented at the St. Louis bank—could he, in that case, have been convicted under the statute by proof that he received such credit at the former bank for the amount of the checks? Clearly not. Yet he could have been, if it be true that he was compensated, within the meaning of the statute, when his account with the Riggs National Bank was credited with the amount of the checks. As between the accused and his client, he was not, in any true *sense, compensated for the services al-[310] leged to have been rendered in violation of the statute, until, by payment of the checks by the St. Louis bank, he was relieved of all liability to the Riggs National Bank, arising from his indorsing the checks to it. The accused is to be regarded as having received, at St. Louis, compensation for his services, because the check made in his behalf was paid there to his representative. The offense was, therefore, consummated at that city, and the Federal court at St. Louis had jurisdiction.

Nor, in my opinion, does the record show any error, in respect of instructions, that was to the substantial prejudice of the ac-

cused; no error for which the judgment should be reversed.

It seems to me that in reversing the judgment upon the grounds stated in the opinion the court has sacrificed substance to mere form. The result, I submit, well illustrates the familiar maxim: *Qui hæret in litera hæret in cortice.*

UNITED STATES, *Appt.*,

v.

HARVEY STEEL COMPANY.

(See S. C. Reporter's ed. 310-319.)

Contracts—liability under, for royalties for use of patented process—estoppel—invalidity of patent as defense—failure to use patent.

1. The alleged invalidity of the patent for the Harvey process of treating armor plate cannot be set up by the United States as a defense to a suit for the royalties due under a contract for the use of the process, which provided that the payment of royalties was to cease "in case it should at any time be judicially decided" that the patent was invalid.
2. The defense that the United States has not used the patent for the Harvey process of treating armor plate, if such patent be properly construed, is not available in a suit for the royalties due under a contract for the use of the process "known as the Harvey process," although the process is also identified in the contract as a patented one, where it is not denied that the United States has used the process communicated to it under the contract, which is known in common speech as the "Harvey process."

[No. 275.]

Argued January 3, 4, 1905. Decided January 16, 1905.

APPPEAL from the Court of Claims to review a judgment awarding royalties under a contract for the use by the United States of the Harvey process of treating armor plate. *Affirmed.*

See same case below, 38 Ct. Cl. 662.

The facts are stated in the opinion.

Assistant Attorney General Pradt argued the cause and filed a brief for appellant.

Messrs. James Russell Soley and Fred-eric H. Betts argued the cause and filed a brief for appellee.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a claim for royalties upon a contract made between the parties to the suit under the following circumstances: The

Harvey Steel Company is the owner of a patent, numbered 460,262, for a process for hardening armor plates 'and for armor plates. After careful experiments, made by the Navy Department before the patent was granted, a contract was made on March 21, 1892, the material elements of which are these: It recited that the company was the owner of the patented rights to a process "known as the 'Harvey Process' for the treatment of armor plate for use in the construction of vessels;" an agreement that armor plate "treated under the said 'Harvey process'" shall be applied to certain vessels; the previous giving of an option to the Navy Department "of purchasing the right to use and employ the 'Harvey process' for treating armor plates, as follows: 'We hereby agree to give to the Navy Department an option for the purchase of the application of the Harvey process for treating armor plates, which was tested at the Naval Ordnance Proving Ground, Annapolis, Maryland, February 14, 1891,'" on terms set forth, one of which *was that Harvey, the in-[314] ventor, should furnish all details in his possession, or which he might develop in the perfection of his methods; the acceptance of the offer by the Navy Department; and an agreement by the United States to pay the expense of applying "the said process," etc. The contract then went on to agree that the United States, upon the terms stated, might use "the hereinbefore-mentioned process known as the 'Harvey process,'" gave the company a royalty of one half of one cent a pound up to \$75,000, when the royalty was to cease, and stated other terms.

This contract had conditions for further tests, etc. Numerous further experiments were made, and on October 8, 1892, the company was informed by letter that "the Harvey process for armor plate has been definitely adopted by the Navy Department." In pursuance of the offer mentioned in the contract, the Navy Department required and received from Harvey a revelation of the secret process and improvements, and thereafter, on April 12, 1893, the parties made a new contract upon which this suit is brought. This recited, as before, that the company was owner of the patented rights to a process "known as the Harvey process," and referred to the patent by number and date. It then recited the making of the agreement of March 21, 1892, "whereby the party of the first part granted to the party of the second part the right to use and employ the Harvey process aforesaid," etc. It then canceled the old contract, and agreed that, in consideration of \$96,056.46 royalty, the United States might use "the aforesaid Harvey process" for all naval vessels authorized by Congress up to

and including July 19, 1892, and further, that it might use the "aforesaid Harvey process" upon vessels authorized after that date, "paying therefor" a half a cent a pound. The company covenanted to hold the United States harmless from further claims, and from demands on account of alleged infringement of "patented rights appertaining to said process;" to furnish full information regarding the composition and application of the compounds employed in the Harvey process, *and all improvements which it might make upon "said process as covered by the aforesaid letters patent," and that the United States might adopt and use such improvements. Finally, it was agreed that "in case it should at any time be judicially decided that the party of the first part is not legally entitled, under the letters patent aforesaid, to own and control the exclusive right to the use and employment of said process, and the decrementally hardened armor plates produced thereunder, as set forth in the letters patent aforesaid, then the payment of royalty under the terms of this agreement shall cease, and all sums of money due the party of the first part from the party of the second part, as royalty for the use and employment of said process and armor plates, as aforesaid, shall become the property of the party of the second part."

The United States has built battle ships armored by the Harvey process communicated to it, and, subject to the questions which will be mentioned, by the terms of the contract there was due a royalty of \$60,-806.45, to which sum the court of claims found the claimant entitled. 38 Ct. Cl. 662. It never has been judicially decided that the claimant has not the rights mentioned in the last-quoted clause of the contract. The United States asked additional findings, which, it now contends, would establish that the patent was invalid, or, if valid, valid only if restricted to the use of a heat above 3100° Fahrenheit, in which case the patent was not used by the United States. These findings were refused as immaterial and the United States appealed. The main question is whether, under the last-quoted clause of the contract, the United States can set up the invalidity of the patent in this suit. It is argued also that the United States ought to have been allowed to show that it had not used the patent, properly construed, although it is not denied that it has used the process communicated to it and known in common speech as the Harvey process.

It is not argued that there was a technical entire failure of consideration. The claimant was under continuing obligations, [316] *which it is not suggested that it did not perform or is not still performing, and one of which, the imparting of its secret infor-

mation and improvements, it had performed under the original agreement, out of which the last contract sprang. The argument is put mainly on the construction of the clause quoted, coupled with the further argument that the United States ought not to be estopped, as licensee, to deny the validity of the patent, because it is not a vendor, but simply a user, of the patented article, and therefore has not enjoyed the advantage of a practical monopoly, as a seller might have enjoyed it even if the patent turned out to be bad. This distinction between sale and use, even for a noncompetitive purpose, does not impress us. So far as the practical advantage secured is matter for consideration, whether a thing made under a patent supposed to be valid is used or sold, it equally may be assumed that the thing would not have been used or sold but for the license from the patentee. We regard the clause in the contract as the measure of the appellant's rights.

The words of the condition on which the payment of royalty was to cease, taken in their natural and literal sense, do not mean what the government says. A plea of that condition, to satisfy the words "in case it should at any time be judicially decided" that the patent was bad, would have to be that it had been decided to that effect. It would not be enough to say that the defendant thought the patent bad, and would like to have the court decide so now. We see no reason to depart from the literal meaning of the words. It is argued that, so construed, they are very little good to the United States, since private persons would not use the armor plates, and the more the United States used them the larger would be the royalties which the company received, so that it would have no motive, even if it had a right, to sue the makers of the plate. It is answered that armor was made for foreign governments, and that the makers were sued by the claimants in good faith, although, as it turned out, the final decrees were entered by consent. *And it is [317] argued on the other hand that the government's construction would put the claimants at a great disadvantage, and would be giving up all benefit of the patent at the moment it was issued. We do not amplify the considerations of this sort on one side or the other. They are too uncertain to have much weight. The truth seems to be that the proviso is a more or less well-known and conventional one in licenses (*Charter Gas Engine Co. v. Charter*, 47 Ill. App. 36, 51), not a special contrivance for the special case, and that fact alone is enough to invalidate attempts to twist the meaning of the words to the interest of either side. The proviso was inserted, no

doubt, on the assumption that a licensee, when sued for royalties, is estopped to deny the validity of the patent which he has been using, and to give him the benefit of litigation by or against third persons, notwithstanding that rule.

We have somewhat more difficulty with the other question mentioned. It is argued that the agreement was only to pay for the use of the process covered by the patent named, and that if the meaning of the parties was to cover anything broader than the patent, even what was known in their speech as the Harvey process, that meaning could be imported into the contract only by reformation, not by construction of the contract as it stands. But we are of opinion that this defense also must fail. In the first place, it is not fully open on the record. The findings asked had a different bearing. All that were asked might have been made without necessitating a judgment for the United States as matter of law, and the court believed that the difference between patent and process was trivial. But we should hesitate to admit the defense in any event. The argument is that at the time of the contract it was supposed that the heat required for the process was greater than that actually used, that the patent was valid only for a process with the greater heat, and that the contract covers no more than the patent. But the fact that the parties assumed that the process used and intended to be used was covered by the patent works both ways. It shows that

[318] they thought *and meant that the agreement covered, and should cover, the process actually used. We think that this can be gathered from the agreement itself, apart from the mere supposition of the parties. The contract dealt with a process "known as the Harvey process." It imported the speech of the parties and the common speech of the time into the description of the subject-matter. The words "Harvey process" commonly are put in quotation marks in the first contract, thus emphasizing the adoption of common speech. They mean the process actually used. The contract states that it is dealing with the same thing that had been the subject of the former agreement. That agreement further identified that subject as a process which was tested at the Naval Ordnance Proving Ground. It also identified it, it is true, as a patented process; but, if the incompatibility of the two marks is more than trivial, as it was regarded by the court which found the facts with which we have to deal, the identification by personal familiarity and by common speech is more pungent and immediate than that by reference to a document couched in technical terms, which the very

argument for the United States declares not to have been understood. It is like a reference to monuments in a deed. As we have said, this identification by a personal experiment and by common speech is carried forward into the contract in suit. The latter contract manifests on its face that it is dealing with a process actually in use, which requires the communication of practical knowledge, and which further experience may improve.

We have not thought it useful to do more than indicate the line of thought which leads us to the conclusion that the claimant must prevail. We have confined ourselves to the dry point of the law. It might have been enough to say even less, and to affirm the judgment on the ground that the findings asked and refused, so far as they were not refused because not proved, were only grounds for further inferences, not a special verdict establishing the defense as matter of law. But the fuller the statement should be made, the more fully it would *appear that the United States was [319] dealing with a matter upon which it had all the knowledge that any one had, that it was contracting for the use of a process which, however much it now may be impugned, the United States would not have used when it did but for the communications of the claimant, and that it was contracting for the process which it actually used,—a process which has revolutionized the naval armor of the world.

Judgment affirmed.

JOHN ROONEY, *Plff. in Err.*,
v.

STATE OF NORTH DAKOTA.

(See S. C. Reporter's ed. 319-327.)

Constitutional law — ex post facto laws — changes in execution of death sentence.

The substitution in cases of convictions of murder in the first degree, made by N. D. act March 9, 1903, of close confinement in the penitentiary for not less than six nor more than nine months after judgment and before execution of the death penalty, in lieu of confinement in the county jail for not less than three nor more than six months, and the change of the place of execution from the county jail to the penitentiary, do not render the statute *ex post facto* as applied to a per-

NOTE.—As to what laws are *ex post facto*—see notes to *State v. Cooler*, 3 L. R. A. 181; *Anderson v. O'Donnell*, 1 L. R. A. 632; *Calder v. Bull*, 1 L. ed. U. S. 648; *Sturges v. Crowninshield*, 4 L. ed. U. S. 529; *Re Medley*, 33 L. ed. U. S. 835; *Otoe County v. Baldwin*, 28 L. ed. U. S. 331; and *Barnitz v. Beverly*, 41 L. ed. U. S. 94.

son convicted of that crime before its passage, since it did not alter the existing situation to the material disadvantage of the criminal.

[No. 123.]

Argued January 12, 1905. Decided January 23, 1905.

IN ERROR to the Supreme Court of the State of North Dakota to review a judgment which affirmed a conviction of murder in the first degree in the District Court of Cass County in that State. *Affirmed.*

See same case below, 12 N. D. 144, 95 N. W. 513.

The facts are stated in the opinion.

Mr. B. F. Spalding argued the cause, and, with **Mr. Seth Newman**, filed a brief for plaintiff in error:

No one can be criminally punished in this country except according to the law prescribed for his government by the sovereign authority before the imputed offense was committed, or by some law passed afterwards by which the punishment is not increased.

Re Medley, 134 U. S. 160, 33 L. ed. 835, 10 Sup. Ct. Rep. 384.

If the imprisonment under the later statute was to be in the county jail, as under the earlier, the statute would be *ex post facto* because the punishment is increased by the three months' added imprisonment.

People v. McNulty (Cal.) 28 Pac. 816.

Imprisonment in the penitentiary, as compared with imprisonment in the county jail, is an increased and greater punishment.

Re Medley, 134 U. S. 160, 33 L. ed. 835, 10 Sup. Ct. Rep. 384.

Mr. Emerson Hall Smith argued the cause, and, with **Mr. W. H. Barnett**, filed a brief for defendant in error:

In order for a law to be *ex post facto* it must be such a one as creates or aggravates the crime, or increases the punishment, or changes the rule of evidence for the purposes of conviction.

Calder v. Bull, 3 Dall. 386, 391, 1 L. ed. 648, 650; *Cooley, Const. Lim.* 322; *United States v. Hall*, 2 Wash. C. C. 366, Fed. Cas. No. 15,285, Affirmed in 6 Cranch, 171, 3 L. ed. 189; *Kring v. Missouri*, 107 U. S. 221, 27 L. ed. 506, 2 Sup. Ct. Rep. 443; *Hopt v. Utah*, 110 U. S. 574, 28 L. ed. 262, 4 Sup. Ct. Rep. 202; *Re Medley*, 134 U. S. 160, 33 L. ed. 835, 10 Sup. Ct. Rep. 384; *Cummings v. Missouri*, 4 Wall. 277, 18 L. ed. 356; *Ex parte Garland*, 4 Wall. 333, 18 L. ed. 366; *State v. Hayes*, 140 N. Y. 484, 23 L. R. A. 830, 37 Am. St. Rep. 572, 35 N. E. 951.

Death is the extreme penalty that can be
196 U. S.

inflicted. Any change in the penalty short of that is considered a mitigation; and postponement of the time of its infliction is also a mitigation.

Com. v. Gardner, 11 Gray, 438; *Com. v. Wyman*, 12 Cush. 239; *Cooley, Const. Lim.* § 272; *Re Tyson*, 13 Colo. 487, 6 L. R. A. 472, 22 Pac. 810.

If the shortening of the life for a single day is to the disadvantage of the convict, the extending of life for a day or three months must be considered to his advantage.

Territory v. Miller, 4 Dak. 173, 29 N. W. 7, 11; *State v. Rooney* (N. D.) 95 N. W. 517.

Neither the law, the judgment, nor the commitment requires solitary confinement. No presumption can be indulged that the officers of the penitentiary charged with the execution of the judgment of the court will go beyond the letter of its mandate and make appellant's confinement solitary, in fact, when there is no legal authority therefor and when to do so would, as to appellant, be illegal.

Holden v. Minnesota, 137 U. S. 483, 34 L. ed. 734, 11 Sup. Ct. Rep. 143.

The confinement is no part of the punishment, but is an incident connected therewith, referable to penal administration as its primary object.

Re Tyson, 13 Colo. 487, 6 L. R. A. 472, 22 Pac. 810; *Holden v. Minnesota*, 137 U. S. 483, 34 L. ed. 734, 11 Sup. Ct. Rep. 143.

Nothing can aggravate the disgrace and infamy following a capital conviction for wilful, deliberate, and premeditated murder.

Re Tyson, 30 Colo. 487, 6 L. R. A. 472, 22 Pac. 810.

Which would be the severer punishment, imprisonment for thirty days longer before hanging, under the new law, or death by hanging thirty days earlier, under the old law,—is a question of law, pure and simple, for the courts to decide.

People v. Hayes, 140 N. Y. 488, 23 L. R. A. 830, 37 Am. St. Rep. 572, 35 N. E. 951.

Mr. Justice Harlan delivered the opinion of the court:

This writ of error brings in question a final judgment of the supreme court of the state of North Dakota, affirming the *judg-[320] ment of an inferior court of that state, by which, pursuant to the verdict of a jury, the plaintiff in error, John Rooney, was sentenced to death for the crime of murder in the first degree.

The sole question upon which the plaintiff in error seeks the judgment of this court, and the only one that will be noticed, is

whether the statute under which he was sentenced was *ex post facto*, and therefore unconstitutional in its application to his case. His counsel agrees that the judgment must stand if the statute be constitutional.

Before, as well as after, the passage of the statute under which the sentence was pronounced, the punishment prescribed by the state for murder in the first degree was death or imprisonment in the penitentiary for life. N. D. Rev. Codes, 1899, § 7068.

By the statutes in force at the time of the commission of the offense, August 26th, 1902, as well as when the verdict of guilty was rendered, it was provided that when a judgment of death is rendered the judge must deliver to the sheriff of the county a warrant stating the conviction and judgment, and appointing a day on which the judgment is to be executed, "which must not be less than three months after the day in which judgment is entered, and not longer than six months thereafter" (§ 8305); that when there was no jail within the county, or whenever the officer having in charge any person under judgment of death deemed the jail of the county where the conviction was had insecure, unfit, or unsafe for any cause, he could confine the convicted person in the jail of any other convenient county of the state (§ 8320); that the judgment of death should be executed within the walls or yard of the jail of the county in which the conviction was had, or within some convenient inclosure within such county (§ 8321); and that judgment of death must be executed by the sheriff of the county where the conviction was had, or by his deputy, one of whom, at least, must be present at the execution. N. D. Rev. Codes, 1899, pp. 1622, 1623.

[321] *The sentence of death was pronounced March 31st, 1903. Prior to that date, namely, on March 9th, 1903, the legislature—without changing the law prescribing death or imprisonment for life as the punishment for the crime of murder in the first degree—passed an act providing that all executions should take place at the penitentiary, and amending certain sections of the Revised Codes of 1899. By that act it was provided:

"§ 1. The mode of inflicting the punishment of death shall be by hanging by the neck until the person is dead; and the warden of the North Dakota penitentiary, or, in case of his death, inability, or absence, the deputy warden, shall be the executioner; and when any person shall be sentenced, by any court of the state having competent jurisdiction, to be hanged by the neck until dead, such punishment shall only be inflicted within the walls of the North Dakota penitentiary at Bismarek, North Dakota, within an inclosure to be prepared for that purpose

under the direction of the warden of the penitentiary and the board of trustees thereof, which inclosure shall be higher than the gallows, and so constructed as to exclude public view."

"§ 3. When a person is sentenced to death, all writs for the execution of the death penalty shall be directed to the sheriff by the court issuing the same, and the sheriff of the county wherein the prisoner has been convicted and sentenced shall, within the next ten days thereafter, in as private and secure a manner as possible to be done, convey the prisoner to the North Dakota penitentiary, where the said prisoner shall be received by the warden, superintendent, or keeper thereof, and securely kept in close confinement until the day designated for the execution. . . ."

"§ 14. That § 8305 of the Revised Codes of 1899, relating to judgment of death, warrant to execute, be amended so as to read as follows: § 8305. When the judgment of death is rendered the judge must sign and deliver to the sheriff of the county a warrant duly attested by the clerk under the seal of the court, stating the conviction and judgment, and appointing *a day upon which [322] the judgment is to be executed, which must not be less than six months after the day in which the judgment is entered, and not longer than nine months thereafter."

"§ 16. All acts and parts of acts in conflict with the provisions of this act are hereby repealed." N. D. Laws, 1903, chap. 99, p. 119.

By the sentence it was ordered that the accused be conveyed to the state penitentiary, "there to be kept in close confinement until October the 9th, 1903," and, within an inclosure in that building to be erected for the purpose, be hung by the warden of the penitentiary, or, in case of his inability to act or his absence therefrom, by the deputy warden, before the hour of sunrise on the day fixed for the execution.

It appears from the statement of the case that the statutes in force when the sentence of death was pronounced differed from those in force when the crime was committed and when the verdict was rendered, in these particulars:

1. By the later law, close confinement in the penitentiary for not less than six months and not more than nine months, after judgment and before execution, was substituted for confinement in the county jail for not less than three months nor more than six months after judgment and before execution.

*2. By the later law, hanging within an [325] inclosure at the penitentiary, by the warden or his deputy, was substituted for hanging by the sheriff within the yard of the jail

of the county in which the conviction occurred.

We are of opinion that in the particulars just mentioned the statute of 1903 is not repugnant to the constitutional provision declaring that no state shall pass an *ex post facto* law. It did not create a new offense, nor aggravate or increase the enormity of the crime for the commission of which the accused was convicted, nor require the infliction upon the accused of any greater or more severe punishment than was prescribed by law at the time of the commission of the offense. The changes, looked at in the light of reason and common sense and applied to the present case, are to be taken as favorable, rather than as unfavorable, to him. It may be sometimes difficult to say whether particular changes in the law are or are not in mitigation of the punishment for crimes previously committed. But it must be taken that there is such mitigation when, by the later law, there is an enlargement of the period of confinement prior to the actual execution of the criminal by hanging. The giving, by the later statute, of three months' additional time to live, after the rendition of judgment, was clearly to his advantage, for the court must assume that every rational person desires to live as long as he may. If the shortening of the time of confinement, whether in the county jail or in the penitentiary, before execution, would have increased, as undoubtedly it would have increased, the punishment to the disadvantage of a criminal sentenced to be hung, the enlargement of such time must be deemed a change for his benefit. So that a statute which mitigates the rigor of the law in force at the time a crime was committed cannot be regarded as *ex post facto* with reference to that crime. *Calder v. Ball*, 3 Dall. 386, 391, 1 L. ed. 648, 650, Chase, J.; Story, Const. § 1345; Cooley, Const. Lim. *267; *Com. v. Gardner*, 11 Gray, 443; 1 Bishop, Crim. Law. § 280. Besides, the extension of the time to live, given by the later law, increased the opportunity of [326] the accused *to obtain a pardon or commutation from the governor of the state before his execution.

Nor was the punishment, in any substantial sense, increased or made more severe by substituting close confinement in the penitentiary prior to execution for confinement in the county jail. It is contended that "close confinement" means "solitary confinement;" and *Re Medley*, 134 U. S. 160, 33 L. ed. 835, 10 Sup. Ct. Rep. 384, is cited in support of the contention that the new law increased the punishment to the disadvantage of the accused. We do not think that the two phrases import the same kind of punishment. Although solitary confine-

ment may involve close confinement, a criminal could be kept in close confinement without being subjected to solitary confinement. It cannot be supposed that any criminal would be subjected to solitary confinement when the mandate of the law was simply to keep him in close confinement.

Again, it is said that the law in force when the crime was committed only required confinement, whereas the later statute required *close* confinement. But this difference of phraseology is not material. "Confinement" and "close confinement" equally mean such custody, and only such custody, as will safely secure the production of the body of the prisoner on the day appointed for his execution.

The objection that the later law required the execution of the sentence of death to take place within the limits of the penitentiary rather than in the county jail, as provided in the previous statute, is without merit. However material the place of confinement may be in case of some crimes not involving life, the place of execution, when the punishment is death, within the limits of the state, is of no practical consequence to the criminal. On such a matter he is not entitled to be heard.

The views we have expressed are in accord with those announced by the supreme court of North Dakota. *State v. Rooney*, 12 N. D. 144, 152, 95 N. W. 513.

We are of opinion that the law of 1903 did not alter the *situation to the material [327] disadvantage of the criminal, and, therefore, was not *ex post facto* when applied to his case in the particulars mentioned.

Judgment affirmed.

UNITED STATES, *Appt.*,

v.

WALTER S. CROSLLEY.

(See S. C. Reporter's ed. 327-337.)

Navy — pay of aid to rear admiral — mounted pay.

1. An aid to a rear admiral is entitled, in addition to the regular pay of his rank, to the same compensation for the additional service as is allowed an aid to a major general, in view of the provision of the Navy personnel act (30 Stat. at L. 1004, chap. 413, U. S. Comp. Stat. 1901, p. 1072), § 13, that officers of the Navy shall receive the same pay and allowances, except for forage, as are, or may be, provided by law for officers of the Army of corresponding rank.
2. Mounted pay cannot be given to an aid to a rear admiral, although the Navy personnel act (30 Stat. at L. 1004, chap. 413, U. S. Comp. Stat. 1901, p. 1072), § 13, equalizes his compensation with that of an aid to a

major general, who is entitled to mounted pay under Army regulations of 1895, § 1301, since this section and the two immediately following, when read in the light of U. S. Rev. Stat. § 1270, U. S. Comp. Stat. 1901, p. 899, giving to Army officers the pay of cavalry officers of the same grade when assigned to duty which requires them to be mounted, indicate a general purpose to give mounted pay to Army officers only when their duties are such as may require them to be actually mounted, or are such as may at any time subject them to the necessity of rendering mounted service, which obviously could not be required of an aid to a rear admiral.

[No. 96.]

Submitted December 9, 1904. Decided January 23, 1905.

APPEAL from the Court of Claims to review a judgment which awarded a Navy officer additional pay as an aid to a rear admiral, together with mounted pay for his services as such aid. Modified by disallowing the item for mounted pay and longevity pay based thereon, and, *as modified, affirmed.*

See same case below, 38 Ct. Cl. 82.

Statement by Mr. Justice **Day**:

This case was tried in the court of claims upon a petition filed to recover pay for services in the United States Navy, rendered by the defendant in error while he was a lieutenant of the junior grade, and acting as aid to Rear Admiral Watson, then serving with the rank of rear admiral in the nine higher numbers of that grade, and, under § 1466 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 1029), entitled to rank with a major general in the Army. The claimant alleges that he should have received from the 1st day of July, 1899, to the 8th day of September, 1899,—

[328]*Pay of a first lieutenant in the Army, being the grade corresponding to lieutenant, junior grade, in the Navy, under Rev. Stat. § 1261, U. S. Comp. Stat. 1901, p. 893.....	\$1,500
Longevity pay under Rev. Stat. § 1262, U. S. Comp. Stat. 1901, p. 896, for second five years of service	150
Pay as aid to rear admiral of corresponding grade to major general, under Rev. Stat. § 1261.....	200
Mounted pay due under Army Regulations of 1895, paragraph 1301, to "authorize aids duly appointed"..	100
Longevity pay upon the last two items, under Rev. Stat. § 1262....	30
Total	\$1,980

That from September 9, 1899, to September 8, 1900 he was entitled to pay as follows:

Pay of a first lieutenant in the Army under Rev. Stat. § 1261.....	\$1,500
Longevity pay under Rev. Stat. § 1262, for third five years of service	300
Pay as aid to rear admiral of corresponding grade to major general, under Rev. Stat. § 1261	200
Mounted pay due under Army Regulations of 1895, paragraph 1301...	100
Longevity pay on the last two items under Rev. Stat. § 1262.....	60
Total	\$2,160

He received pay during the period in controversy at the rate of \$1,800 per annum, being from July 1, 1899, to September 8, 1899, the rate of pay granted by statute (Rev. Stat. § 1556, U. S. Comp. Stat. 1901, p. 1067) to a lieutenant, junior grade, at sea during his first five years in that rank, and for the period from September 9, 1899, to September 8, 1900, being the rate fixed by Rev. Stat. § 1261, for a first lieutenant not mounted, with the longevity allowance of the statute (§ 1262) for the third five years of service; and he claims that, in addition to the amount allowed, *he is entitled[329] to pay or allowance as aid to a rear admiral; also, mounted pay due for such service, with the longevity pay arising from the items in question. In all, he claims the sum of \$394.

The court of claims, upon the hearing, made the following findings of fact:

"I. The claimant entered service in the United States Navy on the 9th day of September, 1889, and from the 1st day of July, 1899, until the 8th day of September, 1900, was a lieutenant, junior grade, in the Navy, and an aid to Rear Admiral J. C. Watson; Rear Admiral Watson was at that time one of the nine higher numbers of the grade of rear admiral, and was entitled, under § 1466 of the Revised Statutes, to rank with a major general in the United States Army. II. During said period claimant was paid at the rate of \$1,800 a year."

And as conclusions of law held: "Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant recover judgment of and from the United States in the sum of three hundred and ninety-four dollars (\$394)."

From the judgment of that court the United States appeals to this court.

Assistant Attorney General **Pradt** and **Mr. John Q. Thompson** submitted the cause for appellant.

Messrs. **George A. King** and **William B. King** submitted the cause for appellee.

Mr. Justice **Day** delivered the opinion of the court:

The decision of this case turns upon the answers to two questions arising under the facts stated: First, was the claimant entitled to the extra \$200, the same as allowed an aid to a major general in the Army? Second, was he entitled to the "mounted pay" as allowed to the major general's aid? [332] *The Navy personnel act, so called, has been so frequently before this court in recent cases as to require little general discussion of its objects and purposes. *Rodgers v. United States*, 185 U. S. 83, 46 L. ed. 816, 22 Sup. Ct. Rep. 582; *White v. United States*, 191 U. S. 545, 48 L. ed. 295, 24 Sup. Ct. Rep. 171; *Gibson v. United States*, 194 U. S. 182, 48 L. ed. 926, 24 Sup. Ct. Rep. 613; *United States v. Thomas*, decided at this term, 195 U. S. 418, ante, 259, 25 Sup. Ct. Rep. 102.

As pointed out in the opinion in the last-named case, while the act of July 16, 1862 (Rev. Stat. § 1466, U. S. Comp. Stat. 1901, p. 1029), had fixed the relative rank of Army and naval officers, no provision for similarity of pay was made until the passage of the Navy personnel act (30 Stat. at L. 1004, chap. 413, U. S. Comp. Stat. 1901, p. 1072), which act, while providing against a reduction of then existing pay of commissioned officers of the Navy, undertook to equalize the pay of naval officers (theretofore generally below that paid to officers of corresponding rank in the Army) with that of officers in the Army of equal rank. Under the act of July 16, 1862, rear admirals ranked with major generals. Section 13 of the Navy personnel act provides:

"That after June 30, 1899, commissioned officers of the line of the Navy and of the Medical Pay Corps shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army."

The claimant, as lieutenant of the junior grade in the Navy, corresponded in rank with a first lieutenant in the Army (Rev. Stat. § 1466, U. S. Comp. Stat. 1901, p. 1029), the rank of "master," named in § 1466, being subsequently changed to lieutenant, junior grade. 22 Stat. at L. 472, chap. 97, U. S. Comp. Stat. 1901, p. 986. By § 1098 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 807) it is provided that each major general shall have three aids, who may be chosen by him from the captains or lieutenants of the Army. First lieutenants, officers of the Army, under § 1261 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 893), are entitled to pay as follows:

Stat. 1901, p. 893), are entitled to pay as follows:

"The officers of the Army shall be entitled to pay herein stated after their respective designations: . . . First lieutenant, mounted, sixteen hundred dollars a year; first lieutenant, *not mounted, fifteen hundred dollars a year; . . . aid to major general, two hundred dollars a year, in addition to the pay of his rank."

For each five years of service it is provided in § 1262 (U. S. Comp. Stat. 1901, p. 896):

"There shall be allowed and paid to each commissioned officer below the rank of brigadier general, including chaplains and others having assimilated rank or pay, ten per centum of their current yearly pay for each term of five years of service."

The contention of the government is that, while the pay of naval officers is made to correspond with that of Army officers of like rank, the naval officer assigned to duty as aid may not receive the \$200 additional pay, as it is not pay on account of rank, but on account of service. But we think this is too narrow a construction of the terms of the act, in view of its intent and purpose. For while we may not add to or take from the terms of a statute, the main purpose of construction is to give effect to the legislative intent as expressed in the act under consideration. An aid to a rear admiral renders services similar to those rendered by an aid to a major general in the Army. The naval aids are appointed under paragraphs 343 and 345 of the Naval Regulations of 1895, which are:

"§ 343. The chief of staff, flag lieutenant, clerk, and aids shall constitute the personal staff of a flag officer.

"§ 345. (1) A flag officer may select any officer of his command to serve as flag lieutenant or clerk, provided his grade accords with the rules laid down in article 344. (2) He may also, when necessary, select other line officers junior to the flag lieutenant to serve on his personal staff as aids, but shall not assign naval cadets to such duty."

They are selected for like service, and it is admitted that there would have been reason for a like express statutory provision in their favor as to compensation. The sum of \$200 is allowed to an aid to a major general in addition to the regular pay of his rank. It is allowed as payment for the additional service imposed. Bearing in mind the purpose of the act to give the same compensation to corresponding officers of the *Army and Navy, and that it is expressly provided that officers of the Navy shall receive the same pay and allowances, except for forage, as are or may be provided

by law for officers of the Army of corresponding rank, we think it does no violence to, but rather carries out, the purpose of Congress to construe this section so as to give to an aid of a rear admiral, in addition to the regular pay of his rank, pay similar to that allowed an aid to a major general. We reach the conclusion that the court of claims was right in its allowance of this item.

The solution of the question as to mounted pay depends upon whether such pay is given to an officer whose duty requires him to be subject to mounted duty, or whether it is a term used to designate the pay of aids whether they are required to render mounted service or not. Section 1301 of the Army Regulations of 1895 provides:

"The following officers, in addition to those whose pay is fixed by law, are entitled to pay as mounted officers: Officers of the staff corps below the rank of major, officers serving with troops of cavalry, officers of a light battery duly organized and equipped, authorized aids duly appointed, officers serving with companies of mounted infantry, and officers on duty which, in the opinion of the department commander, requires them to be mounted and so certified by the latter on their pay vouchers."

The contention of the appellee is that aids, duly appointed under this section, serving in the Army, are entitled to this compensation, whether required to be mounted or not. And further, that the language "pay as mounted officers" is used in the paragraph rather with a view of fixing the amount to be paid than to characterize the service required. It is doubtless true that the term "mounted pay" may be used in this sense. *Richardson v. United States*, 38 Ct. Cl. 182, is cited as an illustration of this use of the phrase. In that case it was held that an assistant surgeon in the Navy was entitled to mounted pay under the Navy personnel act, because an assistant surgeon in the Army was entitled thereto. Under § 1163 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 834) an assistant surgeon in the [335] Army ranked *with a lieutenant of cavalry for the first three years of service, and with a captain of cavalry after the expiration of that period. Under these provisions the assistant surgeon was held entitled to mounted pay.

We are further cited to a decision of the Comptroller of the Treasury (10 Comp. Dec. 523), holding that officers of the pay corps of the Navy are entitled to mounted pay, as officers of the pay corps of the Army are given by law cavalry or mounted pay. It may well be that in these cases mounted pay

was descriptive of the compensation to be paid, and an officer may therefore be entitled to it, although he renders no mounted service.

But the right of mounted pay to an aid to a rear admiral, assuming that the Navy personnel act assimilates the compensation of an admiral's aid to that of an aid to a major general in the Army, depends upon whether an aid to a major general under paragraph 1301 of the Army Regulations above quoted, although he renders no mounted service, and may not be required to be mounted, is entitled to such compensation. We think §§ 1302 and 1303 of the Army Regulations may also be noticed in this connection. They are:

"Sec. 1302. Department commanders will announce, in orders, the authority obtained from the Secretary of War for mounting companies of infantry, giving the date from which such mounted service commences, and termination of the same.

"Sec. 1303. Muster rolls and returns of light batteries and companies of mounted infantry will show the number, date, and source of order authorizing mounted service. The pay accounts of officers charging mounted pay will contain the same information. A copy of the order will be attached to the first muster rolls prepared after the battery or company has been equipped or mounted; a copy of the order discontinuing such service will appear on the first muster rolls prepared after its discontinuance."

We think these sections, with § 1301 of the Army Regulations above quoted, read in the light of the statute (Rev. Stat. *§ 1270, [336] U. S. Comp. Stat. 1901, p. 899), giving to Army officers the pay of cavalry officers of the same grade when assigned to duty which requires them to be mounted, indicate a general purpose to give to officers of the Army mounted pay when their duties are such as may require them to be actually mounted, or are such as may at any time subject them to the necessity of rendering mounted service. The particular section (1301) under which it is insisted that a naval aid is entitled to mounted pay designates officers who either are, or may be, required to be mounted in the discharge of their duties, and likewise to "officers on duty which, in the opinion of the department commander, requires them to be mounted, and so certified by the latter on their pay vouchers."

This paragraph was intended to include the particular classes of officers who are entitled to pay as mounted officers under the classification in the first part thereof, and gives the benefit of the higher rate of compensation to other officers, not expressly

named therein, whose duties require them to be mounted. It may be true, as argued at the bar, that there may be times when the duties of an aid to a major general will not require him to be mounted. But, as we understand the Army Regulations, such officers may be at any time required to render mounted service, and are therefore given the pay of that class. Obviously, the duties of an aid to a rear admiral are not such as to require him to render mounted service, and, as the Navy personnel act only undertakes to afford a measure of compensation for duties which can properly be required of a naval officer, it can have no operation to provide pay for services peculiar to the Army. As was held in *United States v. Thomas*, 195 U. S. 418, ante 259, 25 Sup. Ct. Rep. 102, it does not follow, because Congress gives special pay to Army officers, that the same right of compensation applies to naval officers also. In that case it was held that an allowance to Army officers who might be ordered to sea or a foreign port could not be given to naval officers whose regular duties require them to engage in service upon the sea, and to cruise upon foreign waters and serve in foreign ports.

[337] *The present case affords still less reason for giving the pay of an Army officer to one in the Navy, where the compensation is given for a character of service which never can be required except in the Army.

Upon this branch of the case we think the court of claims was in error, and the judgment for mounted pay should not have been rendered in favor of the claimant.

The judgment of the Court of Claims is modified, disallowing the sums claimed in the petition and carried into the judgment on account of mounted pay and longevity pay based thereon, and, as modified, is affirmed.

CREEDE & CRIPPLE CREEK MINING & MILLING COMPANY, *Petitioner*,
v.

UINTA TUNNEL MINING & TRANSPORTATION COMPANY.

(See S. C. Reporter's ed. 337-360.)

Mining claims—lode location—time of discovery—conclusiveness of patent—tunnel site—adverse suit.

1. The discovery of the vein or lode before any other steps are taken to perfect the location is not required by the provision of U. S. Rev.

NOTE.—On rights under tunnel site locations—see note to *Brewster v. Shoemaker*, 53 L. R. A. 793.

196 U. S. U. S., Book 49.

Stat. § 2320, U. S. Comp. Stat. 1901, p. 1424, that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located," which means nothing more than that no location shall be considered complete until there has been a discovery.

2. An entry of a lode mining claim, sustained by a patent, though conclusive evidence that, at the time of entry, there had been a valid location, does not preclude the owner of a tunnel site located across the lode, who claims that his location was prior to any discovery in the lode claimed, from showing the order of the steps taken to perfect the lode location, including the date of discovery, notwithstanding the provision of U. S. Rev. Stat. § 2320, U. S. Comp. Stat. 1901, p. 1424, that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located," which means nothing more than that no location shall be considered complete until there has been a discovery.
3. The owner of a tunnel site who simply seeks to protect his tunnel, and has as yet discovered no lode claim, is not required, by U. S. Rev. Stat. §§ 2325, 2326, U. S. Comp. Stat. 1901, pp. 1429, 1430, to adverse an application for the patent of the lode claim through which the tunnel runs, the lode of which was discovered on the surface.

[No. 18.]

Argued April 15, 18, 1904. Ordered for re-argument October 31, 1904. Reargued January 10, 11, 1905. Decided January 30, 1905.

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment which reversed a judgment of the Circuit Court for the District of Colorado, in favor of plaintiff, in an action for the possession of certain mining property, and damages, which was originally brought in the District Court of the County of El Paso, in that State. *Affirmed.*

See same case below, 57 C. C. A. 200, 119 Fed. 164.

The facts are stated in the opinion.

Mr. Charles S. Thomas argued the cause, and, with Messrs. A. T. Gunnell, William H. Bryant, H. H. Lee, T. M. Patterson, E. F. Richardson, and H. N. Hawkins, filed a brief for petitioner:

As a question of pleading, and without reference to any other consideration, testimony concerning the want of discovery in the plaintiff's claims was properly rejected.

Reynolds v. Stockton, 140 U. S. 254, 35 L. ed. 464, 11 Sup. Ct. Rep. 773; *Munday v. Vail*, 34 N. J. L. 418; *Hicks v. Murray*, 43 Cal. 522; *Tucker v. Parks*, 7 Colo. 68, 1 Pac. 427; *Miller v. Hallock*, 9 Colo. 551, 13 Pac. 541.

There can be no higher evidence of title

tunnel site by posting in a conspicuous place and at the entrance to the tunnel a notice of their intent to claim and work the tunnel; that they had performed work therein to the value of \$270 in driving said tunnel, and \$80 in furnishing and putting in timbers, and that it was their bona fide intent to prosecute the work with diligence and dispatch for the discovery of lodes and for mining purposes. The certificate also contained a full description of the boundaries of the tunnel site as claimed.

In a general way it may be said that the defenses which were stricken out were a priority of right and an estoppel. We quote these paragraphs from the answer:

"It further avers that the patent of the United States issued for said Ocean Wave and Little Mary lodes and lode mining claims was issued subject to the act of Congress in reference to tunnel rights, and subject to the laws of the state of Colorado in reference to the right to run tunnels through ground that may be patented, for the purpose of reaching territory that belongs to tunnel owners beyond such patented claims, and subject to the rights which the defendant, The Uinta Tunnel Mining & Transportation Company and its grantors, had acquired by reason of the location of said Uinta tunnel, and in and to any and all lodes, veins, and mining claims that it might cut or discover in driving said tunnel, as is guaranteed to the locator of said tunnel under and by virtue of § 2323 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 1426); that the pretended discovery alleged and pretended to have been made in and upon said pretended Ocean Wave and Little Mary lodes and lode mining claims, and by virtue of which the plaintiff claims the right to patent the same under the laws of the United States, was not made until long after the location of said Uinta tunnel, and at the time said pretended locations were made said locators thereof were advised and knew that said tunnel had been located and had been and was being prosecuted with due diligence and in strict compliance with the terms and conditions of the statutes of the

[341] United States *and of the state of Colorado, which authorize and provide for the location and prosecution of such tunnels, and which define and determine the rights pertaining thereto; and that said pretended Ocean Wave and Little Mary lode mining claims, so far as the same may be now claimed and possessed by said plaintiff, were taken and held subject to the rights of this defendant as owner of said Uinta tunnel, located in accordance with § 2323 of the Revised Statutes of the United States, and also subject to the rights of this defendant to cross said claims, and to drive drifts therein, and to

196 U. S.

follow said lode claims as located by this defendant, and to reach lode claims so owned by this defendant, as hereinbefore and hereinafter stated.

"It alleges that it and its grantors have expended in and upon said tunnel the sum of more than one hundred and twenty-five thousand dollars (\$125,000), and in addition to said expenditures have also expended upon surface work, in improvements and expenses, the further sum of not less than ten thousand dollars (\$10,000).

"It alleges that its work and the work of its said grantors in and upon said tunnel has been done openly and without concealment; that the same has been at all times prosecuted under the claim of the defendant and its grantors of the right so to do by virtue of the location of said tunnel and tunnel site location, under and by virtue of the laws of the United States, and under the provisions of § 2323 of the Revised Statutes of the United States; and that the expenditures thereof and the developments made thereon have been made in compliance with the terms and provisions of, and in reliance upon, said statute.

"That the plaintiff, by permitting and allowing this defendant to expend more than the sum of one hundred and thirty-five thousand dollars (\$135,000) as aforesaid in reaching, uncovering, and discovering said ore body, has no right to interfere with the defendant in operating its tunnel over, through, and along said pretended Ocean Wave and Little Mary lodes and lode mining claims, but that, on the contrary, the plaintiff,*by its conduct and actions in the [342] premises as hereinabove recited and set forth, has permitted and allowed the defendant to expend said sum of one hundred and thirty-five thousand dollars (\$135,000), and has permitted and allowed the defendant so to proceed with said tunnel through and across said pretended Ocean Wave and Little Mary lodes and lode mining claims until the same has ripened into such a license and permission as entitled the defendant to use its said tunnel as it penetrates said pretended Ocean Wave and Little Mary lodes and lode mining claims, and that said license and permission is such that the defendant cannot be disturbed therein."

It was also alleged that the tunnel had been driven some 2,200 feet; that it entered the ground of the plaintiff at about 550 feet from its portal, and in running through that ground the tunnel was driven 625 feet, leaving the plaintiff's ground at about 1,175 feet from the portal; that after passing it the defendant discovered in the tunnel three or four blind lodes, which it duly located; and it was not until after the discovery and

of union, where their veins contained in the respective separate locations had united upon their dip.

2 Lindley, Mines, § 730; *Champion Min. Co. v. Consolidated Wyoming Gold Min. Co.* 75 Cal. 78, 16 Pac. 513; *Eureka Consol. Min. Co. v. Richmond Consol. Min. Co.* 4 Sawy. 302, Fed. Cas. No. 4,548; *Kahn v. Old Teleg. Min. Co.* 2 Utah, 188; *Last Chance Min. Co. v. Tyler Min. Co.* 9 C. C. A. 613, 15 U. S. App. 456, 61 Fed. 557.

The title by patent issued upon the relocation of a mining claim does not relate back to the original location, if that was invalid; and, when it becomes material, evidence of the invalidity of the original location is admissible for the purpose, not of impeaching the patent, but of determining the time to which such title relates.

Fisher v. Seymour, 23 Colo. 542, 49 Pac. 30.

Whether the patent, when issued, relates back simply to the date of entry, or to the very origin of the rights of the claimant of the property, is immaterial here, though it is different under different circumstances.

2 Lindley, Mines, p. 975; *Heydenfeldt v. Daney Gold & Silver Min. Co.* 93 U. S. 634, 23 L. ed. 995; *St. Louis Smelting & Ref. Co. v. Kemp*, 104 U. S. 636, 26 L. ed. 875; *Deffebach v. Hawke*, 115 U. S. 392, 405, 29 L. ed. 423, 427, 6 Sup. Ct. Rep. 95; *Silver Bow Min. & Mill. Co. v. Clark*, 5 Mont. 378, 5 Pac. 570; *Talbott v. King*, 6 Mont. 76, 9 Pac. 434; *Butte City Smoke-House Lode Cases*, 6 Mont. 397, 12 Pac. 858; *Deno v. Griffin*, 20 Nev. 249, 20 Pac. 308; *Eureka Consol. Min. Co. v. Richmond Consol. Min. Co.* 4 Sawy. 302, Fed. Cas. No. 4,548; *Kahn v. Old Teleg. Min. Co.* 2 Utah, 174; *Barringer & Adams, Mines & Mining*, p. 417; *Morrison, Mining Rights*, 11th ed. p. 129, 10th ed. p. 149.

The *Ajax-Calhoun Case* must be construed in the light of its own facts, and cannot be applied to the essentially different facts existing in the case at bar.

Carroll v. Carroll, 16 How. 275, 14 L. ed. 936; *Northern Nat. Bank v. Porter Twp.* 110 U. S. 615, 28 L. ed. 260, 4 Sup. Ct. Rep. 254; *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.* 145 U. S. 404, 36 L. ed. 753, 12 Sup. Ct. Rep. 953; *United States v. Wong Kim Ark*, 169 U. S. 679, 42 L. ed. 901, 18 Sup. Ct. Rep. 456.

The discovery of mineral, not the filing of the certificate of location, nor the date recited therein, is the inauguration of a locator's rights.

1 Lindley, Mines, pp. 433, 434; *Barringer & Adams, Mines & Mining*, p. 214; *Erhardt v. Boaro*, 113 U. S. 527, 28 L. ed. 1113, 5 Sup. Ct. Rep. 560; *North Noonday Min. Co. v. Orient Min. Co.* 6 Sawy. 299, 196 U. S.

1 Fed. 522; *Jupiter Min. Co. v. Bodie Consol. Min. Co.* 7 Sawy. 96, 11 Fed. 666; *Cheesman v. Shreeve*, 40 Fed. 787; *Overman Silver Min. Co. v. Corcoran*, 15 Nev. 147; *McLaughlin v. Thompson*, 2 Colo. App. 135, 29 Pac. 816.

The filing of the location certificate is the last step required under the Colorado statutes, is in no manner evidence of title, and is only, at the time of filing, a notice of a claim, and is not proof of anything mentioned or recited therein as having been done, nor of more than its own filing and contents.

Barringer & Adams, Mines & Mining, p. 239; *Cheesman v. Hart*, 42 Fed. 98.

A location certificate is not required by the United States statutes, or by the statutes of all the states; but in those states in which it is required it is prima facie evidence only of its own existence and filing.

1 Lindley, Mines, p. 502; 2 Jones, Ev. § 521; *Campbell v. Rankin*, 99 U. S. 261, 25 L. ed. 435; *Jantzon v. Arizona Copper Co.* 3 Ariz. 6, 20 Pac. 93; *Pollard v. Shively*, 5 Colo. 309.

The time of location and of discovery is not essential to the issuance of the patent, and is not concluded thereby. As to discoveries made subsequent to a location, while they validate the claim and date back to the location, they expressly do so provided no adverse rights intervene.

Morrison, Mining Rights, 10th ed. p. 29; 1 Lindley, Mines, p. 454 and note; *Smith v. Newell*, 86 Fed. 56.

Among the well-known limitations upon the effect and force of patents and their unassailable nature is that they cannot grant what has been by the government already granted, and so far as they attempt or purport so to do they are void, and their void nature may be shown in any proceeding at law or in equity in which the controversy arises.

St. Louis Smelting & Ref. Co. v. Kemp, 104 U. S. 636-657, 26 L. ed. 875-882.

If a location be made before discovery, but is followed by a discovery in the discovery shaft before any adverse rights intervene, such subsequent discovery cures the original defect, and the claim is valid.

McGinnis v. Egbert, 15 Morrison, Min. Rep. 329; *Golden Terra Cotta Co. v. Mahler*, 4 Morrison, Min. Rep. 390; *Jupiter Co. v. Bodie Co.* 4 Morrison, Min. Rep. 411; *Zollars v. Evans*, 4 Morrison, Min. Rep. 407; *North Noonday Co. v. Orient Co.* 9 Morrison, Min. Rep. 529; *Erwin v. Perego*, 35 C. C. A. 482, 93 Fed. 608; *Nevada Sierra Oil Co. v. Home Oil Co.* 98 Fed. 673; *Brewster v. Shoemaker*, 28 Colo. 176, 53 L. R. A. 793,

89 Am. St. Rep. 188, 63 Pac. 309; *Reins v. Raunheim*, 28 Land Dec. 526.

But where a location and record were made with no discovery, a subsequent discovery will not relate back and cut out an intervening location.

Beals v. Cone, 27 Colo. 473, 83 Am. St. Rep. 92, 62 Pac. 948.

When such important rights are to attach to the date of discovery, the date relied on should be a true one, and it must be established, when it is to take effect against another, in a proceeding to which he is a party. This is but to state an axiom of law.

Lindley, Mines, §§ 335, 337.

The fact of discovery must be proved by the party alleging it as the inception of his possessory right.

Morrison, Mining Rights, 11th ed. p. 30; *Sands v. Cruikshank*, 15 S. D. 142, 87 N. W. 589.

Where a location is made without a discovery, the land remains public domain until there be a discovery.

Tuolumne Consol. Min. Co. v. Maier, 134 Cal. 583, 66 Pac. 863.

Mr. J. C. Helm by special leave also argued the cause and filed a brief as *amicus curiæ*:

Respondent should have filed its adverse, and should have litigated in the adverse suit the priority of its location.

Bodie Tunnel & Min. Co. v. Bechtel Consol. Min. Co. 1 Land Dec. 586; *Re Burton*, 29 Land Dec. 235; *Back v. Sierra Nevada Consol. Min. Co.* 2 Idaho, 420, 17 Pac. 83; *Hope Min. Co. v. Brown*, 11 Mont. 370, 28 Pac. 732; *Enterprise Min. Co. v. Rico Aspen Consol. Min. Co.* 167 U. S. 115, 42 L. ed. 101, 17 Sup. Ct. Rep. 762.

Mr. Justice **Brewer** delivered the opinion of the court:

Certiorari to review a judgment of the United States circuit court of appeals for the eighth circuit (57 C. C. A. 200, 119 Fed. 164), reversing a judgment of the circuit court of the United States, rendered upon a verdict of a jury, directed by the court.

The action was originally brought by the Creede & Cripple Creek Mining & Milling Company, as plaintiff, against the Uinta Tunnel Mining & Transportation Company, as defendant, in the district court of the county of El Paso, Colorado, for the possession of certain mining claims, and for damages. Equitable relief was also prayed. On motion of the defendant the action was removed to the United States circuit court for the district of Colorado, where, also on its motion, the pleadings were reformed, and the action made one for the possession of the property, and damages.

The plaintiff filed an amended complaint, alleging in substance that it was the owner in fee and in possession, and entitled to the possession, of the Ocean Wave and Little Mary lode mining claims, being survey lot No. 8192, evidenced by mineral certificate No. 338, the patent of the United States to said plaintiff for said claims bearing date December 21, 1893; that said claims were duly located and discovered on the 2d of January, 1892, and that the patent related back and took effect of that date for all purposes given and provided *by the laws of the [339] United States and the state of Colorado concerning mining claims.

Entry upon the claims and ouster of plaintiff by defendant by means of its tunnel were also alleged.

Thereafter the defendant filed its answer. Upon motion of plaintiff certain portions thereof were stricken out, and on the trial testimony offered by the defendant in support of the portions stricken out was rejected.

The matter to be determined is the sufficiency of the defenses pleaded and stricken out. To appreciate them fully it is well to state some facts about which there is no dispute, and it is sufficient to state the facts in reference to one of the lode mining claims, as the proceedings in respect to the two were alike. On February 1, 1892, J. B. Winchell and E. W. McNeal filed in the office of the county clerk of El Paso county (the county in which the mining claim was situated) a certificate of location which, not verified by affidavit or other testimony, stated that they had, on January 2, 1892, located and claimed, in compliance with the mining acts of Congress, 1,500 linear feet on the Ocean Wave lode, and gave the boundaries of the claim. By several mesne conveyances the title of Winchell and McNeal passed to the plaintiff. On August 5, 1893, the plaintiff made an entry of the claim in the proper land office of the United States, and, no proceedings in adverse being instituted, a patent therefor was issued to it on December 21, 1893. There is no reference in the patent to the discovery or the filing of the location certificate. The first appearance of the claim on the records of any office of the United States is the entry in the local land office of August 5, 1893, and the only prior record in any state office is the location certificate, unsworn to, filed February 1, in which the parties filing the certificate stated that they had discovered the lode on January 2, 1892. On February 25, 1892, a location certificate of the defendant's tunnel was filed in the office of the county clerk of El Paso county, which, verified by the oath of one of the locators, stated that on January 13, 1892, they *had located the [340] 196 U. S.

tunnel site by posting in a conspicuous place and at the entrance to the tunnel a notice of their intent to claim and work the tunnel; that they had performed work therein to the value of \$270 in driving said tunnel, and \$80 in furnishing and putting in timbers, and that it was their bona fide intent to prosecute the work with diligence and dispatch for the discovery of lodes and for mining purposes. The certificate also contained a full description of the boundaries of the tunnel site as claimed.

In a general way it may be said that the defenses which were stricken out were a priority of right and an estoppel. We quote these paragraphs from the answer:

"It further avers that the patent of the United States issued for said Ocean Wave and Little Mary lodes and lode mining claims was issued subject to the act of Congress in reference to tunnel rights, and subject to the laws of the state of Colorado in reference to the right to run tunnels through ground that may be patented, for the purpose of reaching territory that belongs to tunnel owners beyond such patented claims, and subject to the rights which the defendant, The Uinta Tunnel Mining & Transportation Company and its grantors, had acquired by reason of the location of said Uinta tunnel, and in and to any and all lodes, veins, and mining claims that it might cut or discover in driving said tunnel, as is guaranteed to the locator of said tunnel under and by virtue of § 2323 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 1426); that the pretended discovery alleged and pretended to have been made in and upon said pretended Ocean Wave and Little Mary lodes and lode mining claims, and by virtue of which the plaintiff claims the right to patent the same under the laws of the United States, was not made until long after the location of said Uinta tunnel, and at the time said pretended locations were made said locators thereof were advised and knew that said tunnel had been located and had been and was being prosecuted with due diligence and in strict compliance with the terms and conditions of the statutes of the

[341] United States *and of the state of Colorado, which authorize and provide for the location and prosecution of such tunnels, and which define and determine the rights pertaining thereto; and that said pretended Ocean Wave and Little Mary lode mining claims, so far as the same may be now claimed and possessed by said plaintiff, were taken and held subject to the rights of this defendant as owner of said Uinta tunnel, located in accordance with § 2323 of the Revised Statutes of the United States, and also subject to the rights of this defendant to cross said claims, and to drive drifts therein, and to

follow said lode claims as located by this defendant, and to reach lode claims so owned by this defendant, as hereinbefore and hereinafter stated.

"It alleges that it and its grantors have expended in and upon said tunnel the sum of more than one hundred and twenty-five thousand dollars (\$125,000), and in addition to said expenditures have also expended upon surface work, in improvements and expenses, the further sum of not less than ten thousand dollars (\$10,000).

"It alleges that its work and the work of its said grantors in and upon said tunnel has been done openly and without concealment; that the same has been at all times prosecuted under the claim of the defendant and its grantors of the right so to do by virtue of the location of said tunnel and tunnel site location, under and by virtue of the laws of the United States, and under the provisions of § 2323 of the Revised Statutes of the United States; and that the expenditures thereof and the developments made thereon have been made in compliance with the terms and provisions of, and in reliance upon, said statute.

"That the plaintiff, by permitting and allowing this defendant to expend more than the sum of one hundred and thirty-five thousand dollars (\$135,000) as aforesaid in reaching, uncovering, and discovering said ore body, has no right to interfere with the defendant in operating its tunnel over, through, and along said pretended Ocean Wave and Little Mary lodes and lode mining claims, but that, on the contrary, the plaintiff,*by its conduct and actions in the [342] premises as hereinabove recited and set forth, has permitted and allowed the defendant to expend said sum of one hundred and thirty-five thousand dollars (\$135,000), and has permitted and allowed the defendant so to proceed with said tunnel through and across said pretended Ocean Wave and Little Mary lodes and lode mining claims until the same has ripened into such a license and permission as entitled the defendant to use its said tunnel as it penetrates said pretended Ocean Wave and Little Mary lodes and lode mining claims, and that said license and permission is such that the defendant cannot be disturbed therein."

It was also alleged that the tunnel had been driven some 2,200 feet; that it entered the ground of the plaintiff at about 550 feet from its portal, and in running through that ground the tunnel was driven 625 feet, leaving the plaintiff's ground at about 1,175 feet from the portal; that after passing it the defendant discovered in the tunnel three or four blind lodes, which it duly located; and it was not until after the discovery and

location of these lodes that the plaintiff commenced this action.

Was there error in striking out these defenses? By § 2319, Rev. Stat. (U. S. Comp. Stat. 1901, p. 1424), "all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase." Until, therefore, the title to the land passes from the government, the minerals therein are "free and open to exploration and purchase." A lode locator acquires a vested property right by virtue of his location (*Clipper Min. Co. v. Eli Min. & Land Co.* 194 U. S. 220, 48 L. ed. 944, 24 Sup. Ct. Rep. 632); but what is the extent of that property right? Section 2322 (U. S. Comp. Stat. 1901, p. 1425) defines it as follows: "The locators . . . shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges [343] may so far depart from a *perpendicular in their course downward as to extend outside the vertical side lines of such surface locations." The express grant to the locator made by this section includes only the surface and the veins apexing within the boundaries of the location. Until, therefore, by entry and payment to the government the equitable title to the ground passes to the locator, he is in no position to question any rights of exploration which are granted by other provisions of the statute. The fee still remains in the government. By § 2320 (U. S. Comp. Stat. 1901, p. 1424) it is provided that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." And by § 2324 (U. S. Comp. Stat. 1901, p. 1426): "The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the state or territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground, so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located, by reference to some natural object or permanent monument, as will identify the claim." Tunnel rights are granted by § 2323 (U. S. Comp. Stat. p. 1426) which reads:

"Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months *shall be considered as an aban-[344] donment of the right to all undiscovered veins on the line of such tunnel."

It does not appear from the answer or testimony that the tunnel had reached the boundaries of the plaintiff's claims prior to the entry or even prior to the patent. For the purpose of this case, therefore, we must assume that, although its line had been marked out,—a line extending through the plaintiff's ground,—yet in fact no work had been done within such ground prior to the patent.

The propositions upon which the plaintiff relies are that discovery is the initial fact; that the patent when issued relates back to that initial fact and confirms all rights as of that date; that no inquiry is permissible as to the time of that discovery, it being concluded by the issue of the patent; that such time antedated anything done in or for the tunnel; that no adverse proceedings were instituted after it had applied for patent, and that, therefore, its right became vested in the ground, the same right which any other landowner has, and which could not be disturbed by the defendant by means of its tunnel. *St. Louis Min. & Mill. Co. v. Montana Min. Co.* 194 U. S. 235, 48 L. ed. 953, 24 Sup. Ct. Rep. 654.

On the other hand, defendant contends that, as the first record in any office of the government was the record of the entry on August 5, 1893, the patent issued in an *ex parte* proceeding is conclusive only that every preceding step, including discovery, had then been taken; that it in fact located its tunnel site prior to any discovery or marking on the ground of plaintiff's claim; that it was not called upon to adverse plaintiff's application for a patent, because no patent is ever issued for a tunnel, and it had not then discovered any veins within its tunnel; that plaintiff, with full knowledge of defendant's tunnel location, permitted the driving of the tunnel through its ground and beyond, at an expenditure of \$135,000, and made no objection until the discovery of the veins beyond its ground, and then, for the

first time, and to prevent defendant from developing such veins, brought this action, and [345] that by such acquiescence *it was now estopped to question defendant's use of the tunnel.

Obviously the parties divide as to the effect of plaintiff's patent. The circuit court held with the plaintiff, the court of appeals with the defendant. It may be conceded that a patent is conclusive that the patentee has done all required by law as a condition of the issue; that it relates to the initiation of the patentee's right, and cuts off all intervening claims. It may also be conceded that discovery of mineral is the initial fact. But when did the initial fact take place? Are all other parties concluded by the locator's unverified assertion of the date or the acceptance by the government of his assertion as sufficient, with other matters, to justify the issue of a patent? Undoubtedly, so far as the question of time is essential to the right, the patent is conclusive, but is it beyond that?

In order to reach a clear understanding of the question it seems necessary to consider the legislation. Three things are provided for: discovery, location, and patent. The first is the primary, the initial fact. The others are dependent upon it, and are the machinery devised by Congress for securing to the discoverer of mineral the full benefit of his discovery. Chap. 6 of Title 32, Rev. Stat., is devoted to the subject of "Mineral Lands and Mining Resources." The first section, 2318 (U. S. Comp. Stat. 1901, p. 1423), reserves mineral lands for sale, except as expressly directed. The next provides that all valuable mineral deposits in government lands shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase. In the next it is declared that no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim. The whole scope of the chapter is the acquisition of title from the United States to mines and mineral lands, the discovery of the mineral being, as stated, the initial fact. Without that no rights can be acquired. As said by Lindley, in his work on Mines, 2d ed., vol. 1, § 335:

"Discovery, in all ages and all countries, [346] has been regarded *as conferring rights or claims to reward. Gamboa, who represented the general thought of his age on this subject, was of the opinion that the discoverer of mines was even more worthy of reward than the inventor of a useful art. Hence, in the mining laws of all civilized countries the great consideration for granting mines to individuals is *discovery*. 'Rewards so bestowed,' says Gamboa, 'besides being a proper return for the labor and

anxiety of the discoverers, have the further effect of stimulating others to search for veins and mines, on which the general prosperity of the state depends.'"

Location is the act or series of acts by which the right of exclusive possession of mineral veins and the surface of mineral lands is vested in the locator. For this the only requirement made by Congress is the marking on the surface of the boundaries of the claim. By § 2324 (U. S. Comp. Stat. 1901, p. 1426), however, Congress recognized the validity of any regulations made by the miners of any mining district not in conflict with the laws of the United States or the laws of the state or territory within which the district is situated. This is held to authorize legislation by the state. Thus, in *Belk v. Meagher*, 104 U. S. 279, 284, 26 L. ed. 735, 737, it was said:

"A location is not made by taking possession alone, but by working on the ground, recording, and doing whatever else is required for that purpose by the acts of Congress and the local laws and regulations."

In *Kendall v. San Juan Silver Min. Co.* 144 U. S. 658, 664, 36 L. ed. 583, 585, 12 Sup. Ct. Rep. 779, 781, is this language:

"Section 2324 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 1426) makes the manner of locating mining claims and recording them subject to the laws of the state or territory, and the regulations of each mining district, when they are not in conflict with the laws of the United States."

See also *Erhardt v. Boaro*, 113 U. S. 527, 533, 534, 535, 28 L. ed. 1113, 1115, 1116, 5 Sup. Ct. Rep. 560; *Butte City Water Co. v. Baker*, 196 U. S. 119, ante, 409, 25 Sup. Ct. Rep. 221.

And many territories and states (Colorado among the number) have made provisions in respect to the location other *than the [347] mere marking on the ground of the boundaries of the claim. So, before a location in those states is perfected, all the provisions of the state statute as well as of the Federal must be complied with, for location there does not consist in a single act. In *Morrison, Mining Rights*, 11th ed. p. 37, the author, having primarily reference to the laws of Colorado, says:

"The location of a lode consists in defining its position and boundaries, and in doing such acts as indicate and publish the intention to occupy and hold it under the license of the United States. The formal parts of location include: 1, the location notice at discovery; 2, the discovery shaft; 3, the boundary stakes."

In *St. Louis Smelting & Ref. Co. v. Kemp*, 104 U. S. 636, 649, 26 L. ed. 875, 879, Justice Field, referring to the fact that the terms

"location" and "mining claim" are often indiscriminately used to denote the same thing, says by way of definition:

"A mining claim is a parcel of land containing precious metal in its soil or rock. A location is the act of appropriating such parcel, according to certain established rules."

See also *Northern P. R. Co. v. Sanders*, 1 C. C. A. 192, 7 U. S. App. 47, 49 Fed. 129, 135.

The patent is the instrument by which the fee-simple title to the mining claim is granted.

Returning now to the matter of location, the Colorado statutes in substance require—

"1. To place at the point of discovery, on the surface, a notice containing the name of the lode, the name of the locator, and the date of the discovery.

"2. Within sixty days from the discovery, to sink a discovery shaft 10 feet deep, showing a well-defined crevice.

"3. To mark the surface boundaries by six posts, one at each corner and one at the center of each side line, hewed or marked on the side or sides in towards the claim.

"4. The disclosure of the lode in an open cut, cross cut, or tunnel suffices instead of a 10-foot shaft.

[348] *"5. Within three months from date of discovery he must file a location certificate with the county recorder giving a proper description of the claim, and containing also the name of the lode, the name of the locator, the date of the location, the number of feet in length on each side of the center of the discovery shaft, and the general course of the lode." Morrison, Mining Rights, 11th ed. p. 59.

The issue of a patent for a lode claim in Colorado is therefore not only a conclusive adjudication of the fact of the discovery of the mineral vein, but also of compliance with these several provisions of its statutes. The supreme court of that state has decided that the order is not essential, providing no intervening rights have accrued. In *Brewster v. Shoemaker*, 28 Colo. 176, 180, 53 L. R. A. 793, 798, 89 Am. St. Rep. 188, 190, 63 Pac. 309, 310, it said:

"The order of time in which these several acts are performed is not of the essence of the requirements, and it is immaterial that the discovery was made subsequent to the completion of the acts of location, provided, only, all the necessary acts are done before intervening rights of third parties accrue. All these other steps having been taken before a valid discovery, and a valid discovery then following, it would be a useless and idle ceremony, which the law does not require, for the locators again to locate their

claim and refile their location certificate, or file a new one."

And that has been the general doctrine. In 1 Lindley, Mines, 2d ed. § 330, the author says:

"The order in which the several acts required by law are to be performed is non-essential, in the absence of intervening rights. The marking of the boundaries may precede the discovery, or the discovery may precede the marking; and if both are completed before the rights of others intervene, the earlier act will inure to the benefit of the locator. But if the boundaries are marked before discovery, the location will date from the time discovery is made."

In 1 Snyder, Mines, § 354, it is said:

"While the general rule is, as stated elsewhere in the foregoing *sections, that a [349] location must rest upon a valid discovery, yet a location otherwise good, with a discovery made after location, and before the intervention of adverse claims or the creation of adverse rights, will validate the location from the date of discovery, and generally from the first act towards claim and appropriation,—this by relation."

In Morrison, Mining Rights, 11th ed. p. 32:

"If a location be made before discovery, but is followed by a discovery in the discovery shaft, before any adverse rights intervene, such subsequent discovery cures the original defect and the claim is valid."

In *Re Mitchell*, 2 Land Dec. 752, it was held by Commissioner McFarland that, "although prior to location no discovery of mineral was made within the ground claimed, upon a subsequent discovery prior to application for patent the location became good and sufficient, in the absence of any adverse rights."

In *Reins v. Raunheim*, 28 Land Dec. 526, 529, Secretary Hitchcock declared that "it is immaterial whether the discovery occurred before or after the location, if it occurred before the rights of others intervened. *Erwin v. Perego*, 35 C. C. A. 482, 93 Fed. 608."

Reference is made to the statement of Secretary Smith in *Etling v. Potter*, 17 Land Dec. 424, 426, as though that announced a different conclusion, that "a location certificate is but one step—the last one—in the location of a mining claim." But a location certificate is simply a certificate required by the local statute or custom that some things have been done, and, of course, it must come after those things have been done.

Again, in the same volume, pp. 545 and 546 (*Northern P. R. Co. v. Marshall*), he said:

"In the location of a mineral claim, plac-

er or lode, the first requirement of the law is a discovery. §§ 2319, 2320 Rev. Stat. U. S. Comp. Stat. 1901, p. 1424. All rights inuring to the benefit of the locators are based upon this initial act. *Erhardt v. Boaro*, 113 U. S. 537, 28 L. ed. 1116, 5 Sup. Ct. Rep. 565; *United States v. Iron Silver Min. Co.* 128 U. S. 673, 32 L. ed. 571, 9 Sup. Ct. Rep. 195; *O'Reilly v. Campbell*, 116 U. S. 418, 29 L. ed. 669, 6 Sup. Ct. Rep. 421.

[350] When, therefore, a *legal location has been made on land returned as agricultural, the slight presumption in favor of the return of the surveyor general is, *ipso facto*, overcome, and the burden of proof shifts to the party attacking such mineral entry. By such discovery and location it is demonstrated that the return was erroneous, and it would be trifling with physical facts to put the onus on the locator to present further evidence until it is shown that, as a matter of fact, he had no discovery."

But the question he was considering was simply as to the burden of proof between one claiming land returned as agricultural land and one claiming a portion thereof as an apparently legal location of a mineral claim.

In *North Noonday Min. Co. v. Orient Min. Co.* 6 Sawy. 299, 1 Fed. 522, 531, Judge Sawyer, in charging the jury, said:

"I instruct you further, that if a party should make a location in all other respects regular, and in accordance with the laws, and the rules, regulations, and customs in force at the place at the time, upon a supposed vein, before discovering the true vein or lode, and should do sufficient work to hold the claim, and after such location should discover the vein or lode within the limits of the claim located, before any other party had acquired any rights therein, from the date of his discovery his claim would be good to the limits of his claim, and the location valid."

To the same effect was the charge of the same judge in *Jupiter Min. Co. v. Bodie Consol. Min. Co.* 7 Sawy. 96, 11 Fed. 666, 676.

In *Cedar Canyon Consol. Min. Co. v. Yarwood*, 27 Wash. 271, 91 Am. St. Rep. 841, 67 Pac. 749, the supreme court of Washington ruled that—

"In the absence of intervening rights, the fact that mineral is not discovered on a claim until after the notice of location is posted and the boundary marked is immaterial; and, where the discovery is the result of work subsequently done by the locator, his possessory rights under his location are complete from the date of such discovery."

[351] *Nevada Sierra Oil Co. v. Home Oil Co.* 98 Fed. 673; *Erwin v. Perego*, 35 C. C. A. 482, 93 Fed. 608; *Jupiter Min. Co. v. Bodie Consol. Min. Co.* 7 Sawy. 96, 11 Fed. 196 U. S.

666; 1 Lindley, Mines, § 335, and cases cited."

See especially *Erwin v. Perego*, cited in this quotation, decided by the court of appeals for the eighth circuit. Tending in the same direction are *Thompson v. Spray*, 72 Cal. 528, 533, 14 Pac. 182; *Gregory v. Pershbaker*, 73 Cal. 109, 118, 14 Pac. 401; *Tuolumne Consol. Min. Co. v. Maier*, 134 Cal. 583, 585, 66 Pac. 863.

But what is the meaning of the statute? Its language is "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." Does that require that a discovery must be made before any marking on the ground, especially when, as under the Colorado statutes, several other steps in the process of location are prescribed, or does it mean that no location shall be considered as complete until there has been a discovery? Bearing in mind that the principal thought of the chapter is exploration and appropriation of mineral, does it mean anything more than that the fact of discovery shall exist prior to the vesting of that right of exclusive possession which attends a valid location?

This may be looked at in another aspect. Suppose a discovery is not made before the marking on the ground and posting of notice, but is then made, and it and all other statutory provisions are complied with before the entry, which is an application for the purchase of the ground,—of what benefit would it be to the government to require the discoverer to repeat the marking on the ground, the posting of notice, and other acts requisite to perfect a location? If everything has been done which, under the law, ought to be done to entitle the party to purchase the ground, wherein is the government prejudiced if the precise order of those acts is not followed? Or, to go a step farther, suppose, on an application for a patent, an adverse suit is instituted, and on the trial it appeared that the plaintiff in that suit had made a discovery and taken all the *steps necessary for a location in the statu [352] tory order, although not until after the applicant for the patent had done everything required by law, would there be any justice in sustaining the adverse suit, and awarding the property to the plaintiff therein, on the ground that the applicant had not made any discovery until the day after his marking on the ground, and so the discovery did not precede the location?

These suggestions add strength to the concurring opinion of three leading commentators on mining law, the general trend of the rulings of the department and decisions of the courts, to the effect that the order in which the several acts are done is not es-

sential, except so far as one is dependent on another. Doubtless a locator does not acquire the right of exclusive possession unless he has made a valid location, and discovery is essential to its validity; but if all the acts prescribed by law are done, including a discovery, is it not sacrificing substance to form to hold that the order of those acts is essential to the creation of the right? It must be remembered that the discovery and the marking on the ground are not matters of record but *in pais*, and, if disputed in an adverse suit or otherwise, must be shown, as other like facts, by parol testimony. It must also be remembered that the certificate of location required by the Colorado statutes need not be verified. The one in this case was not. A locator might, if so disposed, place the date of discovery before it was in fact made, and at any time within three months prior to the filing of the certificate.

But it has been said that the question has been decided by this court adversely to these views, and *Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co.* 167 U. S. 108, 42 L. ed. 96, 17 Sup. Ct. Rep. 762, and *Cathoun Gold Min. Co. v. Ajax Gold Min. Co.* 182 U. S. 499, 45 L. ed. 1200, 21 Sup. Ct. Rep. 885, are cited. In the former case the question was as to when a vein discovered in a tunnel must be located, and in the opinion (p. 112, L. ed. p. 100, Sup. Ct. Rep. p. 763) we said:

[353] "In order to make a location there must be a discovery; at least, that is the general rule laid down in the statute. Section*2320 (U. S. Comp. Stat. 1901, p. 1424) provides: 'But no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located.' The discovery in the tunnel is like a discovery on the surface. Until one is made there is no right to locate a claim in respect to the vein, and the time to determine where and how it shall be located arises only upon the discovery,—whether such discovery be made on the surface or in the tunnel."

But that comes far short of meeting the question before us. It is undoubtedly true that discovery is the initial fact. The language of the statute makes that plain, and parties may not go on the public domain and acquire the right of possession by the mere performance of the acts prescribed for a location. But the question here is whether, if there be both a discovery and the performance of all the acts necessary to constitute a location, the order in which these things take place is essential to the right of exclusive possession which belongs to a valid location.

In the *Ajax Case* the contest was between

mining claims, on the one hand, and a mining claim and tunnel site, on the other. All the mining claims had passed to patent. The plaintiff in error, who was defendant below, held the junior patent issued upon a later entry, and the entries of plaintiff's claims were made and the receiver's final receipts issued prior to the location of the tunnel site. In other words, the defendant, admitting that its right to a tunnel had not been established by a location at the time of the entries of plaintiff's claims, sought to invalidate them by proof that there had been no previous discovery of mineral. This was refused by the trial court, and we sustained the ruling, saying (p. 510, L. ed. p. 1206, Sup. Ct. Rep. 890):

"The patents were proof of the discovery, and related back to the date of the locations of the claims. The patents could not be collaterally attacked. This has been decided so often that a citation of cases is unnecessary."

An entry, sustained by a patent, is conclusive evidence that, at the time of the entry, there had been a valid location, and *such[354] valid location implies, as one of its conditions, a discovery; and the decision only went to the extent that this could not be challenged by one who, at the time of the entry, had made no location, and therefore had acquired no tunnel right. There is nothing in this ruling to conflict with the views we have expressed.

It would seem, therefore, from this review of the authorities as well as from the foregoing considerations that, as between the government and the locator, it is not a vital fact that there was a discovery of mineral before the commencement of any of the steps required to perfect a location, and that if, at the time of the entry, everything has been done which entitled the party to an entry, to wit, a discovery and a perfected location, the government would not be justified in rejecting the application on the ground that the customary order of procedure had not been followed. In other words, the government does not, by accepting the entry, and confirming it by a patent, determine as to the order of proceedings prior to the entry, but only that all required by law have been taken.

If, therefore, the entry and patent do not of themselves necessarily determine the order of the prior proceedings, why may not anyone who claims rights anterior to the entry, and dependent upon that order, show, as a matter of fact what it was? One not a party to proceedings between the government and the patentee is concluded by the action of the government only so far as that action involves a determination. There is a determination by the fact of entry and

patent that there was, prior to the entry, a discovery and a location. Having been so determined, third parties may be concluded thereby.

But it may be said that when the time of a particular fact is concluded by an adjudication, or when an opportunity is presented for such an adjudication, and not availed of, the time as stated must be considered as settled; that when the plaintiff applied for its patent, if there was any question to be made by the defendant of any statement of fact made in the location certificate or other record, it should have been [355]challenged by *an adverse suit. Failing to do so, the fact must be considered to be settled as stated. Undoubtedly, if, in an adverse suit, the time of any particular matter is litigated, the judgment is conclusive; and if the date of discovery stated in the plaintiff's location certificate had been challenged in an appropriate action brought by the defendant, and determined in favor of the plaintiff, there could be now no inquiry. So, when the owner of a lode claim makes application for a patent, and the owner of another seeks to challenge the former's priority of right on account of the date of discovery, it is his duty to bring an adverse suit; and, if he fails to do so, that question will be, as to him, concluded. Such is the purpose and effect of the adverse proceedings.

Is the same rule also applicable to a tunnel site? This opens up the question of what are the rights and obligations of the owner of a tunnel. And here these facts must be borne in mind: The owner of a tunnel never receives a patent for it. There is no provision in the statute for one, and none is in fact ever issued. No discovery of mineral is essential to create a tunnel right or to maintain possession of it. A tunnel is only a means of exploration. As the surface is free and open to exploration, so is the subsurface. The citizen needs no permit to explore on the surface of government land for mineral. Neither does he have to get one for exploration beneath the surface for like purpose. Nothing is said in § 2323 (U. S. Comp. Stat. 1901, p. 1426) as to what must be done to secure a tunnel right. That is left to the miners' customs or the state statutes, and the statutes of Colorado provide for a location and the filing of a certificate of location. When the tunnel right is secured the Federal statute prescribes its extent,—a tunnel 3,000 feet in length and a right to appropriate the veins discovered in such tunnel to the same extent as if discovered from the surface.

If the tunnel right was vested before a discovery in the plaintiff's lode claim the defendant ought to have the benefit of it.

The plaintiff's right does not antedate his discovery; at least it does not prevail over any then-existing right. But, it *is said, [356] the defendant did not adverse the plaintiff's application for a patent; that its omission so to do precludes it from now asserting a right prior to the date of discovery named in the certificate of location, just as a judgment in an adverse suit involving the question of date would have been conclusive. Is the owner of a tunnel who simply seeks to protect his tunnel, and has, as yet, discovered no lode claim, bound to adverse an application for the patent of a lode claim, the lode of which was discovered on the surface? It is contended that the case of *Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co.* 167 U. S. 108, 42 L. ed. 96, 17 Sup. Ct. Rep. 762, decides this question. But in that case the line of the tunnel did not enter the ground of the lode claim, but ran parallel with and distant from it some 500 feet, and we held that the mere possibility that, in the line of the tunnel, might be discovered a vein which extended through the ground of the distant lode claim, did not necessitate adverse proceedings. Here the line of the tunnel runs directly through the ground of the plaintiff, and the question is distinctly presented whether, in order to protect the right to that tunnel, the defendant was called upon to adverse? Whatever might be the propriety or advantage of such action, the statute does not require it.

Sections 2325 and 2326 (U. S. Comp. Stat. 1901, pp. 1429, 1430) provide the manner of obtaining a patent and for adverse proceedings. The first commences: "A patent for any land claimed and located for valuable deposits may be obtained in the following manner." This, obviously, does not refer to easements or other rights, nor the acquisition of title to land generally, but only to land claimed and located for valuable deposits. Then, after prescribing certain proceedings, the statute adds: "If no adverse claim shall have been filed with the register . . . it shall be assumed that the applicant is entitled to a patent . . . and that no adverse claim exists." The next section commences, "where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and *extent of such [357] adverse claim." The section then authorizes the commencement of an action by the adverse claimant and a stay of proceedings in the Land Department pending such action, and adds:

"After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certi-

fied copy of the judgment roll with the register of the land office, together with the certificate of the surveyor general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment roll shall be certified by the register to the Commissioner of the General Land Office, and a patent shall issue thereon for the claim, or such portion thereof, as the applicant shall appear, from the decision of the court, to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, with the proper fees, and file the certificate and description by the surveyor general, whereupon the register shall certify the proceedings and judgment roll to the Commissioner of the General Land Office, as in the preceding case, and patents shall issue to the several parties according to their respective rights."

Reading these two sections together, it is apparent that they provide for a judicial determination of a controversy between two parties contesting for the possession of "land claimed and located for valuable deposits;" in other words, the decision of a conflict between two mining claims,—a decision which will enable the Land Department, without further investigation, to issue a patent for the land. A tunnel is not a mining claim, although it has sometimes been inaccurately called one. As we have seen, it is only a means of exploration. The owner has a right to run it in the hope of finding a mineral vein. When one is found he is called upon to make a location of the

[358] *ground containing that vein, and thus creates a mining claim, the protection of which may require adverse proceedings. As the claimant of the tunnel he takes no ground for which he is called upon to pay, and is entitled to no patent. A judgment in adverse proceedings instituted by him (if such proceedings were required) might operate to create a limitation on the estate of the applicant for a patent to the mining claim, and, thus as it were, engraft an exception on his patent. But, taking the whole surface, the applicant is required to pay the full price of \$5 per acre, with no deduction because of the tunnel. The statute provides for no reduction on account of any tunnel. The tunnel owner might be said to have established his right to continue the tunnel through the lode claim after patent,—a right which he undoubtedly had before patent, or at least before entry. There is

no statutory warrant for placing in a patent to the owner of a lode claim any limitation of his title by a reservation of tunnel rights. In *Deffebach v. Hawke*, 115 U. S. 392, 406, 29 L. ed. 423, 427, 6 Sup. Ct. Rep. 95, 101, we said:

"The position that the patent to the plaintiff should have contained a reservation excluding from its operation all buildings and improvements not belonging to him, and all rights necessary or proper to the possession and enjoyment of the same, has no support in any legislation of Congress. The land officers, who are merely agents of the law, had no authority to insert in the patent any other terms than those of conveyance, with recitals showing a compliance with the law and the conditions which it prescribed."

Other limitations in the full title granted by a patent for a mineral claim are recognized in the statutes. Thus, by § 2339 (U. S. Comp. Stat. 1901, p. 1437), which is found in the same chapter as the other sections quoted, the one devoted to "Mineral Lands and Mining Resources," it is provided that:

"Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions *of [359] courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed."

But it has never been supposed that the owner of any of these rights was compelled to adverse an application for a patent for a mining claim, for they are not "mining claims."

The decisions on the question of the duty of the tunnel owner to adverse the application of the lode claimant are not harmonious. In *Bodie Tunnel & Min. Co. v. Bechtel Consol. Min. Co.* 1 Land Dec. 584, Secretary Kirkwood held that a tunnel location was a mining claim and necessitated adverse proceedings to protect its rights as against an applicant for a lode claim (see also *Back v. Sierra Nevada Consol. Min. Co.* 2 Idaho, 420, 17 Pac. 83), while the supreme court of Colorado, in *Corning Tunnel Co. v. Pell*, 4 Colo. 507, denied the right of a tunnel owner to adverse the application for a patent for a lode claim where the lode had not been discovered in the tunnel, and the discovery shaft was not on the line of the tunnel. Lindley, § 725, referring to the decision in *Enterprise Min. Co. v. Rico*

Aspen Consol. Min. Co. 167 U. S. 108, 42 L. ed. 96, 17 Sup. Ct. Rep. 762, said:

"In the light of this decision and the one which it affirms, the rule may be thus formulated: Where a lode claimant applies for a patent to a location embracing a lode which has previously been discovered in the tunnel, the tunnel claimant will be compelled to adverse to protect his rights. A right in the particular lode inures to the tunnel proprietor immediately upon its discovery in the tunnel, which right is essentially adverse to the lode applicant; but where there has been no discovery in the tunnel, and it cannot be demonstrated that the lode will be cut by the tunnel bore, there is no necessity for an adverse claim."

[360] Without further review of the conflicting authorities, it would seem that whatever may be the propriety or advantage of an adverse suit, one cannot be adjudged necessary when *Congress has not specifically required it. Until the discovery of a lode or vein within the tunnel, its owner has only a possibility. He is like an explorer on the surface. Adverse proceedings are called for only when one mineral claimant contests the right of another mineral claimant.

If the defendant was not estopped by a failure to institute adverse proceedings, then the trial court erred in striking out the parts of the answer in reference to the date of plaintiff's discovery, and the judgment of the court of appeals was right.

This conclusion avoids the necessity of any inquiry as to the effect of the alleged estoppel, and the judgment of the Circuit Court of Appeals is affirmed.

SUSAN A. RAMSEY, *Plff. in Err.*,
v.

TACOMA LAND COMPANY and Philadelphia Trust, Safe Deposit, & Insurance Company and John C. Bullitt, Trustees of the estate of Charles B. Wright, Deceased.

(See S. C. Reporter's ed. 360-364.)

Railroad land grants—bona fide purchasers—state corporation a citizen—effect of delay on right to purchase from government.

1. A state corporation is a citizen of the United States within the meaning of the act of March 3, 1887 (24 Stat. at L. 557, chap. 376, U. S. Comp. Stat. 1901, p. 1595), § 5, conferring upon such citizens who are bona fide purchasers from a railway company of land excepted from its grant, the right to purchase the same from the government.

NOTE.—As to land grants to railroads—see note to *Kansas P. R. Co. v. Atchison, T. & S. F. R. Co.* 28 L. ed. U. S. 794.

196 U. S.

2. Delay cannot successfully be urged to prevent bona fide purchasers from a railway company of land excepted from its grant from exercising the right to purchase the same from the government, conferred by the act of March 3, 1887 (24 Stat. at L. 557, chap. 376, U. S. Comp. Stat. 1901, p. 1595), § 5, where the application to purchase was made within ten months after the land had been stricken from the company's list, pursuant to a decision of the Land Department, and, prior to such decision, both the railway company and the Land Department had assumed that the land was already the property of the railway company's grantee by virtue of its purchase from that company.

[No. 138.]

Submitted January 17, 1905. Decided January 30, 1905.

IN ERROR to the Supreme Court of the State of Washington to review a judgment which reversed a decree of the Superior Court of Pierce County, in favor of plaintiff, in a suit to establish a trust in certain real property, and dismissed the suit. *Affirmed.*

See same case below, 31 Wash. 351, 71 Pac. 1024.

Statement by Mr. Justice Brewer:

*This was a suit commenced in the superior court of Pierce county, Washington, by the plaintiff in error, praying that she be decreed to be the owner of the S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 3, township 20 north, range 2 east, in said county, and that the defendants be adjudged to hold the legal title in trust for her. A decree of the trial court in her favor was reversed by the supreme court of the state, and the cause dismissed. 31 Wash. 351, 71 Pac. 1024.

The essential facts, which are not disputed, are stated in the opinion of the supreme court. The land was within the primary limits of the grant to the Northern Pacific Railroad Company by joint resolution of Congress, of May 31, 1870. 16 Stat. at L. 378. The company filed its map of general route on August 13, 1870, and its map of definite location on May 14, 1874. The Land Department thereupon withdrew from sale and entry this with other tracts. On May 19, 1869, one W. C. Kincaide made a pre-emption filing on the land, but had abandoned the filing and the land prior to the act of 1870. Subsequently to the filing of the map of definite location the tract was held by the company and considered by the Land Department to have passed to the company until the departmental decision of July 13, 1896, in *Corlis v. Northern P. R. Co.* 23 Land Dec. 265, on review, 26 Land Dec. 652, which held that lands situated as this were excepted from the grant. In 1874 the

railroad company, for value and in good faith, sold and conveyed the land to the Tacoma Land Company, a corporation created under the laws of Pennsylvania. Thereafter that company, for value, and in good faith, sold to the other defendants, who also acted in good faith. The several deeds representing these transactions were placed on record in the county where the tract is situated. On October 13, 1896, the Commissioner of the General Land Office canceled the railroad company's list of the tract in question, on the basis of the decision in *Cortis v. Northern P. R. Co.* On February 24, 1897, the plaintiff filed in the local land office her application to enter the land as a home-
 [362]stead, which filing was accepted by the local officers, and in May of that year she went upon the land, and has there since remained, making improvements to the value of \$1,200. In August, 1897, the land company filed its application to purchase the tract, under § 5 of the act of Congress of March 3, 1887. 24 Stat. at L. 557, chap. 376, U. S. Comp. Stat. 1901, p. 1595. A contest between the plaintiff and the land company was had in the Department, which resulted in a decision in its favor, and to it a patent was issued.

Mr. John F. Shafroth submitted the cause for plaintiff in error. *Messrs. John C. Stallcup* and *J. W. A. Nichols* were on his brief.

Mr. Stanton Warburton submitted the cause for defendants in error. *Mr. E. R. York* was on his brief.

Mr. Justice Brewer delivered the opinion of the court:

Plaintiff in error presents but two questions which have not already been determined by this court. One is whether a state corporation is entitled to the benefit of § 5 of the act of 1887, which names as beneficiaries "citizens of the United States," or "persons who have declared their intentions to become such citizens." This can scarcely be considered a debatable question, for in *United States v. Northwestern Exp., Stage & Transp. Co.* 164 U. S. 686, 41 L. ed. 599, 17 Sup. Ct. Rep. 296, similar language in the Indian depredations statute [26 Stat. at L. 851, chap. 538, U. S. Comp. Stat. 1901, p. 758] was adjudged broad enough to include a state corporation. No review of authorities there considered and no restatement of the argument is necessary. Obviously, in a remedial statute like this, the term "citizens" is to be considered as including state corporations, unless there be something beyond the mere use of the word to indicate an intent on the part of Congress to exclude them.

The other question arises on the conten-

tion of the plaintiff that the statute of 1887 is not curative, but simply permissive; that it does not attempt to confirm the title of the purchaser *from the railroad company,
 [363] but simply gives him the privilege of purchasing from the government at the ordinary price. It is urged that it cannot be presumed that Congress intended that the land should be held indefinitely, waiting for the election of the purchaser, and that the privilege must be exercised at once or considered as abandoned. It is said that the land company did not attempt to exercise the privilege immediately after the passage of the act, but waited for more than ten years. Obviously the statute is not a curative one, confirms no title, but simply grants a privilege. We shall assume that that privilege is not one continuing indefinitely, that the land is not held free from entry until the purchaser from the railroad company has formally refused to purchase, and that he must act within a reasonable time. Nevertheless, we are of opinion that the action of the Land Department must be sustained. It is true that the land company did not proceed immediately after the passage of the act of 1887, but until 1896 both the railroad company and the Land Department assumed that the land was already the property of the land company by its purchase from the railroad company. While all parties considered the full equitable title as vested in the land company, there was no duty cast upon it of securing a further title by purchase from the government. Only after the decision in the *Cortis Case* in 1896, and on October 13 of that year, was the land stricken from the railroad company's list. Within ten months thereafter the land company made its application. Now, whether it acted with reasonable promptness was a question primarily for the consideration of the Land Department. That Department had before it the application of the plaintiff to enter the land under the general land laws, and that of the land company to purchase it under the act of 1887; and after a full consideration it decided in favor of the land company,—a decision which, in effect, determined that the company had acted with all necessary promptness, and was entitled to the benefit of the statute. Of course, the privilege granted by the statute would be of little or no avail if it had *to be exercised
 [364] on the very day. Some time must be allowed for acquiring knowledge of the situation and determining the course of action. The plaintiff was as fully charged with knowledge of this act of 1887 as the land company. Upon the records of the county were the deeds from the railroad to the land company and from the latter to its grantees. So she acted with knowledge both of the law and the

facts, and is not in a position now to complain of the action of the Land Department. We are not justified in setting aside the decision of the Land Department, and holding that it erred in awarding to the land company the privilege which the statute, without any express limitation of time, gives to it.

We see no error in the record, and the judgment of the Supreme Court of Washington is affirmed.

MARTHA S. MUNSEY, *Plff. in Err.*,
v.

M. SWAIN CLOUGH, Sheriff of Merrimack County.

(See S. C. Reporter's ed. 364-375.)

Extradition—right to hearing—questions open on habeas corpus—prima facie case.

1. The person demanded in interstate extradition proceedings has no right to a hearing before the governor on the question whether he has been substantially charged with a crime and whether he is a fugitive from justice.
2. On habeas corpus to review the issuance of an extradition warrant by the governor of a state, the accused is concluded by the prima facie case made out by the papers upon which the governor acted, where such accused, upon the hearing in the habeas corpus proceedings, waived the right to introduce further evidence.
3. The technical sufficiency of the indictment and the question of the procedure under it are not open to inquiry on habeas corpus to review the issuance of a warrant of arrest in interstate extradition proceedings.
4. Contradictory evidence on the question of the presence or absence of the accused in the state at the time of the commission of the offense will not require his discharge on habeas corpus to review the issuance of a warrant of arrest in interstate extradition proceedings.

[No. 126.]

*Argued and submitted January 13, 1905.
Decided January 30, 1905.*

IN ERROR to the Superior Court of the State of New Hampshire for Merrimack County, to review a judgment refusing to discharge, on habeas corpus, a person arrested under a warrant issued by the governor of that State in extradition proceedings, which judgment was affirmed by the Supreme Court of the State. *Affirmed.*

NOTE.—On habeas corpus to review extradition proceedings—see notes to *State v. Jackson*, 1 L. R. A. 373; *Cortes v. Jacobus*, 34 L. ed. U. S. 464; and *Bruce v. Rayner*, 62 C. C. A. 506.

On interstate extradition generally—see note to *State v. Jackson*, 1 L. R. A. 370.

196 U. S.

See same case below in Supreme Court, 71 N. H. 594, 53 Atl. 1086, 72 N. H. 178, 55 Atl. 554.

The facts are stated in the opinion.

Mr. Edward A. Lane argued the cause and filed a brief for plaintiff in error.

Mr. Edwin G. Eastman submitted the cause for defendant in error. Mr. George A. Sanderson was on his brief.

Mr. Justice Peckham delivered the opinion of the court:

This was a proceeding on habeas corpus in a state court of New Hampshire to obtain the discharge of the plaintiff in error from arrest under a warrant given by the governor of that state, directing the return of the plaintiff in error to the commonwealth of Massachusetts, as a fugitive from justice. *Upon the hearing the state court refused [369] to discharge the plaintiff in error, the order of refusal was affirmed by the supreme court, and she has brought the case here for review. On a former proceeding in supreme court, see 71 N. H. 594, 53 Atl. 1086.

The proceedings before the governor of New Hampshire to obtain the warrant of arrest were taken under § 5278 of the Revised Statutes of the United States, re-enacting the statute approved February 12, 1793 (1 Stat. at L. 302, chap. 7, U. S. Comp. Stat. 1901, p. 3597), relating to the arrest of persons as fugitives from justice, under clause 2 of § 2 of article 4 of the Constitution of the United States.

The papers before the governor of New Hampshire consisted of a copy of an indictment of the plaintiff in error, found in Massachusetts on the second Monday of February, 1902; it contained three counts, and charged the plaintiff in error with uttering and publishing as true a certain forged instrument, purporting to be a will, well knowing the same to be forged. The first count alleged that the crime was committed on the 28th of February, 1895, at Cambridge, in the county of Middlesex, in the commonwealth of Massachusetts; and it also alleged that since the commission of the offense the plaintiff had not been usually or publicly a resident in that commonwealth.

The second count averred the uttering, etc., to have been on the 17th day of May, in the year 1895, in the same place, and the indictment had the same averment as to the nonresidence of the plaintiff in error as contained in the first count.

The third count averred the uttering at the same place as that named in the other two counts, but laid the date as the 20th day of November, 1901. There was also before the governor of New Hampshire an application, dated the 26th of February,

1902, signed by George A. Sanderson, district attorney for the northern district of Middlesex, to the governor of Massachusetts, requesting a requisition from him upon the governor of New Hampshire for the extradition of *the plaintiff in error, who, as stated in the application, stood charged by indictment with the crime of uttering forged wills, committed in the county of Middlesex (on the days stated in the indictment), and who, to avoid prosecution, had fled from the jurisdiction of the commonwealth, and was a fugitive from justice, and was within the jurisdiction of the state of New Hampshire. It was also stated in the application that the indictment was not found by the grand jury until the February sitting of the superior court in the year 1902. There was also before the governor of New Hampshire a copy of what purported to be an affidavit of one Whitney, the original of which was used before the governor of Massachusetts, to obtain the requisition. It is short, and is as follows:

Commonwealth of Massachusetts, }
Middlesex. } ss.:

I, Jophanus H. Whitney, of Medford, in the county of Middlesex and said commonwealth, on oath depose and say that Martha S. Munsey, who stands charged by indictment with the crime of uttering forged wills, as is more fully set forth in the papers hereto annexed, has fled from the limits of said commonwealth, and is a fugitive from justice. And I further depose that at the time of the commission of said crime she was in the state of Massachusetts, in the county of Middlesex of said commonwealth, and that at the same time and previous thereto she was a resident of Cambridge in the said county of Middlesex; that she fled from said commonwealth of Massachusetts on or about the fourth day of November, A. D. 1901; that she is not now within the limits of the commonwealth, but, as I have reason to believe, is now in Pittsfield, in the state of New Hampshire. The grounds of my knowledge are that I have interviewed her since the fourth of November last in Pittsfield, New Hampshire, where she was living with her husband during the last week January last.

Jophanus H. Whitney.

There was also a certificate of the district attorney for the *northern district of Middlesex, that the offense charged against the plaintiff in error is a felony within that commonwealth, and that application for the arrest and return of the fugitive had not been sooner made because the indictment was not found by the grand jury until February, 1902.

The governor of the commonwealth of Massachusetts having given the requisition applied for, the papers above mentioned were presented to the governor of New Hampshire, and a request made that he should issue his warrant of arrest to take the plaintiff in error back to the commonwealth of Massachusetts, as a fugitive from justice, and for the purpose of being tried on the indictment referred to. The counsel for the plaintiff in error appeared before the governor, and stated they desired a hearing before him before the warrant of arrest should be granted. This hearing was refused, and the governor then granted the warrant for the arrest and return of the plaintiff in error to the commonwealth of Massachusetts as a fugitive from justice. In that warrant it was provided that the plaintiff in error should be afforded an opportunity to sue out a writ of habeas corpus before being delivered over to the authorities of Massachusetts. She availed herself of that right and sued out such writ, and upon its return the plaintiff in error made several objections to the execution of the governor's warrant, and alleged the insufficiency of the papers to authorize the granting of the same. At the close of the hearing the counsel for plaintiff in error moved that she be discharged for the reasons stated in the motion; the motion was denied, subject to the objection and exception of the plaintiff in error. The record then shows the following:

"The court thereupon ordered that the relator proceed to introduce evidence upon the question whether she was in fact a fugitive from justice. This the relator's counsel declined to do, upon the ground that such action, on their part, would constitute a waiver of their right to object to the refusal of the governor to grant a hearing upon this question of fact.

"The court then directed that the counsel for the relator *state whether the relator [372] waived the right to then, or at any future time, introduce further evidence upon this, or any question of fact, and counsel for relator declared that she did waive that right.

"No evidence was offered by the relator either upon the question whether the relator was a fugitive from justice, or upon any other question of fact, other than as above stated."

The question of the legality of the detention of the plaintiff in error is thus brought before the court. The proceedings in matters of this kind before the governor are summary in their nature. The questions before the governor, under the section of the Revised Statutes, above cited, are whether the person demanded has been sub-

stantially charged with a crime, and whether he is a fugitive from justice. The first is a question of law and the latter is a question of fact, which the governor, upon whom the demand is made, must decide upon such evidence as is satisfactory to him. Strict common-law evidence is not necessary. The statute does not provide for the particular kind of evidence to be produced before him, nor how it shall be authenticated, but it must at least be evidence which is satisfactory to the mind of the governor. *Roberts v. Reilly*, 116 U. S. 80, 95, 29 L. ed. 544, 549, 6 Sup. Ct. Rep. 291. The person demanded has no constitutional right to be heard before the governor on either question, and the statute provides for none. To hold otherwise would, in many cases, render the constitutional provision, as well as the statute passed to carry it out, wholly useless. The governor, therefore, committed no error in refusing a hearing. The issuing of the warrant by him, with or without a recital therein that the person demanded is a fugitive from justice, must be regarded as sufficient to justify the removal, until the presumption in favor of the legality and regularity of the warrant is overthrown by contrary proof in a legal proceeding to review the action of the governor. *Roberts v. Reilly*, 116 U. S. 80, 29 L. ed. 544, 6 Sup. Ct. Rep. 291; *Hyatt v. New York*, 188 U. S. 691, 47 L. ed. 657, 23 Sup. Ct. Rep. 456.

After the decision of the governor, and the issuing of the warrant, the plaintiff in error sued out this writ of habeas corpus [373]*for the purpose of reviewing his action.

The position taken by the plaintiff in error upon the hearing on the return of the writ, in refusing to introduce evidence upon the question whether she was in fact a fugitive from justice, left the case for decision upon the papers before the governor upon which he acted in issuing the warrant of arrest. We have no doubt that a prima facie case was made out, and as the plaintiff in error waived any right to give further evidence, she is concluded by that prima facie case. The indictment undoubtedly set forth a substantial charge against the plaintiff in error, and the facts therein set forth constituted a felony in the commonwealth of Massachusetts, as certified by the district attorney. The sufficiency of the indictment, as a matter of technical pleading, will not be inquired into on habeas corpus. *Ex parte Reggel*, 114 U. S. 642, 29 L. ed. 250, 5 Sup. Ct. Rep. 1148; *Pearce v. Texas*, 155 U. S. 311, 39 L. ed. 164, 15 Sup. Ct. Rep. 116; *Ex parte Hart*, 59 Fed. 894.

If the indictment be for three distinct offenses (although of the same nature) set out in the three different counts, as is

argued by plaintiff in error, it will not be presumed that such an indictment is void under the laws of Massachusetts, and the question of procedure under the indictment is one for the courts of the state where it was found. The courts of that state would undoubtedly protect her in the enjoyment of all her constitutional rights. These are matters for the trial court of the demanding state, and are not to be inquired of on this writ. If it appear that the indictment substantially charges an offense for which the person may be returned to the state for trial, it is enough for this proceeding.

Upon the question of fact, whether the plaintiff was a fugitive from justice, her counsel, in the argument before this court, set up several objections of a technical nature, which, he argued, showed that the plaintiff in error was not present in Massachusetts at the time when one of the crimes, at least, was alleged to have been committed. As the indictment sets up in the first two counts that the plaintiff in error had not been usually or publicly a resident of Massachusetts at any *time since the commission [374] of the offense set forth in those counts, it is argued that the indictment shows that she was not present in the state at the time when the third count charges a crime to have been committed, and the Whitney affidavit shows she fled from the state before the alleged commission of the crime set forth in the third count. There is no impossibility in the plaintiff in error having returned and been present in the state at the time of the alleged commission of the offense set forth in the third count, even though she had not been "usually or publicly a resident of that state" since the time when it is alleged that she committed the offenses set forth in the first two counts, and had fled therefrom before the commission of the last offense set forth in the third count. The affidavit of Mr. Whitney is to the effect that at the time of the commission of the crimes she was in the state of Massachusetts, and that at the same time, and previous thereto, she was a resident of Cambridge, in the county of Middlesex. Whether she was a resident or not is not important, as to the third count, if she were present in the state and committed the crime therein. The statement in the affidavit that she fled on or about the 4th day of November, 1901, while the third count of the indictment avers the commission of the crime on the 20th November of that year, is sufficiently exact, considering the facts in the case, as the affiant states that she was in the commonwealth at the time of the commission of the crime. Reasonably construed, the affidavit of Whitney shows the presence of the plaintiff in error in the state, and is suffi-

cient, unexplained and uncontradicted, for that purpose.

When it is conceded, or when it is so conclusively proved that no question can be made, that the person was not within the demanding state when the crime is said to have been committed, and his arrest is sought on the ground only of a constructive presence at that time, in the demanding state, then the court will discharge the defendant. *Hyatt v. New York*, 188 U. S. 691, 47 L. ed. 657, 23 Sup. Ct. Rep. 456, affirming the judgment of the New York court [375] *of appeals, 172 N. Y. 176, 60 L. R. A. 774, 92 Am. St. Rep. 706, 64 N. E. 825. But the court will not discharge a defendant arrested under the governor's warrant where there is merely contradictory evidence on the subject of presence in or absence from the state, as habeas corpus is not the proper proceeding to try the question of alibi, or any question as to the guilt or innocence of the accused. As a prima facie case existed for the return of the plaintiff in error and she refused to give any evidence upon the return of the writ which she had herself sued out, other than the papers before the governor, no case was made out for her discharge, and the judgment of the Supreme Court of New Hampshire, refusing to grant it, must, therefore, be affirmed.

SWIFT & COMPANY *et al.*, Appts.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 375-402.)

Interstate commerce—unlawful restraints and monopolies—combinations of meat dealers—sufficiency of allegations of bill.

1. A general allegation of intent may color and apply to all the specific charges of a bill which seeks relief against alleged violations of the act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), to protect trade and commerce against unlawful restraints and monopolies.
2. A bill charges a violation of the act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), to protect trade and commerce against unlawful restraints and monopolies, as against the objections of want of equity, multifariousness, and failure to set forth sufficient definite or specific facts, where it avers the existence of a combination of a dominant proportion of the dealers in fresh meat throughout the United States not to bid against each other in the live stock markets of the different states, to bid up prices for a few days in order to induce shipments to the stock yards, to fix selling prices, and to that

end to restrict shipments of meat when necessary, to establish a uniform rule of credit to dealers, and to keep a black list, to make uniform and improper charges for cartage, and to secure less than lawful freight rates, to the exclusion of competitors.

3. A combination of independent meat dealers, in aid of an attempt to monopolize commerce in fresh meat among the states, to restrict the competition of their respective agents when purchasing stock for them in the stock yards, is an interference with interstate commerce, forbidden by the act of July 2, 1890, (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), to protect trade and commerce against unlawful restraints and monopolies, where such dealers and their slaughtering establishments are largely in different states from those of the stock yards, and the sellers of the cattle largely in different states from either.
4. Trade in fresh meat is sufficiently shown to be commerce among the states, protected from restraint by the act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), by allegations in a bill charging meat dealers with violations of that act, which, even if they import a technical passing of title at the slaughtering places in cases of sales, also import that the sales are to persons in other states, and that the shipments to other states are pursuant to such sales, and by allegations charging sales of such meat by their agents in other states, which indicate that some, at least, of the sales were in the original packages.
5. Vagueness cannot be asserted of a charge in a bill seeking relief against an attempt to monopolize commerce in fresh meat among the states, in violation of the act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), that a combination exists among independent meat dealers to restrain their respective agents from bidding against each other when purchasing live stock for them in the stock yards.
6. Interstate commerce is unlawfully restrained, in violation of the act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), by a combination of independent meat dealers, in aid of an attempt to monopolize commerce in fresh meat among the states, to bid up prices for live stock for a few days at a time, in order to induce cattle men in other states to make large shipments to the stock yards, or by a combination for the same purpose to fix the selling price of fresh meat, and to that end to restrict shipments, when necessary, to establish a uniform rule of credit to dealers, and to keep a black list, or by a combination in aid of such purpose to make uniform and improper charges for cartage for the delivery of meat sold to be shipped to dealers and consumers in the several states.
7. A combination to secure less than lawful freight rates, entered into by independent meat dealers with the intent to monopolize commerce in fresh meat among the several states, is forbidden by the act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), to protect trade and commerce against unlawful restraints and monopolies.

NOTE.—On illegal trusts under modern anti-trust laws—see note to *Whitwell v. Continental Tobacco Co.* 64 L. R. A. 689.

Argued January 6, 9, 1905. Decided January 30, 1905.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois to review a decree on demurrer, granting an injunction against alleged violations of the act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), to protect trade and commerce against unlawful restraints and monopolies. Modified by making the injunction more specific, and *as modified affirmed*.

See same case below, 122 Fed. 529.

The facts are stated in the opinion.

Mr. John S. Miller argued the cause, and, with **Mr. Merritt Starr**, filed a brief for appellants:

The charges in each of the paragraphs or counts of the bill or petition, of alleged violations of the Sherman act, are, respectively, mere statements of legal conclusions. Each is bad on demurrer for that reason.

These charges would be bad on that ground, even in an indictment under this act.

Re Greene, 52 Fed. 104; *United States v. Cruikshank*, 92 U. S. 542, 563, 23 L. ed. 588, 595; *United States v. Simmons*, 96 U. S. 360, 24 L. ed. 819; *United States v. Carll*, 105 U. S. 611, 26 L. ed. 1135; *United States v. Britton*, 107 U. S. 655, 27 L. ed. 520, 2 Sup. Ct. Rep. 512.

And *a fortiori* are they bad in a bill or petition in equity, which is required to state the facts essential to the cause of action.

Lawson v. Howell, 118 Cal. 613, 49 L. R. A. 400, 50 Pac. 763; *Wright v. Dame*, 22 Pick. 59; *Ambler v. Choteau*, 107 U. S. 586, 591, 27 L. ed. 322, 324, 1 Sup. Ct. Rep. 556; *Van Weel v. Winston*, 115 U. S. 228, 237, 238, 29 L. ed. 384, 385, 6 Sup. Ct. Rep. 22; 1 Foster, Fed. Pr. § 67.

The facts alleged are looked at, and not adjectives or adverbs or epithets.

Magniac v. Thomson, 2 Wall. Jr. 209, Fed. Cas. No. 8,957; *Price v. Coleman*, 21 Fed. 357; *Van Weel v. Winston*, 115 U. S. 228, 29 L. ed. 384, 6 Sup. Ct. Rep. 22; *Ambler v. Choteau*, 107 U. S. 586, 27 L. ed. 322, 1 Sup. Ct. Rep. 556.

The importance of applying this rule with strictness here is more marked because answer by the defendants under oath is called for.

This point is properly raised by demurrer.

1 Dan. Ch. Pr. 372.

It was so raised in *Van Weel v. Winston*, 115 U. S. 228, 29 L. ed. 384, 6 Sup. Ct. Rep. 22.

The decree complained of, which is merely one of injunction, is erroneous on like grounds of indefiniteness.

196 U. S.

Laurie v. Laurie, 9 Paige, 234; *Robinson v. Clapp*, 65 Conn. 365, 29 L. R. A. 582, 32 Atl. 939; *Whipple v. Hutchinson*, 4 Blatchf. 190, Fed. Cas. No. 17,517.

The provisions of the Sherman act do not contemplate such a general proceeding or decree to interfere in advance with future dealings as interstate commerce, which may be interstate trade or may be domestic trade, according to the future and changeable intention of the dealers.

United States v. E. C. Knight Co. 156 U. S. 1, 15, 39 L. ed. 325, 330, 15 Sup. Ct. Rep. 249.

The deliveries by defendants to the carriers, who are agents of the purchasers in that respect, under the allegations of the bill, are deliveries to the purchasers in the state where the sale is made; and the sales and deliveries are there fully completed.

Merchant v. Chapman, 4 Allen, 362; *Orcutt v. Nelson*, 1 Gray, 543; *Waldron v. Romaine*, 22 N. Y. 368; *Kelsea v. Ramsey & G. Mfg. Co.* 55 N. J. L. 320, 22 L. R. A. 415, 26 Atl. 907; *Coxe v. Harden*, 4 East, 211; *Brown v. Hodgson*, 2 Campb. 36; *Groning v. Mendham*, 5 Maule & S. 189; 2 Kent Com. 499; *Crossman v. Lurman*, 192 U. S. 189, 198-200, 48 L. ed. 401, 405, 406, 24 Sup. Ct. Rep. 234.

The sellers' act in delivering the merchandise to the common carrier, or carrying the merchandise to the carrier's depot (if that is taken to be in effect alleged), is not any part of the interstate transportation, and does not make the goods the subject of interstate commerce.

Coe v. Errol, 116 U. S. 517, 528, 29 L. ed. 715, 719, 6 Sup. Ct. Rep. 475.

The fact that the sale is made with a view to the goods being transported by the buyer's agent to another state after the sale and delivery is fully completed does not make the sale interstate commerce.

Kidd v. Pearson, 128 U. S. 1, 23, 24, 32 L. ed. 346, 351, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; *United States v. E. C. Knight Co.* 156 U. S. 1, 13-17, 39 L. ed. 325, 329-331, 15 Sup. Ct. Rep. 249.

The sales alleged in the third paragraph of the bill, by agents of the owners in other states and territories, to whom the owners of the fresh meats have shipped the same for sale there by such agents on the ground, are not interstate commerce.

Coe v. Errol, 116 U. S. 517, 525, 526, 29 L. ed. 715, 718, 6 Sup. Ct. Rep. 475; *Kidd v. Pearson*, 128 U. S. 1, 13-17, 32 L. ed. 346, 348, 349, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; *United States v. E. C. Knight Co.* 156 U. S. 1, 13, 17, 39 L. ed. 325, 329, 331, 15 Sup. Ct. Rep. 249; *Austin v. Tennessee*, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132; *Crossman v. Lurman*,

192 U. S. 189, 198-200, 48 L. ed. 401, 405, 406, 24 Sup. Ct. Rep. 234; *American Harrow Co. v. Shaffer*, 5 Inters. Com. Rep. 336, 68 Fed. 750; *Stevens v. Ohio*, 93 Fed. 793.

Under the allegations here in question, it is to be taken that the meats, before the sales here referred to are made, have come to their place of rest, and are at rest for an indefinite time, awaiting sale at their place of destination, and are a commodity in the market where the sales are made; and that the sales are not in the original packages; and that the meats at the time of the sales have become a part of the general property in the state where sold, and are there handled and sold as such.

Pittsburg & S. Coal Co. v. Bates, 156 U. S. 577, 588, 589, 39 L. ed. 538, 544, 5 Inters. Com. Rep. 30, 15 Sup. Ct. Rep. 415; *Brown v. Houston*, 114 U. S. 623, 632, 633, 29 L. ed. 257, 260, 261, 5 Sup. Ct. Rep. 1091; *Emert v. Missouri*, 156 U. S. 296, 310, 39 L. ed. 430, 433, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367; *Singer Mfg. Co. v. Wright*, 97 Ga. 123, 35 L. R. A. 497, 25 S. E. 249.

The point here made is entirely consistent with the rulings in many cases, that the owner of merchandise who transports it from one state to another for sale has a right, which cannot be interfered with by state or municipal laws, to sell it as an article of interstate commerce. He also has a right to make such article part of the general property of the state into which it is taken, and he then has the right to sell and others have the right to purchase it as an article of domestic commerce, which cannot be interfered with by Federal law. The Sherman act does not seek to and could not interfere with that right. (*United States v. E. C. Knight Co.* 156 U. S. 15, 39 L. ed. 330, 15 Sup. Ct. Rep. 249; *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; *Veazie v. Moor*, 14 How. 568, 14 L. ed. 545.) But this bill here does seek to interfere with that right.

Again, the point here made is not touched by the line of decisions holding that state or municipal laws are invalid which, by taxation or other regulations, discriminate against merchandise brought from another state, or seek to prevent interstate commerce therein,—such as—

Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347; *Walling v. Michigan*, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454; *Minnesota v. Barber*, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Brimmer v. Rebman*, 138 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213; *Schollenberger v. Penn-*

sylvania, 171 U. S. 1, 24, 25, 43 L. ed. 49, 57, 58, 18 Sup. Ct. Rep. 757.

The description of the live stock in the sixth paragraph as live stock produced and owned principally in other states and territories, and shipped by the owners to the place where sold, for sale to persons engaged in producing and dealing in fresh meats, does not show that the sales of the live stock are interstate commerce. The live stock, when offered for sale in the pens of the stock yards, are, under the allegations of fact in the bill, to be considered as having become part of the general mass of property of the state where offered for sale. The defendants purchasing the live stock have the right so to treat and deal therewith.

Brown v. Houston, 114 U. S. 622, 632, 633, 29 L. ed. 257, 260, 261, 5 Sup. Ct. Rep. 1091; *Pittsburg & S. Coal Co. v. Bates*, 156 U. S. 577, 588, 589, 39 L. ed. 538, 544, 5 Inters. Com. Rep. 30, 15 Sup. Ct. Rep. 415; *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 497, 30 L. ed. 694, 697, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Diamond Match Co. v. Ontonagon*, 188 U. S. 82, 92-97, 47 L. ed. 394, 398-400, 23 Sup. Ct. Rep. 266.

When purchased, the live stock is, under the allegations of this bill, at rest for an indefinite time, awaiting sale at its place of destination.

Diamond Match Co. v. Ontonagon, 188 U. S. 95, 96, 47 L. ed. 399, 23 Sup. Ct. Rep. 266.

If these purchases of live stock are interstate commerce, the acts alleged in the sixth and seventh paragraphs are not violations of the Sherman act.

Hopkins v. United States, 171 U. S. 591, 43 L. ed. 295, 19 Sup. Ct. Rep. 40; *Anderson v. United States*, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50.

A criminal conspiracy is an agreement of two or more either to do an act criminal or unlawful in itself, or to do a lawful act by means which are criminal or unlawful.

Pettibone v. United States, 148 U. S. 203, 37 L. ed. 422, 13 Sup. Ct. Rep. 542; *Com. v. Shedd*, 7 Cush. 514.

Here, neither the act nor the means alleged are criminal or unlawful. The allegation of intent is immaterial.

Stevenson v. Newnham, 13 C. B. 285; *Allen v. Flood* [1898] A. C. 1.

The restraint of trade, if any, which a combination by defendants to raise or lower their own prices would tend to effect, would be an indirect result, and such result would not necessarily determine the object of the contract, combination, or conspiracy.

United States v. E. C. Knight Co. 156

U. S. 16, 39 L. ed. 330, 15 Sup. Ct. Rep. 249.

The cartage as described is not, under the allegations of the bill, interstate commerce.

New York ex rel. Pennsylvania R. Co. v. Knight, 192 U. S. 21, 48 L. ed. 325, 24 Sup. Ct. Rep. 202; *Detroit, G. H. & M. R. Co. v. Interstate Commerce Commission*, 21 C. C. A. 103, 43 U. S. App. 308, 74 Fed. 803; *Hopkins v. United States*, 171 U. S. 578, 592-597, 43 L. ed. 290, 296, 297, 19 Sup. Ct. Rep. 40.

The allegation of the tenth paragraph is of a legal conclusion. It also is too indefinite and general. Sufficient facts are not alleged.

United States v. Hanley, 71 Fed. 672.

With respect to the supposed limitations of the Sherman act upon the right of private contract, that act is to be interpreted in the light of the principles of the common law.

United States v. Wong Kim Ark, 169 U. S. 649, 42 L. ed. 890, 18 Sup. Ct. Rep. 456; *Moore v. United States*, 91 U. S. 270, 274, 23 L. ed. 346, 347; *Minor v. Happersett*, 21 Wall. 162, 22 L. ed. 627; *Ex parte Wilson*, 114 U. S. 417, 422, 29 L. ed. 89, 91, 5 Sup. Ct. Rep. 935; *Boyd v. United States*, 116 U. S. 616, 624, 625, 29 L. ed. 746, 748, 749, 6 Sup. Ct. Rep. 524; *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564.

The bill of complaint is multifarious, and there is a misjoinder of causes and of parties.

Walker v. Powers, 104 U. S. 251, 26 L. ed. 731; *Brown v. Guarantee Trust & Safe Deposit Co.* 128 U. S. 403, 32 L. ed. 468, 9 Sup. Ct. Rep. 127; *Ziegler v. Lake Street Elev. R. Co.* 22 C. C. A. 465, 46 U. S. App. 242, 76 Fed. 662; *Eastern Bldg. & L. Asso. v. Denton*, 13 C. C. A. 44, 31 U. S. App. 187, 65 Fed. 569.

The demurrers to so much of the bill as prays for answer under oath, and to so much thereof as prays discovery of defendants' books, papers, etc., are well taken.

Rights protected by the 4th and 5th Amendments are thereby infringed.

United States v. Saline Bank, 1 Pet. 100, 7 L. ed. 69; *Boyd v. United States*, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; *Counselman v. Hitchcock*, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; *Entick v. Carrington*, 19 How. St. Tr. 1029, 2 Wils. 275; *Huckle v. Money*, 2 Wils. 206; *Mitford & Tyler's Eq. Pl.* 289.

Attorney General **Moody** argued the cause, and, with *Mr. W. A. Day*, filed a brief for appellee:

A combination, conspiracy, or agreement between independent manufacturers or pro-

ducers of a necessary of life, to fix and maintain uniform prices for their products, or otherwise to suppress competition with each other, is an unlawful restraint upon trade.

United States v. E. O. Knight Co. 156 U. S. 1, 16, 39 L. ed. 325, 330, 15 Sup. Ct. Rep. 249; *United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; *United States v. Joint Traffic Asso.* 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; *Northern Securities Co. v. United States*, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; *Chesapeake & O. Fuel Co. v. United States*, 53 C. C. A. 256, 115 Fed. 610; *Mogul S. S. Co. v. McGregor* [1892] A. C. 46; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173, 8 Am. Rep. 159; *Nester v. Continental Brewing Co.* 161 Pa. 473, 24 L. R. A. 247, 41 Am. St. Rep. 894, 92 Atl. 102; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666, *People v. Sheldon*, 139 N. Y. 251, 23 L. R. A. 221, 36 Am. St. Rep. 690, 34 N. E. 785; *Cummings v. Union Blue Stone Co.* 164 N. Y. 405, 52 L. R. A. 262, 79 Am. St. Rep. 655, 58 N. E. 525; *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507, 46 L. R. A. 255, 78 Am. St. Rep. 612, 43 Atl. 723; *Craft v. McConoughy*, 79 Ill. 346, 22 Am. Rep. 171; *Noyes, Intercorporate Relations*, p. 513, note 1.

Necessarily, the means agreed upon to effect the unlawful object of the combination or conspiracy are inseparable parts of the combination or conspiracy itself, and, along with it, fall within the condemnation of the law.

Interstate commerce, or commerce among the several states, according to Chief Justice Marshall's definition in *Gibbons v. Ogden*, 9 Wheat. 1, 194, 6 L. ed. 23, 69, is commerce which concerns more states than one; and a combination or agreement between independent manufacturers or producers, to fix and control prices and suppress competition, is a restraint upon commerce.

To destroy or restrict free competition in interstate commerce is to restrain such commerce.

Northern Securities Co. v. United States, 193 U. S. 197, 337, 48 L. ed. 679, 700, 24 Sup. Ct. Rep. 436.

A combination may restrain interstate commerce, although the individual transactions of its members might, standing alone and viewed separate and apart from the purpose and necessary effect of the whole combination, be intrastate in character.

W. W. Montague & Co. v. Lowry, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307;

Addyston Pipe Steel Co. v. United States, 175 U. S. 211, 240, 44 L. ed. 136, 147, 20 Sup. Ct. Rep. 96.

The right to transport articles of commerce from one state to another includes the right of the owner or consignee to sell them in the latter free from any burden or restraint that the states might attempt to impose (*Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Rhodes v. Iowa*, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664) and, *a fortiori*, free from any burden or restraint that a combination of individuals might impose (*Re Debs*, 158 U. S. 564, 581, 39 L. ed. 1092, 1101, 15 Sup. Ct. Rep. 900).

The selling of an article at its destination, which has been brought from another state, may be regarded as an interstate sale, and one which the importer is entitled to make, although the services of the individual employed at the place where the article is sold are not so connected with the subject sold as to make them a portion of interstate commerce.

Hopkins v. United States, 171 U. S. 578, 590, 43 L. ed. 290, 295, 19 Sup. Ct. Rep. 40.

The test for multifariousness is whether the bill, fairly construed, shows a single object and seeks to enforce one general and common right.

14 Enc. Pl. & Pr. 198; 1 Bates, Fed. Eq. Proc. §§ 135, 195.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an appeal from a decree of the circuit court, on demurrer, granting an injunction against the appellants' commission of alleged violations of the act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), "to Protect Trade and Commerce against Unlawful Restraints and Monopolies." It will be necessary to consider both the bill and the decree.

The bill is brought against a number of corporations, firms, and individuals of different states, and makes the following allegations: 1. The defendants * (appellants) are engaged in the business of buying live stock at the stock yards in Chicago, Omaha, St. Joseph, Kansas City, East St. Louis, and St. Paul, and slaughtering such live stock at their respective plants in places named, in different states, and converting the live stock into fresh meat for human consumption. 2. The defendants "are also engaged in the business of selling such fresh meats, at the several places where they are so prepared, to dealers and consumers in

divers states and territories of the said United States other than those wherein the said meats are so prepared and sold as aforesaid, and in the District of Columbia, and in foreign countries, and shipping the same meats, when so sold, from the said places of their preparation, over the several lines of transportation of the several railroad companies serving the same as common carriers, to such dealers and consumers, pursuant to such sales." 3. The defendants also are engaged in the business of shipping such fresh meats to their respective agents at the principal markets in other states, etc., for sale by those agents in those markets to dealers and consumers. 4. The defendants together control about six tenths of the whole trade and commerce in fresh meats among the states, territories, and District of Columbia, and, 5, but for the acts charged would be in free competition with one another.

6. In order to restrain competition among themselves as to the purchase of live stock, defendants have engaged in, and intend to continue, a combination for requiring, and do and will require, their respective purchasing agents at the stock yards mentioned, where defendants buy their live stock (the same being stock produced and owned principally in other states and shipped to the yards for sale), to refrain from bidding against each other, "except perfunctorily and without good faith," and by this means compelling the owners of such stock to sell at less prices than they would receive if the bidding really was competitive.

7. For the same purposes the defendants combine to bid up, through their agents, the prices of live stock for a few days at a time, "so that the market reports will show prices much higher than the state of the trade will warrant," thereby inducing stock owners in other states to make large shipments to the stock yards, to their disadvantage.

8. For the same purposes, and to monopolize the commerce protected by the statute, the defendants combine "to arbitrarily, from time to time, raise, lower, and fix prices, and to maintain uniform prices at which they will sell" to dealers throughout the states. This is effected by secret periodical meetings, where are fixed prices to be enforced until changed at a subsequent meeting. The prices are maintained directly, and by collusively restricting the meat shipped by the defendants, whenever conducive to the result, by imposing penalties for deviations, by establishing a uniform rule for the giving of credit to dealers, etc., and by notifying one another of the delinquencies of such dealers, and keeping a black list of de-

linquents, and refusing to sell meats to them.

9. The defendants also combine to make uniform charges for cartage for the delivery of meats sold to dealers and consumers in the markets throughout the states, etc., shipped to them by the defendants through the defendants' agents at the markets, when no charges would have been made but for the combination.

10. Intending to monopolize the said commerce, and to prevent competition therein, the defendants "have all and each engaged in and will continue" arrangements with the railroads whereby the defendants received, by means of rebates and other devices, rates less than the lawful rates for transportation, and were exclusively to enjoy and share this unlawful advantage to the exclusion of competition and the public. By force of the consequent inability of competitors to engage or continue in such commerce, the defendants are attempting to monopolize, have monopolized, and will monopolize, the commerce in live stock and fresh meats among the states and territories and with foreign countries, and, 11, the defendants are and have been in conspiracy with each [393] other, with *the railroad companies, and others unknown, to obtain a monopoly of the supply and distribution of fresh meats throughout the United States, etc. And to that end defendants artificially restrain the commerce and put arbitrary regulations in force affecting the same from the shipment of the live stock from the plains to the final distribution of the meats to the consumer. There is a prayer for an injunction of the most comprehensive sort, against all the foregoing proceedings and others, for discovery of books and papers relating directly or indirectly to the purchase or shipment of live stock, and the sale or shipment of fresh meat, and for an answer under oath. The injunction issued is appended in a note.†

*To sum up the bill more shortly, it [394] charges a combination of a dominant proportion of the dealers in fresh meat throughout the United States not to bid against each other in the live-stock markets of the different states, to bid up prices for a few days in order to induce the cattle men to send their stock to the stock yards, to fix prices at which they will sell, and to that end to restrict shipments of meat when necessary, to establish a uniform rule of credit to dealers, and to keep a black list, to make uniform and improper charges for cartage, and finally to get less than lawful rates from the railroads, to the exclusion of competitors. It is true that the last charge is not clearly stated to be a part of the combination. But as it is alleged that the defendants have each and all made arrangements with the railroads, that they were exclusively to enjoy the unlawful advantage, and that their intent in what they did was to monopolize the commerce and to prevent competition, and in view of the general allegation to which we *shall refer, we [395] think that we have stated correctly the purport of the bill. It will be noticed further that the intent to monopolize is alleged for the first time in the 8th section of the bill as to raising, lowering, and fixing prices. In the earlier sections, the intent alleged is to restrain competition among themselves. But, after all the specific charges, there is a general allegation that the defendants are conspiring with one another, the railroads and others, to monopolize the supply and distribution of fresh meat throughout the United States, etc., as has been stated above, and it seems to us that this general allegation of intent colors and applies to all the specific charges of the bill. Whatever may be thought concerning the proper construction of the statute, a bill in equity is not to be read and construed as an indictment would have been read and construed a hundred years ago, but it is to

†"And now, upon motion of the said attorney, the court doth order that the preliminary injunction heretofore awarded in this cause, to restrain the said defendants and each of them, their respective agents and attorneys, and all other persons acting in their behalf, or in behalf of either of them, or claiming so to act, from entering into, taking part in, or performing any contract, combination, or conspiracy, the purpose or effect of which will be, as to trade and commerce in fresh meats between the several states and territories and the District of Columbia, a restraint of trade, in violation of the provisions of the act of Congress approved July 2, 1890, entitled 'An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies,' either by directing or requiring their respective agents to refrain from bidding against each other in the purchase of live stock; or collusively, and by agreement, to refrain from bidding against each other at the sales

of live stock; or, by combination, conspiracy, or contract, raising or lowering prices or fixing uniform prices at which the said meats will be sold, either directly or through their respective agents; or by curtailing the quantity of such meats shipped to such markets and agents; or by establishing and maintaining rules for the giving of credit to dealers in such meats, the effect of which rules will be to restrict competition; or by imposing uniform charges for cartage and delivery of such meats to dealers and consumers, the effect of which will be to restrict competition; or by any other method or device, the purpose and effect of which is to restrain commerce as aforesaid; and also from violating the provisions of the act of Congress approved July 2, 1890, entitled 'An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies,' by combining or conspiring together, or with each other and others, to monopolize or

be taken to mean what it fairly conveys to a dispassionate reader by a fairly exact use of English speech. Thus read this bill seems to us intended to allege successive elements of a single connected scheme.

We read the demurrer with the same liberality. Therefore we take it as applying to the bill generally for multifariousness and want of equity, and also to each section of it which makes a charge, and to the discovery. The demurrer to the discovery will not need discussion in the view which we take concerning the relief, and therefore we turn at once to that.

The general objection is urged that the bill does not set forth sufficient definite or specific facts. This objection is serious, but it seems to us inherent in the nature of the case. The scheme alleged is so vast that it presents a new problem in pleading. If, as we must assume, the scheme is entertained, it is, of course, contrary to the very words of the statute. Its size makes the violation of the law more conspicuous, and yet the same thing makes it impossible to fasten the principal fact to a certain time and place. The elements, too, are so numerous and shifting, even the constituent parts alleged are, and from their nature must be,

[396]so extensive in time *and space, that something of the same impossibility applies to them. The law has been upheld, and therefore we are bound to enforce it notwithstanding these difficulties. On the other hand, we equally are bound, by the first principles of justice, not to sanction a decree so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt. We cannot issue a general injunction against all possible breaches of the law. We must steer between these opposite difficulties as best we can.

The scheme as a whole seems to us to be within reach of the law. The constituent

elements, as we have stated them, are enough to give to the scheme a body and, for all that we can say, to accomplish it. Moreover, whatever we may think of them separately, when we take them up as distinct charges, they are alleged sufficiently as elements of the scheme. It is suggested that the several acts charged are lawful, and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful. *Aikens v. Wisconsin*, 195 U. S. 194, 206, *ante*, 154, 25 Sup. Ct. Rep. 3. The statute gives this proceeding against combinations in restraint of commerce among the states and against attempts to monopolize the same. Intent is almost essential to such a combination, and is essential to such an attempt. Where acts are not sufficient in themselves to produce a result which the law seeks to prevent,—for instance, the monopoly,—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. *Com. v. Peaslee*, 177 Mass. 267, 272, 59 N. E. 55. But when that intent and the consequent dangerous probability exist, this statute, like many others, and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result. What we have said disposes incidentally of the objection to the bill as multifarious. The unity of the plan embraces all the parts.

One further observation should be made. Although the *combination alleged embraces [397] restraint and monopoly of trade within a single state, its effect upon commerce among the states is not accidental, secondary, remote, or merely probable. On the allegations of the bill the latter commerce no less, perhaps even more, than commerce within a

attempt to monopolize any part of the trade and commerce in fresh meats among the several states and territories and the District of Columbia, by demanding, obtaining, or, with or without the connivance of the officers or agents thereof, or any of them, receiving from railroad companies or other common carriers transporting such fresh meats in such trade and commerce, either directly or by means of rebates, or by any other device, transportation of or for such meats, from the points of the preparation and production of the same from live stock or elsewhere, to the markets for the sale of the same to dealers and consumers in other states and territories than those wherein the same are so prepared, or the District of Columbia, at less than the regular rates which may be established or in force on their several lines of transportation, under the provisions in that behalf of the laws of the said United States for the regulation of commerce, be, and the same is hereby, made perpetual.

"But nothing herein shall be construed to pro-

hibit the said defendants from agreeing upon charges for cartage and delivery, and other incidents connected with local sales, where such charges are not calculated to have any effect upon competition in the sales and delivery of meats; nor from establishing and maintaining rules for the giving of credit to dealers where such rules in good faith are calculated solely to protect the defendants against dishonest or irresponsible dealers, nor from curtailing the quantity of meats shipped to a given market where the purpose of such arrangement in good faith is to prevent the over-accumulation of meats as perishable articles in such markets.

"Nor shall anything herein contained be construed to restrain or interfere with the action of any single company or firm, by its or their officers or agents (whether such officers or agents are themselves personally made parties defendant hereto or not), acting with respect to its or their own corporate or firm business, property, or affairs."

single state, is an object of attack. See *Leloup v. Port of Mobile*, 127 U. S. 640, 647, 32 L. ed. 311, 314, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; *Crutcher v. Kentucky*, 141 U. S. 47, 59, 35 L. ed. 649, 652, 11 Sup. Ct. Rep. 851; *Allen v. Pullman's Palace Car Co.* 191 U. S. 171, 179, 180, 48 L. ed. 134, 138, 24 Sup. Ct. Rep. 39. Moreover, it is a direct object; it is that for the sake of which the several specific acts and courses of conduct are done and adopted. Therefore the case is not like *United States v. E. C. Knight Co.* 156 U. S. 1, 33 L. ed. 325, 15 Sup. Ct. Rep. 249, where the subject-matter of the combination was manufacture, and the direct object monopoly of manufacture within a state. However likely monopoly of commerce among the states in the article manufactured was to follow from the agreement, it was not a necessary consequence nor a primary end. Here the subject-matter is sales, and the very point of the combination is to restrain and monopolize commerce among the states in respect to such sales. The two cases are near to each other, as sooner or later always must happen where lines are to be drawn, but the line between them is distinct. *Montague & Co. v. Lowry*, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307.

So, again, the line is distinct between this case and *Hopkins v. United States*, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40. All that was decided there was that the local business of commission merchants was not commerce among the states, even if what the brokers were employed to sell was an object of such commerce. The brokers were not like the defendants before us, themselves the buyers and sellers. They only furnished certain facilities for the sales. Therefore, there again the effects of the combination of brokers upon the commerce was only indirect, and not within the act. Whether the case would have been different if the combination had resulted in exorbitant charges was left open. In *Anderson v. United States*, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50, the defendants were buyers and sellers at the stock yards, but their agreement was merely not to employ brokers, or [398] to *recognize yard-traders, who were not members of their association. Any yard-trader could become a member of the association on complying with the conditions, and there was said to be no feature of monopoly in the case. It was held that the combination did not directly regulate commerce between the states, and, being formed with a different intent, was not within the act. The present case is more like *Montague & Co. v. Lowry*, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307.

For the foregoing reasons we are of opinion
196 U. S.

ion that the carrying out of the scheme alleged, by the means set forth, properly may be enjoined, and that the bill cannot be dismissed.

So far it has not been necessary to consider whether the facts charged in any single paragraph constitute commerce among the states or show an interference with it. There can be no doubt, we apprehend, as to the collective effect of all the facts, if true, and if the defendants entertain the intent alleged. We pass now to the particulars, and will consider the corresponding parts of the injunction at the same time. The first question arises on the 6th section. That charges a combination of independent dealers to restrict the competition of their agents when purchasing stock for them in the stock yards. The purchasers and their slaughtering establishments are largely in different states from those of the stock yards, and the sellers of the cattle, perhaps it is not too much to assume, largely in different states from either. The intent of the combination is not merely to restrict competition among the parties, but, as we have said, by force of the general allegation at the end of the bill, to aid in an attempt to monopolize commerce among the states.

It is said that this charge is too vague and that it does not set forth a case of commerce among the states. Taking up the latter objection first, commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one state, with the expectation that they will end their transit, after purchase, in another, and when in effect *they do so, with only the interruption [399] necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the states, and the purchase of the cattle is a part and incident of such commerce. What we say is true at least of such a purchase by residents in another state from that of the seller and of the cattle. And we need not trouble ourselves at this time as to whether the statute could be escaped by any arrangement as to the place where the sale in point of law is consummated. See *Norfolk & W. R. Co. v. Sims*, 191 U. S. 441, 48 L. ed. 254, 24 Sup. Ct. Rep. 151. But the 6th section of the bill charges an interference with such sales, a restraint of the parties by mutual contract, and a combination not to compete in order to monopolize. It is immaterial if the section also embraces domestic transactions.

It should be added that the cattle in the stock yard are not at rest even to the extent that was held sufficient to warrant tax-

ation in *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 48 L. ed. 538, 24 Sup. Ct. Rep. 365. But it may be that the question of taxation does not depend upon whether the article taxed may or may not be said to be in the course of commerce between the states, but depends upon whether the tax so far affects that commerce as to amount to a regulation of it. The injunction against taking part in a combination, the effect of which will be a restraint of trade among the states, by directing the defendants' agents to refrain from bidding against one another at the sales of live stock, is justified so far as the subject-matter is concerned.

The injunction, however, refers not to trade among the states in cattle, concerning which there can be no question of original packages, but to trade in fresh meats, as the trade forbidden to be restrained, and it is objected that the trade in fresh meats described in the 2d and 3d sections of the bill is not commerce among the states, because the meat is sold at the slaughtering places, or, when sold elsewhere, may be sold in less than the original packages. But the allegations of the 2d section, even if they [400] import a technical passing *of title at the slaughtering places, also import that the sales are to persons in other states, and that the shipments to other states are part of the transaction,—“pursuant to such sales,”—and the 3d section imports that the same things which are sent to agents are sold by them, and sufficiently indicates that some, at least, of the sales, are of the original packages. Moreover, the sales are by persons in one state to persons in another. But we do not mean to imply that the rule which marks the point at which state taxation or regulation becomes permissible necessarily is beyond the scope of interference by Congress in cases where such interference is deemed necessary for the protection of commerce among the states. Nor do we mean to intimate that the statute under consideration is limited to that point. Beyond what we have said above, we leave those questions as we find them. They were touched upon in *Northern Securities Co. v. United States*, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436.

We are of opinion, further, that the charge in the 6th section is not too vague. The charge is not of a single agreement, but of a course of conduct intended to be continued. Under the act it is the duty of the court, when applied to, to stop the conduct. The thing done and intended to be done is perfectly definite: with the purpose mentioned, directing the defendants' agents and inducing each other to refrain from competition in bids. The defendants cannot be

ordered to compete, but they properly can be forbidden to give directions or to make agreements not to compete. See *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96. The injunction follows the charge. No objection was made on the ground that it is not confined to the places specified in the bill. It seems to us, however, that it ought to set forth more exactly the transactions in which such directions and agreements are forbidden. The trade in fresh meat referred to should be defined somewhat as it is in the bill, and the sales of stock should be confined to sales of stock at the stock yards named, which stock is sent from other states to the stock yards for sale, or is bought at those yards for transport to another state.

*After what we have said, the 7th, 8th, and [401] 9th sections need no special remark, except that the cartage referred to in § 9 is not an independent matter, such as was dealt in in *New York ex rel. Pennsylvania R. Co. v. Knight*, 192 U. S. 21, 48 L. ed. 325, 24 Sup. Ct. Rep. 202, but a part of the contemplated transit,—cartage for delivery of the goods. The general words of the injunction “or by any other method or device, the purpose and effect of which is to restrain commerce as aforesaid,” should be stricken out. The defendants ought to be informed, as accurately as the case permits, what they are forbidden to do. Specific devices are mentioned in the bill, and they stand prohibited. The words quoted are a sweeping injunction to obey the law, and are open to the objection which we stated at the beginning, that it was our duty to avoid. To the same end of definiteness, so far as attainable, the words “as charged in the bill,” should be inserted between “dealers in such meats,” and “the effect of which rules,” and two lines lower, as to charges for cartage, the same words should be inserted between “dealers and consumers” and “the effect of which.”

The acts charged in the 10th section, apart from the combination and the intent, may, perhaps, not necessarily be unlawful, except for the adjective which proclaims them so. At least we may assume, for purposes of decision, that they are not unlawful. The defendants severally lawfully may obtain less than the regular rates for transportation if the circumstances are not substantially similar to those for which the regular rates are fixed. Act of Feb. 4, 1887, 24 Stat. at L. 379, chap. 104, § 2, U. S. Comp. Stat. 1901, p. 3155. It may be that the regular rates are fixed for carriage in cars furnished by the railroad companies, and that the defendants furnish their own cars and other necessities of transportation. We see nothing to hinder them from com-

binning to that end. We agree, as we already have said, that such a combination may be unlawful as part of the general scheme set forth in the bill, and that this scheme as a whole might be enjoined. Whether this particular combination can be enjoined, as it is, apart from its connection with the other [402] *elements, if entered into with the intent to monopolize, as alleged, is a more delicate question. The question is how it would stand if the 10th section were the whole bill. Not every act that may be done with intent to produce an unlawful result is unlawful, or constitutes an attempt. It is a question of proximity and degree. The distinction between mere preparation and attempt is well known in the criminal law. *Com. v. Peaslee*, 177 Mass. 267, 272, 59 N. E. 55. The same distinction is recognized in cases like the present. *United States v. E. C. Knight Co.* 156 U. S. 1, 13, 39 L. ed. 325, 329, 15 Sup. Ct. Rep. 249; *Kidd v. Pearson*, 128 U. S. 1, 23, 24, 32 L. ed. 346, 351, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6. We are of opinion, however, that such a combination is within the meaning of the statute. It is obvious that no more powerful instrument of monopoly could be used than an advantage in the cost of transportation. And even if the advantage is one which the act of 1887 permits, which is denied, perhaps inadequately, by the adjective "unlawful," still a combination to use it for the purpose prohibited by the act of 1890 justifies the adjective, and takes the permission away.

It only remains to add that the foregoing question does not apply to the earlier sections, which charge direct restraints of trade within the decisions of the court, and that the criticism of the decree, as if it ran generally against combinations in restraint of trade or to monopolize trade, ceases to have any force when the clause against "any other method or device" is stricken out. So modified it restrains such combinations only to the extent of certain specified devices, which the defendants are alleged to have used and intend to continue to use.

Decree modified and affirmed.

[403] *WALTER W. SMALL, *Plff, in Err.*,
v.

SAMUEL O. RAKESTRAW.

(See S. C. Reporter's ed. 403-406.)

Public lands—homestead entry—finding of Secretary of the Interior as to residence—effect of residence elsewhere for voting purposes.

1. A finding by the Secretary of the Interior

that the residence of a homestead entryman for voting purposes was in another precinct from that in which the land lies cannot be said to be erroneous as a matter of law, where it was admitted that the entryman, on one occasion after his entry, voted in another county from that in which the land is situated, and it does not clearly appear that the Secretary did not have other evidence before him on that question.

2. A residence for voting purposes in another precinct from that in which a homestead entry lies precludes the entryman from claiming residence at the same time on the land for homestead purposes.

[No. 133.]

Argued January 18, 1905. Decided January 30, 1905.

IN ERROR to the Supreme Court of the State of Montana to review a judgment which affirmed a judgment of the District Court of Flathead County, in that State, sustaining a demurrer to, and dismissing, a complaint which seeks to establish a trust in certain real property which the defendant holds under a patent from the United States. *Affirmed.*

See same case below, 28 Mont. 413, 72 Pac. 746.

The facts are stated in the opinion.

Mr. George A. King argued the cause, and, with Messrs. William B. King and William E. Harvey, filed a brief for plaintiff in error:

The action of the officers of the Land Office was not conclusive, and a court of equity may inquire into the proceedings by which the title was vested.

Lindsey v. Hawes, 2 Black, 554, 557, 17 L. ed. 265, 267; *Johnson v. Towsley*, 13 Wall. 72, 86, 87, 20 L. ed. 485, 487, 488; *Cornelius v. Kessel*, 128 U. S. 456, 461, 32 L. ed. 482, 483, 9 Sup. Ct. Rep. 122; *Cunningham v. Ashley*, 14 How. 377, 14 L. ed. 462; *Barnard v. Ashley*, 18 How. 43, 15 L. ed. 285; *Garland v. Wynn*, 20 How. 6, 15 L. ed. 801; *Lytle v. Arkansas*, 22 How. 193, 16 L. ed. 306; *O'Brien v. Perry*, 1 Black, 132, 17 L. ed. 114; *Minnesota v. Bachelder*, 1 Wall. 109, 17 L. ed. 551; *Stark v. Starr*, 6 Wall. 402, 419, 18 L. ed. 925, 930; *Silver v. Ladd*, 7 Wall. 219, 19 L. ed. 138; *Monroe Cattle Co. v. Becker*, 147 U. S. 47, 57, 37 L. ed. 72, 77, 13 Sup. Ct. Rep. 217; *Thayer v. Spratt*, 189 U. S. 346, 47 L. ed. 845, 23 Sup. Ct. Rep. 576; *Hodges v. Colcord*, 193 U. S. 192, 48 L. ed. 677, 24 Sup. Ct. Rep. 433.

Poverty excuses noncontinuous residence. Drought excuses noncultivation, provided

NOTE.—On the conclusiveness and effect of the decisions of Land Department—see notes to *Hartman v. Warren*, 22 C. C. A. 38; *Carson City Gold & S. Min. Co. v. North Star Min. Co.* 196 U. S.

28 C. C. A. 344; and *Uinta Tunnel Min. & Transp. Co. v. Creede & C. C. Min. & Mill. Co.* 57 C. C. A. 207.

good faith is manifested by the homestead claimant.

Clark v. Lawson, 2 Land Dec. 149.

Where the entryman's absences were caused by sickness and poverty, and in no instance exceeded four months, and where there was good faith shown in the matter of cultivation and improvement, the entry was allowed to stand.

Foley v. Brasch, 2 Land Dec. 155.

An entryman placed improvements worth \$350 on land. He was a newspaper correspondent, and frequently absent, taking his wife with him, but had no fixed abode save on the land. The value of improvements and the fact that the settler made no attempt to conceal the facts were held sufficient.

Re Dunlap, 3 Land Dec. 545.

In the matter of pre-emption entry, the value of the improvements, preparations for a permanent home, and residence after final proof are held as evidence of good faith, and therefore excuse temporary absences from the land.

Kurtz v. Holt, 4 Land Dec. 56.

Though continuous residence is required of the pre-emptor, temporary absences which do not impeach good faith are excused.

Re Healey, 4 Land Dec. 80.

The maintenance of a residence established in good faith is not inconsistent with absences rendered necessary to secure support and improve the land.

Re Prescott, 6 Land Dec. 245.

The establishment of residence within six months from date of homestead entry is not a specific statutory requirement, but a regulation of the Department based on the provisions in U. S. Rev. Stat. § 2297 (U. S. Comp. Stat. 1901, p. 1398), authorizing cancellation on proof of abandonment or change of residence for more than six months. The poverty of the claimant, the condition of his family, and the severity of the climate are matters entitled to consideration in determining whether due compliance with the law as to residence has been shown.

Nilson v. St. Paul, M. & M. R. Co. 6 Land Dec. 567.

The rule requiring actual residence of the claimant on the land for six months preceding entry is for the purpose of testing the good faith of the claimant.

Re Martel, 6 Land Dec. 566.

Temporary absences from the land, that indicate no intention of abandonment, may be excused after the establishment of a bona fide residence.

Platt v. Graham, 7 Land Dec. 249; *Re Wood*, 7 Land Dec. 345.

Absences during the winter season, for the purpose of earning money to improve the

land, are not inconsistent with the maintenance of residence in good faith.

Re Farringer, 7 Land Dec. 360.

Absences will not be excused where good faith is not shown. *Re Fuchser*, 7 Land Dec. 467.

After the establishment of residence, temporary absences for the purpose of earning a livelihood do not authorize a presumption of abandonment.

Re Alderson, 8 Land Dec. 517.

After the establishment of residence, absences occasioned by sickness are excusable, and do not interrupt the continuity of residence. The fact that the claimant, while necessarily absent from the land on account of sickness, voted in the precinct where he had been taken for treatment, will not in itself raise a conclusive presumption of abandonment, where he subsequently returned to the land.

Re Edwards, 8 Land Dec. 353.

Residence on land, and actual presence thereon, are not convertible or synonymous terms; and, residence being once established, subsequent absences, *animo revertendi* and for a lawful purpose, not indicating an intent to abandon, do not break the continuity of such residence.

Re Lutz, 9 Land Dec. 266.

Where the good faith of the settler is otherwise sufficiently established, temporary absences during any period of the inhabitation, for the purpose of earning a living, not inconsistent with an honest intention to comply with the law, may be accounted constructive residence.

Montgomery v. Curl, 9 Land Dec. 57; *Re Martel*, 6 Land Dec. 566.

Temporary absences caused by ill health do not interrupt the continuity of residence. The cultivation of crops from year to year indicates the good faith of the settler.

Re Smith, 9 Land Dec. 146.

Continuity of residence is not broken by temporary absences made necessary by the poverty of the claimant.

Re Main, 12 Land Dec. 102; *Re Williams*, 13 Land Dec. 42; *Logan v. Gunn*, 13 Land Dec. 113.

Good faith of the entryman was not impeached by absence from land to earn money to support himself and family, and to enable him to pay for the land.

Paulsen v. Ellingwood, 17 Land Dec. 1.

Engagement in public service will not be construed into an abandonment of residence, so long as such efforts are made to maintain improvements as manifest good faith on the part of the entryman.

Tomlinson v. Soderlund, 21 Land Dec. 155.

No counsel for defendant in error.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a complaint by the plaintiff in [405] error to charge the *defendant with a trust in respect of land which the latter holds under a patent from the United States. It alleges a homestead entry by the plaintiff, a contest by the defendant, a decision for the defendant by the local register and receiver, a reversal of this by the Commissioner of the Land Office, and a reversal of the latter decision and a cancelation of the plaintiff's entry by the Secretary of the Interior. The last order is set forth in full, and the complaint goes on the ground that this order discloses a mistake of law on its face. The complaint was demurred to, the demurrer was sustained, and the suit dismissed. An appeal was taken to the supreme court of the state, which affirmed the judgment. 28 Mont. 413, 72 Pac. 746. The case then was brought here.

The material portion of the Secretary's decision is as follows:

"January 21, 1892, plaintiff filed his affidavit of contest against the defendant's homestead entry, charging that the entryman had failed to comply with the law as to residence. The testimony of Small, himself, is that he never voted in the precinct in which his homestead entry lies, but did vote at other points a long distance from his homestead at least twice during the time he claims he was seeking to maintain residence upon the land. He runs a carpenter shop in town, and, to use his own words, 'determined to return to the ranch only often enough to keep a good showing of habitation.' His excuse for that was that the plaintiff threatened him with violence if he undertook to stay on the land.

"Without passing upon any other question it is enough to say that a residence for voting purposes in another precinct from the land precludes an entryman from claiming residence, at the same time, on the land for homestead purposes. *Re Burns*, 4 Land Dec. 62; *Hart v. McHugh*, 17 Land Dec. 176; *Edwards v. Ford* (decided June 18, 1894) 18 Land Dec. 546."

The plaintiff's case rests on the assumption that the words "without passing upon [406] any other question," mean without *passing upon any other question than an absolute proposition of law, and that this proposition is that a vote in another precinct is fatal to a claim of residence. But the Secretary found, by implication, that the plaintiff not merely voted elsewhere, but resided elsewhere for voting. It was after this finding that he laid down the rule complained of. The case presents no exceptional circumstances which would warrant our
196 U. S.

going behind the finding of fact. *Bohall v. Dilla*, 114 U. S. 47, 29 L. ed. 61, 5 Sup. Ct. Rep. 782; *Lee v. Johnson*, 116 U. S. 48, 51, 29 L. ed. 570, 571, 6 Sup. Ct. Rep. 249; *Stewart v. McHarry*, 159 U. S. 643, 650, 40 L. ed. 290, 292, 16 Sup. Ct. Rep. 117. The plaintiff admits that, on one occasion after his entry, he voted in a county other than that in which the land lies, so that it appears from the complaint that there was some evidence that his residence for voting was not in the latter county, and, as the supreme court of Montana remarks, it does not appear clearly that all the facts before the Secretary are those set forth. It is true that a vote in another county is only a circumstance to be considered, but, when it leads to the conclusion of a voting residence elsewhere, it leads to the conclusion of a residence elsewhere for all purposes by the very words of the Compiled Statutes of Montana on which the plaintiff relies. §§ 1007, 1020.

In view of what we have said it does not appear as matter of law that the Secretary's finding of voting residence was wrong, and it does not appear that his proposition, taken as a proposition of law, was wrong. But, further, the words, "without passing on any other question" cannot be taken absolutely to limit the ground of decision to the proposition of law. It hardly goes further than to emphasize one aspect of the facts as dominant in the Secretary's mind. He already had adopted the plaintiff's own words as establishing that the plaintiff's purpose was only to keep up a good showing. This goes to the general conclusion which the Secretary drew, and shows that it was a conclusion, not from the plaintiff's voting residence merely, but from other facts.

Judgment affirmed.

*HAMBURG AMERICAN STEAMSHIP [407]
COMPANY, Plff. in Err.,
v.

MINNIE GRUBE, as Administratrix of
John Grube, Deceased.

(See S. C. Reporter's ed. 407-415.)

Error to state court—Federal question—cession to United States—effect of state laws.

1. The contention that the congressional consent, in the act of June 28, 1834 (4 Stat. at

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to *Hamblin v. Western*

L. 708, chap. 126), to the agreement or compact between the states of New Jersey and New York respecting their territorial limits and jurisdiction, vested exclusive jurisdiction in the Federal government over the sea adjoining the two states, does not raise a Federal question which will sustain a writ of error from the Federal Supreme Court to a state court, where there is nothing in the agreement and confirmatory state statutes abdication rights in favor of the United States, and the transaction simply amounted to fixing the boundaries between the two states.

2. A contention, on a motion for a directed verdict, that the cession to the United States, in N. J. act March 12, 1846, of jurisdiction over a certain strip of land at Sandy Hook, vested in the United States exclusive legislative jurisdiction over the littoral waters extending 3 miles to the eastward of the coast line, presents a question respecting the exclusive legislative power of Congress under U. S. Const. art. I., § 8, cl. 17, which will sustain a writ of error from the Federal Supreme Court to a state court.
3. The public laws of New Jersey are in force in the littoral waters of Sandy Hook peninsula below low-water mark, whether enacted prior or subsequently to the cession to the United States, by N. J. act March 12, 1846, of jurisdiction over a portion of that peninsula for military purposes.

[No. 411.]

Submitted January 16, 1905. Decided February 20, 1905.

IN ERROR to the Supreme Court of the State of New York to review a judgment of that court at a term held in and for the County of New York, in favor of plaintiff, in an action to recover damages for death occasioned by the sinking of a vessel as the result of a collision in waters alleged to be subject to the exclusive legislative jurisdiction of the United States, which judgment was affirmed by the Appellate Division of the Supreme Court for the First Department, leave to appeal to the Court of Appeals being denied. On motion to dismiss or affirm, *Affirmed*.

Statement by Mr. Chief Justice **Fuller**:

This action was brought in the supreme court of New York by Minnie Grube, as administratrix of John Grube, against the Hamburg American Steamship Company, to recover damages for his death, under the statute of New Jersey in that behalf, occasioned by the sinking of the James Gordon

Bennett, a vessel owned by a New Jersey corporation, by the steamship Alene, belonging to the steamship company. There was a conflict of evidence as to the place of the collision, evidence being given, on the one hand, that it occurred in waters beyond the 3-mile limit of the coast of the state of New Jersey, and, on the other, that it occurred within the 3-mile limit along that coast.

The record discloses no instructions to the jury requested by defendant below, and no exceptions were taken by it to the charge of the court, which was not included in the bill of exceptions or case made.

*Defendant moved the court to direct a [408] verdict in its favor upon the following grounds:

"Defendant claims the right, under the statute of the United States confirming and approving the agreement as to boundaries between the state of New York and the state of New Jersey, to be free in navigating the main sea to the eastward of Sandy Hook peninsula, from the operation of any law of the state of New Jersey giving a right of action for injuries causing death, and claims that, under the statutes aforesaid, the jurisdiction of that state extends only to the main sea; that is to say, low-water mark along its exterior coast line, and to a line drawn from headland to headland across the entrance to the bay of New York. It therefore asks the court to direct the jury to return a verdict for the defendant, on the ground that it appears by uncontradicted evidence that the collision between the steamship Alene and the schooner James Gordon Bennett, to recover damages for which this suit is brought, occurred upon the main sea and to the eastward of the Sandy Hook peninsula, and at a distance of more than a mile to the eastward of low-water mark upon the exterior line thereof.

"Defendant claims the right, by reason of the purchase by the United States of the Sandy Hook peninsula, and the cession to the United States by the state of New Jersey of jurisdiction over the same, and the long continued use of that peninsula, and of the main sea to the eastward of it, for military purposes, to be free in navigating the main sea to the eastward of that peninsula from the operation of any law of the state of New Jersey, giving a right of action for injuries causing death, and claims that the main sea to the eastward of said peninsula to a distance of 3 miles from the shore is

Land Co. 37 L. ed. U. S. 267; *Klpley v. Illinois*, 42 L. ed. U. S. 998; and *Re Buchanan*, 39 L. ed. U. S. 884.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to *Apex Transp. Co. v. Garbade*, 62 L. R. A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to *Mutual L. Ins. Co. v. McGrew*, 63 L. R. A. 33.

As to jurisdiction over the sea—see note to *Humboldt Lumber Manufacturers' Assn. v. Christopherson*, 46 L. R. A. 264.

subject to the exclusive jurisdiction of the United States. It therefore asks the court to direct the jury to return a verdict for the defendant on the ground that it appears by uncontradicted evidence that the collision between the steamship *Alene* and the schooner *James Gordon Bennett*, to recover damages for which *this suit is brought, occurred upon the main sea and to the eastward of the Sandy Hook peninsula, and at a distance of more than a mile to the eastward of low-water mark, upon the exterior line thereof."

The court denied the motion, and defendant excepted. The jury found a general verdict for plaintiff below, and assessed the damages. Judgment was entered thereon, which was affirmed by the appellate division of the supreme court, and a writ of error from the court of appeals was denied. This writ of error was then allowed, and the case submitted on motions to dismiss or affirm.

Mr. Everett P. Wheeler submitted the cause for plaintiff in error:

A Federal question was involved.

Wedding v. Meyler, 192 U. S. 573, 48 L. ed. 570, 66 L. R. A. 833, 24 Sup. Ct. Rep. 322; *National Mut. Bldg. & L. Asso. v. Brahan*, 193 U. S. 635, 48 L. ed. 823, 24 Sup. Ct. Rep. 532.

Wherever land is purchased by the United States within the limits of an existing state and with the consent of the legislature, the jurisdiction of Congress, under the Constitution, is exclusive.

Ft. Leavenworth R. Co. v. Lowe, 114 U. S. 525, 29 L. ed. 264, 5 Sup. Ct. Rep. 995; *Story*, Const. § 1227; *Re Ladd*, 74 Fed. 31; *United States v. Tucker*, 122 Fed. 518; *Com. v. Clary*, 8 Mass. 72; *United States v. King*, 34 Fed. 302.

As the states have no longer legislative power over these military tracts, so their inhabitants have none of the rights of citizens of the states to which they originally belonged.

Sinks v. Reese, 19 Ohio St. 306, 2 Am. Rep. 397; *Opinion of the Justices*, 1 Met. 580; *Com. v. Clary*, 8 Mass. 72; 6 Ops. Atty. Gen. 577.

The United States has the same jurisdiction over places ceded by states as over those purchased by the consent of a state, in so far as the particular act of cession does not expressly restrict it.

United States v. Carter, 84 Fed. 622.

Littoral waters within 3 miles of a maritime frontier are subject to the jurisdiction of the sovereign of the shore.

Wheaton, International Law, § 177.

The effect of the increase in the range of

projectiles is to extend the exclusive jurisdiction of the sovereign of the shore.

Pom. International Law, § 144; 1 *Hautefeuille, Droits des Nations Neutres*, pp. 53, 54.

The New Jersey act which gave to the United States exclusive jurisdiction over the peninsula of Sandy Hook passed the same jurisdiction over the littoral waters.

Ex parte Tatem, 1 Hughes, 588, Fed. Cas. No. 13,759.

To realize the particular object of this cession, control of the waters is peculiarly necessary. It would be difficult to put a case which better illustrates the wisdom of the doctrine that, when the use of a thing is granted, everything is granted by which the grantee may have and enjoy the same.

Kent, Com. 467, note *g*; *United States v. Appleton*, 1 Sumn. 492, Fed. Cas. No. 14,463; *Potter v. Boyce*, 73 App. Div. 383, 77 N. Y. Supp. 24, Affirmed in 176 N. Y. 551, 68 N. E. 1123; *Huttemeier v. Albro*, 18 N. Y. 48; *Richardson v. Bigelow*, 15 Gray, 154; *Voorhees v. Burchard*, 55 N. Y. 98; *Simmons v. Cloonan*, 81 N. Y. 557; *Ex parte Tatem*, 1 Hughes, 588, Fed. Cas. No. 13,759.

Before the act of cession, Sandy Hook was subject to the common and statute law of the state of New Jersey. We do not contend that the cession operated *ipso facto* to abrogate this body of law. On the contrary, it is well recognized that change of sovereignty over territory does not *ipso facto* work a general change of the law then existing.

Halleck, International Law, chap. 34, § 14; *American Ins. Co. v. 356 Bales of Cotton*, 1 Pet. 511, 542, 7 L. ed. 243, 255; *Com. v. Chapman*, 13 Met. 68; *Chappell v. Jardine*, 51 Conn. 64.

The same doctrine is applied to cessions by particular estates to the United States for military purposes.

Chicago, R. I. & P. R. Co. v. McGlinn, 114 U. S. 542, 29 L. ed. 270, 5 Sup. Ct. Rep. 1005; *Barrett v. Palmer*, 135 N. Y. 336, 17 L. R. A. 720, 31 Am. St. Rep. 835, 31 N. E. 1017; *Madden v. Arnold*, 22 App. Div. 240, 47 N. Y. Supp. 757.

The effect of such a cession is to subject the territory ceded, to the United States as its sovereign, and to sever all further political relation with the state of which it was formerly a part.

Madden v. Arnold, 22 App. Div. 240, 47 N. Y. Supp. 757.

Thenceforth all legislation must be by the new sovereign, the United States, and New Jersey is utterly without power to enact new laws for this territory.

Re Ladd, 74 Fed. 31; *Mitchell v. Tibbetts*, 17 Pick. 298; *Com. v. Clary*, 8 Mass. 72;

Contzen v. United States, 179 U. S. 191, 45 L. ed. 148, 21 Sup. Ct. Rep. 98.

The New Jersey act of cession contains nothing at variance with the propositions advanced above.

Ft. Leavenworth R. Co. v. Lowe, 114 U. S. 533, 29 L. ed. 267, 5 Sup. Ct. Rep. 995; *United States v. Cornell*, 2 Mason, 60, Fed. Cas. No. 14,867; *United States v. Mcagher*, 37 Fed. 875; *Lasher v. State*, 30 Tex. App. 387, 28 Am. St. Rep. 922, 17 S. W. 1064; *United States v. Hammond*, 1 Cranch, C. C. 15, Fed. Cas. No. 15,293.

The court will not adopt a construction which renders the act of cession inconsistent with itself.

United States v. Hammond, 1 Cranch, C. C. 15, Fed. Cas. No. 15,293.

Descriptive matter in a statute must refer to things as they existed at the time of its passage.

McConihay v. Wright, 121 U. S. 201, 205, 30 L. ed. 932, 933, 7 Sup. Ct. Rep. 940; *Morris Canal & Bkg. Co. v. State*, 24 N. J. L. 62; *Griswold v. Atlantic Dock Co.* 21 Barb. 225.

When the phrase "main sea," or its equivalent, "high seas," is used, it means the ocean from low-water mark.

General Iron Screw Collier Co. v. Schurmanns, 1 Johns. & H. 180; *United States v. Kessler*, Baldw. 15, Fed. Cas. No. 15,528; 1 Bl. Com. p. 110; *Coulson & F. Waters*, 11; *United States v. Ross*, 1 Gall. 624, Fed. Cas. No. 16,196.

Statutes of the local authorities do not have any force within the 3-mile limit, unless expressly so stated in the statute.

The Saxonia, Lush. Adm. Cas. 410; *Queen v. Keyn*, L. R. 2 Exch. Div. 63.

Mr. Gilbert D. Lamb submitted the cause for defendant in error:

This court has no jurisdiction, and will entertain none, unless it affirmatively appears in the record that a Federal question was, of necessity, passed upon by the court below and against the claim of plaintiff in error,—actually and properly set up.

Giles v. Teasley, 193 U. S. 146, 48 L. ed. 655, 24 Sup. Ct. Rep. 359; *Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co.* 172 U. S. 475, 487, 43 L. ed. 521, 525, 19 Sup. Ct. Rep. 247; *Eustis v. Bolles*, 150 U. S. 361, 366, 37 L. ed. 1111, 1112, 14 Sup. Ct. Rep. 131; *Johnson v. Risk*, 137 U. S. 300, 34 L. ed. 683, 11 Sup. Ct. Rep. 111.

The territorial sovereignty of a state extends to a vessel of the state when it is upon the high seas, the vessel being deemed a part of the territory of the state to which it belongs; and it follows that a state statute which creates a liability or authorizes a recovery for the consequences of a tortious act

operates as efficiently upon a vessel of the state when the vessel is beyond its boundaries as it does when it is physically within the state.

International Nav. Co. v. Lindstorm, 60 C. C. A. 649, 123 Fed. 475; *McDonald v. Mallory*, 77 N. Y. 546, 33 Am. Rep. 664; *Crapo v. Kelly*, 16 Wall. 610, 21 L. ed. 430.

The James Gordon Bennett was a vessel owned by a New Jersey corporation. As such it was subject, with its occupants, including John Grube, to the legislative jurisdiction and law of the state of New Jersey while on the high seas; and, even upon the testimony of plaintiff in error as to the situs of the collision, the verdict as rendered was right.

Ibid.

The claim of Federal jurisdiction not being properly set up in the record, the writ of error should be dismissed.

Hamburg American S. S. Co. v. Lennan, 194 U. S. 629, 48 L. ed. 1157, 24 Sup. Ct. Rep. 857; *Staten Island R. Co. v. Lambert*, 131 U. S. cxxi. Appx. and 24 L. ed. 615; *Weatherby v. Bowie*, 131 U. S. ccxv. Appx. and 25 L. ed. 606; *Murdock v. Memphis*, 20 Wall. 590, 22 L. ed. 429; *Egan v. Hart*, 165 U. S. 188, 191, 41 L. ed. 680, 681, 17 Sup. Ct. Rep. 300; *Hannibal & St. J. R. Co. v. Missouri River Packet Co.* 125 U. S. 260, 272, 31 L. ed. 731, 736, 8 Sup. Ct. Rep. 874; *Eustis v. Bolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; *New Orleans Waterworks Co. v. Louisiana*, 185 U. S. 336, 46 L. ed. 936, 22 Sup. Ct. Rep. 691; *Lennan v. Hamburg-American S. S. Co.* 73 App. Div. 357, 77 N. Y. Supp. 60; *The Alene*, 116 Fed. 57.

The jurisdiction of the United States extends only to low-water mark on the New Jersey shore.

Middleton v. La Compagnie, Generale Transatlantique, 41 C. C. A. 98, 100 Fed. 866.

The acquisition of Sandy Hook by the United States was not an instance of a purchase, by the consent of the legislature, of land by the United States authorized by § 8 of art. 1 of the Constitution of the United States.

Ibid; *Ft. Leavenworth R. Co. v. Lowe*, 114 U. S. 525, 29 L. ed. 264, 5 Sup. Ct. Rep. 995.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The assertion by plaintiff in error that Federal questions were decided by the action of the courts below turns on the denial of the motion to direct a verdict on the two grounds above set forth.

As to the first ground, the contention is that the act of Congress of June 28, 1834 (4 Stat. at L. 708; chap. 126), giving consent

to the agreement or compact between the states of New Jersey and New York in respect of their territorial limits and jurisdiction, dated September 16, 1833, vested exclusive jurisdiction in the Federal government over the sea adjoining the two states. But there is absolutely nothing in the agreement and confirmatory statutes abdicating rights in favor of the United States, and the transaction simply amounted to fixing the boundaries between the two states. N. Y. Laws 1834, p. 8, chap. 8; N. J. Laws 1834, p. 118. The first proposition raised no Federal question.

As to the second ground, the contention is that the cession by New Jersey to the United States of jurisdiction over a certain strip of land at Sandy Hook vested in the United States exclusive legislative jurisdiction over the littoral waters extending 3 miles to the eastward of the coast line thereof.

Yet there was evidence introduced on behalf of defendant that the collision took place outside of that limit; and the trial court was not requested to instruct the jury that, if they found the collision to have occurred within that limit, the verdict should be for the defendant.

[414] The charge of the court is not before us, nor was any exception *taken to any part of it, and the verdict and judgment must be held to have been rendered on the facts according to law. *Hamburg-American S. S. Co. v. Lennan*, 194 U. S. 629, 48 L. ed. 1157, 24 Sup. Ct. Rep. 857.

This being the situation, we hesitate to retain jurisdiction. Nevertheless, as clause 17 of § 8 of article I. of the Constitution† may be regarded as having been properly invoked by the second proposition, we feel justified in declining to sustain the motion to dismiss; and, retaining jurisdiction, we think the judgment must be affirmed.

The jurisdiction of the United States over Sandy Hook is derived from the act of the legislature of New Jersey of March 12, 1846, set forth below.‡ N. J. Laws 1846, p. 146.

†“The Congress shall have power . . . to exercise exclusive legislation in all cases whatsoever, over such district (not exceeding 10 miles square) as may, by cession of particular states and the acceptance of Congress, become the seat of government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings.”

‡1. “That the jurisdiction in and over all that portion of Sandy Hook, in the county of Monmouth, owned by the United States, lying north of an east and west line through the mouth of Young’s creek at low water, and extending across the island or cape of Sandy Hook from shore to shore, and bounded on all other sides by the sea and Sandy Hook bay, be, and the same is

In 1806 and 1817 deeds of the land included in Sandy Hook were given the United States, being simple conveyances of real estate for named money consideration.

The New Jersey act of 1846 was merely one of cession,*and the operation of the [415] general laws of New Jersey was reserved as therein provided. *Ft. Leavenworth R. R. Company v. Lowe*, 114 U. S. 525, 29 L. ed. 264, 5 Sup. Ct. Rep. 995; *Chicago, R. I. & P. R. Co. v. McGlinn*, 114 U. S. 542, 29 L. ed. 270, 5 Sup. Ct. Rep. 1005.

Moreover, as was held by the circuit court of appeals for the second circuit, in *Middleton v. La Compagnie Générale Transatlantique*, 41 C. C. A. 98, 100 Fed. 866, the act did not purport to transfer jurisdiction over the littoral waters beyond low-water mark, and for the purposes of this case the public laws of New Jersey must be regarded as obtaining there, whether enacted prior or subsequent to the cession.

Judgment affirmed.

SALLIE J. McDANIEL, Nannie A. Hoshall,
and Mary E. Jackson, *Appts.*,
v.

GEORGE M. TRAYLOR, John F. Stratton,
John F. Smith, *et al.*

(See S. C. Reporter’s ed. 415-431.)

Courts — jurisdiction of Federal circuit court — diverse citizenship — amount in dispute.

1. A Federal circuit court has jurisdiction of

NOTE.—As to diverse citizenship as ground of Federal jurisdiction—see *Shipp v. Williams*, 10 C. C. A. 247, and note; *Mason v. Dullaghan*, 27 C. C. A. 296, and note; *Seddon v. Virginia, T. & C. Steel & I. Co.* 1 L. R. A. 108, and note; and *Myers v. Murray, N. & Co.* 11 L. R. A. 216, and note. And see note to *Roberts v. Lewis*, 36 L. ed. U. S. 579.

As to jurisdiction of United States circuit court as dependent upon amount—see notes to *Auer v. Lombard*, 19 C. C. A. 72; *Tennent-Stribbling Shot Co. v. Roper*, 36 C. C. A. 455.

hereby, ceded to the said United States for military purposes; and the said United States shall retain such jurisdiction so long as the said tract shall be applied to the military or public purposes of said United States, and no longer.”

2. “That the jurisdiction ceded in the 1st section of this act shall not prevent the execution on the said tract of land of any process, civil or criminal, under the authority of this state, except so far forth as such process may affect any of the real or personal property of the United States of America within the said tract; nor shall it prevent the operation of the public laws of this state within the bounds of the said tract, so far as the same may not be incompatible with the free use and enjoyment of the said premises by the United States for the purposes above specified.”

a suit in equity brought by citizens of the state in which it sits, against citizens of other states, to set aside, as fraudulently obtained, judgments of a probate court against an intestate's estate, which are a lien on his real property situated within the district and inherited by complainants, since, under the act of March 3, 1875 (18 Stat. at L. 472, chap. 137, U. S. Comp. Stat. 1901, p. 513), § 8, a circuit court is empowered by final decree to remove any encumbrance or lien or cloud upon the title to real or personal property within the district as against persons not inhabitants thereof, and not found therein, who did not voluntarily appear in the suit.

2. The value of the matter in dispute in a suit to set aside judgments of a probate court establishing claims against the estate of an intestate, which are a lien on his real property inherited by complainants, on the ground that they were fraudulently obtained by defendants acting in concert, is the aggregate amount of the claims whose allowance was procured in furtherance of the unlawful combination.

[No. 129.]

Submitted January 16, 1905. Decided February 20, 1905.

APPPEAL from the Circuit Court of the United States for the Eastern District of Arkansas, to review a judgment sustaining a demurrer to, and dismissing for want of jurisdiction, a bill in a suit to set aside, as fraudulently obtained, judgments of probate court establishing claims against the estate of an intestate, which are a lien on his property situated within the district, which is inherited by the complainants. *Reversed.*

See same case below, 123 Fed. 338.

The facts are stated in the opinion.

Mr. George B. Webster submitted the cause for appellants. **Mr. J. R. Beasley** was on his brief:

The bill is one for the removal of a cloud from title, within the meaning of the rule that in such cases the value of the property upon which the cloud rests, rather than the amount of the defendant's claim, is the amount in controversy for jurisdictional purposes.

Smith v. Adams, 130 U. S. 175, 32 L. ed. 898, 9 Sup. Ct. Rep. 566; *Parker v. Morrill*, 106 U. S. 1, 27 L. ed. 72, 1 Sup. Ct. Rep. 14; *Simon v. House*, 46 Fed. 317; *Woodside v. Ciceroni*, 35 C. C. A. 177, 93 Fed. 1; *Cowell v. City Water Supply Co.* 96 Fed. 769, 57 C. C. A. 393, 121 Fed. 53; *Fuller v. Grand Rapids*, 40 Mich. 395; *Scripture v. Johnson*, 3 Conn. 211; *Queyrouze v. Thibodeaux*, 30 La. Ann. 1114; *Simon v. Richard*, 42 La. Ann. 842, 8 So. 629; *Kahn v. Kerngood*, 80

Va. 342; *Ayres v. Blair*, 26 W. Va. 558; *Berthold v. Hoskins*, 38 Fed. 772.

The value of the property being the test of the jurisdictional amount, the complainants could have proceeded against any of the defendants, irrespective of the amount of his claim, and therefore may join all in one bill, unless that would make the bill multifarious.

Fellows v. Fellows, 4 Cow. 682, 15 Am. Dec. 412; *Story*, Eq. Pl. § 271.

And it would be so, even if the defendants claimed under separate judgments, where all were attacked for the same fraud.

Gaines v. Chew, 2 How. 619, 11 L. ed. 402.

Even though the value of the real estate is not the true test of the amount in controversy, the complainants were entitled to join the several defendants in one bill, and, when so joined, the aggregate amount of their claims was the amount in controversy.

1 Pom. Eq. Jur. 2d ed. § 269; *Sheffield Waterworks v. Yeomans*, L. R. 2 Ch. 8; *Campbell v. Mackay*, 1 Mylne & C. 603; *Hardie v. Bulger*, 66 Miss. 577, 6 So. 186; *De Forest v. Thompson*, 40 Fed. 375; *Brown v. Guarantee Trust & S. D. Co.* 128 U. S. 403, 32 L. ed. 468, 9 Sup. Ct. Rep. 127; *New York & N. H. R. Co. v. Schuyler*, 17 N. Y. 592; *Duff v. First Nat. Bank*, 13 Fed. 65; *Pullman v. Stebbins*, 51 Fed. 10; *Curran v. Champion*, 29 C. C. A. 26, 56 U. S. App. 383, 85 Fed. 67; *Marshall v. Holmes*, 141 U. S. 589, 35 L. ed. 589, 12 Sup. Ct. Rep. 62; *Shields v. Thomas*, 17 How. 3, 15 L. ed. 93; *Clay v. Field*, 138 U. S. 479, 34 L. ed. 1049, 11 Sup. Ct. Rep. 419; *Handley v. Stutz*, 137 U. S. 369, 34 L. ed. 708, 11 Sup. Ct. Rep. 117; *Davis v. Schwartz*, 155 U. S. 647, 39 L. ed. 296, 15 Sup. Ct. Rep. 237; *Illinois C. R. Co. v. Caffrey*, 128 Fed. 770.

Mr. N. W. Norton submitted the cause for appellees:

Where the purpose of a bill is to relieve property of a lien or charge, the amount of the encumbrance is the test of jurisdiction in the courts of the United States, and not the value of the property.

Ross v. Prentiss, 3 How. 771, 11 L. ed. 639; *Carne v. Russ*, 152 U. S. 250, 38 L. ed. 428, 14 Sup. Ct. Rep. 578; *Farmers Bank v. Hooff*, 7 Pet. 168, 8 L. ed. 646; *Peyton v. Robertson*, 9 Wheat. 527, 6 L. ed. 151; *Gibson v. Shufeldt*, 122 U. S. 27, 30 L. ed. 1083, 7 Sup. Ct. Rep. 1066.

Separate causes cannot be combined to make the amount necessary to jurisdiction in the courts of the United States.

Walter v. Northeastern R. Co. 147 U. S. 370, 373, 37 L. ed. 206, 208, 13 Sup. Ct. Rep. 348.

In *Marshall v. Holmes*, 141 U. S. 589, 35 L. ed. 870, 12 Sup. Ct. Rep. 62, the jurisdiction was not defeated by the fact that the

liability had been entered in several small judgments; neither can it be given by an entry of separate matters in one general order.

Mr. Justice **Harlan** delivered the opinion of the court:

This was a suit in equity, instituted in the circuit court of the United States for the Eastern District of Arkansas by the appellants, citizens of Arkansas, against the appellees, more than thirty in number, and respectively citizens, corporate and individual, of Tennessee, New York, Missouri, Illinois, New Jersey, Connecticut, Ohio, and Georgia.

There was a demurrer to the bill by some of the defendants upon the ground, among others, that the circuit court had no jurisdiction of the parties and subject-matter. The demurrer was sustained, and the bill dismissed for want of jurisdiction.

The question of jurisdiction depends, of course, upon the allegations of the bill. The case made by the bill is this:

On the 13th day of April, 1891, Hiram Evans, a resident of St. Francis county, Arkansas, died intestate and possessed of personal property exceeding \$12,000 in value.

He was also seised in fee of 760 acres of land of the value of about \$16,000, and left surviving him as his only heirs at law the three appellants, and three sons, James Evans, William E. Evans, and John Evans.

By an order made April 21st, 1891, in the probate court of the county, James Evans was appointed administrator of the estate of the intestate. Having duly qualified as such, he took possession of all the assets of the estate, and acted as such administrator until his death.

Among the assets that came to his hands as administrator was a drug store, which, with its stock of goods, fixtures, book accounts, and other things therein contained, was sold and delivered by him to John Evans [417] on the 1st day of May, 1891. *The latter conducted the business in his own name, and while doing so incurred debts and obligations to the defendants in this suit, aggregating \$3,000, as well as debts and obligations to other persons; but no single one of his debts exceeded \$2,000.

John Evans became insolvent, and on May 27th, 1892, transferred and delivered to James Evans, administrator of Hiram Evans, the drug store and all that remained of the stock of goods, fixtures, and book accounts.

Thereupon, the bill alleged, the defendants herein "conspired, colluded, and confederated" together and with John Evans and with James Evans, administrator, to secure

the payment of their claims and demands against John Evans out of the assets of the estate of Hiram Evans, deceased, and, "so conspiring and confederating," they presented to the probate court their several claims and demands—and James Evans, administrator, fraudulently and illegally approved them—for allowance against the estate of Hiram Evans.

The bill also alleged that the defendants and the administrator of Hiram Evans, still conspiring and confederating together, procured the judgment of the probate court establishing their claims against the estate of Hiram Evans by concealing from the court the fact that they were debts and obligations of John Evans, and cloaking them under the name of expenses of administration of the said estate; "all of which transactions were part of the same scheme, and were participated in by each and all of the said defendants, and by said John Evans and said James Evans, administrator."

It was further alleged: "That the said judgments of said court, establishing and allowing the respective claims and demands of the defendants herein against the said estate, were wholly the result of the conspiracy and confederation hereinbefore mentioned, and the fraud practised in pursuance thereof as aforesaid, and are, therefore, in equity and good conscience, void and ineffectual for any purpose whatsoever, and ought not to be enforced; but that, nevertheless, the same are at law liens *upon the real estate here-[418] inbefore described, and charges against the respective interests" of the plaintiffs; that, in pursuance of the said conspiracy and confederation, the defendants, and John Evans and James Evans, concealed from plaintiffs the matters and things hereinbefore complained of, and failed to disclose to them the sale of the drug store to John Evans, and the fact that the said claims and demands of defendants were the personal debts and obligations of John Evans; that it had been determined by the supreme court of the state in certain proceedings relating to the matters here in controversy that neither the probate court, nor the state circuit court on appeal, had jurisdiction to hear or determine equitable issues, and that plaintiffs' remedy lay "in an original proceeding in a court of competent chancery jurisdiction, and that the said action and ruling of the said supreme court was without prejudice to your orators' beginning and maintaining this bill of complaint."

The bill still further alleged that, under the law of Arkansas, the judgments of the probate court, allowing and classifying the demands of defendants, passed beyond the control of that court at the expiration of the term at which the same were rendered, and that thereafter it was not within its power

to alter, amend, or set aside the same; that the time within which plaintiffs might have taken an appeal, or have compelled the administrator to take an appeal, from the judgment, had expired long prior to the time when they acquired knowledge of the matters and things hereinbefore complained of; that, by reason thereof, plaintiffs are wholly without remedy in the premises unless the relief prayed be granted them; that all the acts and doings of the defendants toward procuring the said judgments of the probate court were wrongful, fraudulent, and inequitable, and tended to the manifest wrong, injury, and oppression of plaintiffs; and that, in equity and good conscience, the defendants ought not to have or enjoy the benefit or advantage of the said judgments.

[419] The relief prayed was that the judgments of the probate court be set aside, and held not to be valid or lawful liens upon or against the real estate herein described, nor upon the right, title, or interest therein of the plaintiffs; that the defendants be enjoined from enforcing such judgments, or from taking any benefit, profit, or advantage by them; and that, all the defendants being without the jurisdiction of the circuit court, an order be made directing them to be notified of this suit by publication, according to the provisions of the act of Congress of March 3d, 1875. 18 Stat. at L. 470, chap. 137, U. S. Comp. Stat. 1901, p. 508.

By the act just referred to it was, among other things, provided: "Sec. 8. That when, in any suit commenced in any circuit court of the United States to enforce any legal or equitable lien upon, or claim to, or to remove any encumbrance or lien or cloud upon, the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur, by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or, where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks; and in case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order, and of the per-

536

formance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants *without appearance, affect only the prop-[420] erty which shall have been the subject of the suit and under the jurisdiction of the court therein within such district. . . ." 1 U. S. Rev. Stat. Supp. pp. 84-5; 18 Stat. at L. 470, chap. 137, U. S. Comp. Stat. 1901, p. 513.

Upon demurrer to the jurisdiction of the circuit court, that court dismissed the suit, being of opinion that the value of the matter in dispute was not sufficient to give jurisdiction. *McDaniel v. Traylor*, 123 Fed. 338.

If, within the meaning of the judiciary act of 1887-88 [24 Stat. at L. 552, chap. 373], the value of the matter in dispute exceeded the sum of \$2,000, exclusive of interest and costs (25 Stat. at L. 433, chap. 866, U. S. Comp. Stat. 1901, p. 508), then there was no reason for dismissing the bill for want of jurisdiction in the circuit court; for, diversity of citizenship was shown by the bill, and under the above act of March 3d, 1875, chap. 137 (18 Stat. at L. 470), it was competent for the circuit court, by a final decree, to remove any encumbrance or lien or cloud upon the title to real or personal property within the district, as against persons not inhabitants thereof and not found therein, or who did not voluntarily appear in the suit.

The lands of which Hiram Evans died possessed were of the alleged value of \$16,000, and we assume that the plaintiffs jointly owned one undivided half of them. Was the value of the joint interest of the plaintiffs in the lands in question to be deemed the value of the matter in dispute, or was the circuit court without jurisdiction if no one of the alleged fraudulent claims held by the defendants exceeded \$2,000, exclusive of interest and costs?

Some light will be thrown upon this question by certain cases in which this court held it to be competent for a circuit court, in a suit in equity, to deprive parties of the benefit of a judgment or order fraudulently obtained by them in a state court.

In *Johnson v. Waters*, 111 U. S. 640, 667, 28 L. ed. 547, 556, 4 Sup. Ct. Rep. 619, 634, the question was as to the authority of a circuit court to set aside as fraudulent and void certain sales made by a testamentary executor under the orders of a probate court. Conceding that the administration of the estate there in question properly belonged to the probate court, and that in a general

196 U. S.

sense its decisions were conclusive, especially upon parties, Mr. Justice Bradley, speaking for this court, said: "But this is not universally true. The most solemn transactions and judgments may, at the *instance of the parties, be set aside or rendered inoperative for fraud. The fact of being a party does not estop a person from obtaining in a court of equity relief against fraud. It is generally parties that are the victims of fraud. The court of chancery is always open to hear complaints against it, whether committed *in pais* or in or by means of judicial proceedings. In such cases the court does not act as a court of review, nor does it inquire into any irregularities or errors of proceeding in another court; but it will scrutinize the conduct of the parties; and, if it finds that they have been guilty of fraud in obtaining a judgment or decree, it will deprive them of the benefit of it, and of any inequitable advantage which they have derived under it."

In *Arrowsmith v. Gleason*, 129 U. S. 86, 98, 32 L. ed. 630, 634, 9 Sup. Ct. Rep. 237, 240, the question was whether the circuit court had jurisdiction by its decree to set aside a sale of an infant's lands fraudulently made by his guardian under authority derived from a probate court, and give such relief as would be consistent with equity. One of the grounds of demurrer to the bill in that case was that the circuit court had no authority to set aside and vacate the orders of the state court. This court said: "If by this is meant only that the circuit court cannot, by its orders, act directly upon the probate court, or that the circuit court cannot compel or require the probate court to set aside or vacate its own orders, the position of the defendants could not be disputed. But it does not follow that the right of Harmoning, in his lifetime, or of his heirs since his death, to hold these lands, as against the plaintiff, cannot be questioned in a court of general equitable jurisdiction upon the ground of fraud. If the case made by the bill is clearly established by proof, it may be assumed that some state court of superior jurisdiction and equity powers, and having before it all the parties interested, might afford the plaintiff relief of a substantial character. But, whether that be so or not, it is difficult to perceive why the circuit court is not bound to give relief according to the recognized rules of equity, as administered [424] in the courts of the *United States, the plaintiff being a citizen of Nevada, the defendants citizens of Ohio, and the value of the matter in dispute, exclusive of interest and costs, being in excess of the amount required for the original jurisdiction of such courts." "While there are general expressions in some cases apparently asserting a 196 U. S.

contrary doctrine, the later decisions of this court show that the proper circuit court of the United States may, without controlling, supervising, or annulling the proceedings of state courts, give such relief, in a case like the one before us, as is consistent with the principles of equity."

After citing the case of *Johnson v. Waters*, above, the court referred to *Reigal v. Wood*, 1 Johns. Ch. 402, 406, in which Chancellor Kent said: "Relief is to be obtained, not only against writings, deeds, and the most solemn assurances, but against judgments and decrees, if obtained by fraud and imposition." It also referred to *Bowen v. Evans*, 2 H. L. Cas. 257, 281, in which Lord Chancellor Cottenham said: "If a case of fraud be established, equity will set aside all transactions founded upon it, by whatever machinery they may have been effected, and notwithstanding any contrivances by which it may have been attempted to protect them. It is immaterial, therefore, whether such machinery and contrivances consisted of a decree of a court of equity and a purchase under it, or of a judgment at law, or of other transactions between the actors in the fraud." The opinion of this court concluded: "These principles control the present case, which, although involving rights arising under judicial proceedings in another jurisdiction, is an original, independent suit for equitable relief between the parties, such relief being grounded upon a new state of facts, disclosing, not only imposition upon a court of justice in procuring from it authority to sell an infant's lands when there was no necessity therefor, but actual fraud in the exercise, from time to time, of the authority so obtained. As this case is within the equity jurisdiction of the circuit court, as defined by the Constitution and laws of the United States, that court may, by its decree, lay hold of the parties, and compel *them to do what, according to the [425] principles of equity, they ought to do, thereby securing and establishing the rights of which the plaintiff is alleged to have been deprived by fraud and collusion."

In *Marshall v. Holmes*, 141 U. S. 589, 595, 596, 35 L. ed. 870, 872, 12 Sup. Ct. Rep. 62, 64, it appeared that twenty-three judgments for different amounts were fraudulently procured to be rendered in a state court against a citizen of another state. Upon learning of the judgments, the latter brought suit in one of the courts of Louisiana for a decree avoiding them as obtained upon false testimony, and thereafter filed a petition and bond for the removal of the case to the circuit court of the United States. The right of removal was denied, and the court dissolved the preliminary injunction which had been granted, and au-

thorized Mayer, who had become the owner of the judgments, to proceed in their collection. Upon appeal to a higher state court, the original judgment was affirmed, and that judgment was brought here for review by writ of error. This court sustained the right of removal. After stating that the judgments aggregated more than \$3,000, and were all held by Mayer and against the plaintiff, we said: "Their validity depends upon the same facts. If she is entitled to relief against one of the judgments, she is entitled to relief against all of them. The cases in which they were rendered were, in effect, tried as one case, so far as she and Mayer were concerned; for the parties stipulated that the result in each one not tried should depend upon the result in the one tried. As all the cases not tried went to judgment in accordance with the result in the one tried; as the property of Mrs. Marshall [the plaintiff] was liable to be taken in execution on all the judgments; *as the judgments were held in the same right; and as their validity depended upon the same facts,—she was entitled, in order to avoid a multiplicity of actions, and to protect herself against the vexation and cost that would come from numerous executions and levies, to bring one suit for a decree finally determining the matter in dispute in all the [426] cases. *And as, under the rules of equity obtaining in the courts of the United States, such a suit could be brought, the aggregate amount of all the judgments against which she sought protection, upon grounds common to all the actions, is to be deemed, under the act of Congress, the value of the matter here in dispute."

The question of jurisdiction here presented arises out of facts not to be found in any case brought to our attention or of which we have knowledge.

The suit is to remove a cloud on the title to certain lands of the value of \$16,000. The plaintiffs, being three of the six heirs at law of the intestate, jointly own an undivided interest of one half of those lands, but no interest in any particular part of them. If the value of their joint, undivided interest (\$8,000), or the value of the undivided interest of each (one third of \$8,000), is to be taken as the value of the matter in dispute, then the circuit court had jurisdiction. But we are of opinion that, within the meaning of the judiciary act of 1887-88, the jurisdiction of the circuit court in this case depended upon the value in dispute measured by the aggregate amount of the claims of the defendants.

It is contended that the jurisdiction of the circuit court must fail, because no one defendant has a claim of the required jurisdictional amount. In support of this conten-

tion, several cases are cited of the class to which *Walter v. Northeastern R. Co.* 147 U. S. 370, 373, 37 L. ed. 206, 208, 13 Sup. Ct. Rep. 348, 349, belongs. That was a suit by a railroad company against the treasurers and sheriffs of several counties through which its road passed, to enjoin them—separately, of course—from issuing executions against, or seizing the property of, the company for the purpose of collecting a tax based upon an assessment alleged to be unconstitutional and void. The court said: "It is entirely clear that, had these taxes been paid under protest, and the plaintiff had sought to recover them back, it would have been obliged to bring separate actions in each county. As the amount recoverable from each county would be different, no joint* judgment could possibly be rendered. [427] So, had a bill for injunction been filed in a state court, and the practice had permitted, as in some states, a chancery subpoena to be served in any county of the state, these defendants could not have been joined in one bill, but a separate bill would have had to be filed in each county. . . . It is well settled in this court that when two or more plaintiffs, having several interests, unite, for the convenience of litigation, in a single suit, it can only be sustained in the court of original jurisdiction, or on an appeal in this court, as to those whose claims exceed the jurisdictional amount; and that, when two or more defendants are sued by the same plaintiff in one suit, the test of jurisdiction is the joint or several character of the liability to the plaintiff."

The case before us, however, is presented by the bill in an entirely different aspect. The case may be regarded as exceptional in its facts, and may be disposed of without affecting former decisions. There is no dispute as to the amount of any particular claim. So far as the bill is concerned, if any one of the specified claims is good against the estate of Hiram Evans, then all are good; if the lands in question, or any interest in them, can be sold to pay one claim, they must be sold to pay all. The court could not, under the bill, enjoin the prosecution of one claim and leave the others untouched. The matter in dispute is whether the lands in which the plaintiffs have a joint, undivided interest of one half can be sold to pay *all* the claims, *in the aggregate*, which the defendants, by *combination and conspiracy*, procured the probate court to allow against the estate of Hiram Evans. The essence of the suit is the alleged fraudulent combination and conspiracy to fasten upon that estate a liability for debts of John Evans, which were held by the defendants, and which they, acting in combination, procured, in co-operation with James Evans,

to be allowed as claims against the estate of Hiram Evans. By reason of that combination, resulting in the allowance of all those claims in the probate court, as expenses of [428] administering the estate of *Hiram Evans, the defendants have so tied their respective claims together as to make them, so far as the plaintiffs and the relief sought by them are concerned, *one* claim. The validity of all the claims depends upon the same facts. The lien on the lands which is asserted by each defendant has its origin as well in the combination to which all were parties as in the orders of the probate court, which, in furtherance of that combination, were procured by their joint action. Those orders were conclusive against the plaintiffs, as to all the claims, if the claims could be allowed at all against the estate of Hiram Evans. A comprehensive decree by which the plaintiffs can be protected against those orders will avoid a multiplicity of suits, save great expense, and do justice. If the plaintiffs do not prove such a combination and conspiracy, in respect, at least, of so many of the specified claims as in the aggregate will be of the required amount, then their suit must fail for want of jurisdiction in the circuit court; for, in the absence of the alleged combination, the claim of each defendant must, according to our decisions, be regarded, for purposes of jurisdiction, as separate from all the others.

An instructive case on the general subject is *Shields v. Thomas*, 17 How. 3, 15 L. ed. 93. That was a suit in equity in a Kentucky state court in which the plaintiffs, as the legal representatives of an intestate, sought a decree for certain proportionate amounts alleged to be due them respectively from the defendant, who had married the widow and thereby obtained possession of the property of the deceased. The defendant was charged with having converted to his own use a large amount of the intestate's property to which the legal representatives of the intestate, plaintiffs in the suit, were entitled. In that suit a decree was rendered against the defendant for a large sum of money, "the shares of the respective complainants being apportioned to them in the decree," and the defendant being required by the decree to pay to each of the plaintiffs the specific sum to which he was entitled as his portion of the property misappropriated [429] by him. Subsequently a suit was *brought in a circuit court of the United States (jurisdiction being based on diversity of citizenship) to enforce the decree rendered in the Kentucky state court, and to compel the defendant to pay to the plaintiffs, respectively, the several sums which had been decreed in their favor. A decree to that effect was rendered. The whole amount which the

defendant was required by the decree to pay was large enough to give this court jurisdiction on appeal, although the specific sum awarded to each plaintiff was less than the jurisdictional sum. The defendant appealed to this court, and a motion was made to dismiss the appeal on the ground "that the sum due to each complainant is severally and specifically decreed to him; and that the amount thus decreed is the sum in controversy between each representative and the appellant, and not the whole amount for which he has been held liable."

After observing that, if that view of the matter in controversy was correct, this court was without jurisdiction, Chief Justice Taney, speaking for the court, said: "But the court think the matter in controversy, in the Kentucky court, was the sum due to the representatives of the deceased collectively, and not the particular sum to which each was entitled, when the amount due was distributed among them, according to the laws of the state. They all claimed under one and the same title. They had a common and undivided interest in the claim; and it was perfectly immaterial to the appellant how it was to be shared among them. He had no controversy with either of them on that point; and, if there was any difficulty as to the proportions in which they were to share, the dispute was among themselves, and not with him. It is like a contract with several to pay a sum of money. It may be that the money when recovered is to be divided between them in equal or unequal proportions. Yet, if a controversy arises on the contract, and the sum in dispute upon it exceeds \$2,000, an appeal would clearly lie to this court, although the interest of each individual was less than that sum. *This be- [430] ing the controversy in Kentucky, the decree of that court, apportioning the sum recovered among the several representatives, does not alter its character when renewed in Iowa. So far as the appellant is concerned, the entire sum found due by the Kentucky court is in dispute. He disputes the validity of that decree, and denies his obligation to pay any part of the money. And if the appellees maintain their bill, he will be made liable to pay the whole amount decreed to them. This is the controversy on his part; and the amount exceeds \$2,000. We think the court, therefore, has jurisdiction on the appeal."

The doctrines of *Shields v. Thomas* have been frequently recognized by this court. In the recent case of *Overby v. Gordon*, 177 U. S. 214, 218, 44 L. ed. 741, 743, 20 Sup. Ct. Rep. 603, 605, the court, interpreting the decision in that case, said: "It was held that, where the representatives of a deceased intestate recovered a judgment against an ad-

ministrator for an amount in excess of the sum necessary to confer jurisdiction to review, and such recovery was had under the same title and for a common and undivided interest, this court had jurisdiction, although the amount decreed to be distributed to each representative was less than the jurisdictional sum." See also *The Connemara* (*Sinclair v. Cooper*) 103 U. S. 756, 26 L. ed. 322; *Handley v. Stutz*, 137 U. S. 369, 34 L. ed. 708, 11 Sup. Ct. Rep. 117; *New Orleans P. R. Co. v. Parker*, 143 U. S. 51, 36 L. ed. 68, 12 Sup. Ct. Rep. 364; *Texas & P. R. Co. v. Gentry*, 163 U. S. 361, 41 L. ed. 191, 16 Sup. Ct. Rep. 1104; *Davis v. Schwartz*, 155 U. S. 631, 647, 39 L. ed. 289, 296, 15 Sup. Ct. Rep. 237.

[431] It is said that as to any single one of the claims in question the plaintiffs in the present case could have released the lands in which they had an undivided interest by paying that particular claim; therefore, it is argued, the value of the matter in dispute, as between the plaintiffs and such defendant, was the amount of the latter's claim. And so as to each separate claim. But that same thing could have been said as to the respective claims involved in *Shields v. Thomas*. The defendant there could have paid off any of the respective claims involved. This court, however, held that fact to be immaterial because the defendant dis-

puted the validity of the *original decree holding him liable for all the claims, and had no concern as to how the whole amount decreed against him was to be distributed. So here, the plaintiffs, suing to protect their common undivided interest in lands put in peril by fraudulent orders obtained by the defendants acting in combination to obtain such orders for their benefit, are only concerned in preventing the defendants from proceeding under the orders of the probate court, which they procured for their benefit equally, and under which they all now equally claim. The plaintiffs made no contest as to particular claims. They dispute all of them as claims against Hiram Evans's estate. If the orders of the probate court stand for the benefit of the respective defendants, then the plaintiff's interests in the lands are liable for all the claims asserted by the defendants; for there is no dispute here as to the amount of any particular claim. Hence, as we have said, the value of the matter in dispute is the aggregate amount of the claims fraudulently procured by the defendants acting in combination to be allowed in the probate court as claims against the estate of Hiram Evans.

For the reasons stated we hold: 1. That it was competent for the circuit court, upon the case made by the bill, to deprive the defendants, acting in combination and claim-

ing the benefit of the orders made in the probate allowing their respective claims. 2. That the value of the matter in dispute in the circuit court was the aggregate amount of all the claims so allowed against the estate of Hiram Evans.

The decree is reversed with directions to set aside the order dismissing the suit for want of jurisdiction, to overrule the demurrer, and for further proceedings as may be consistent with this opinion and with the law.

Reversed.

*TERRITORY OF NEW MEXICO *ex rel.* [432]
CALEDONIAN COAL COMPANY, *Appt.*,
v.

BENJAMIN S. BAKER, Associate Justice
of the Supreme Court of the Territory of
New Mexico and Judge of Second Judicial
District Court thereof, etc.

(See S. C. Reporter's ed. 432-446.)

Action—abatement—substitution of successor in public office—service of summons on officer of corporation.

1. The successor in office of a judge of a territorial court may be substituted in the place of his predecessor on appeal from a final judgment denying mandamus to compel the latter to take jurisdiction of an action attempted to be brought in his court, since the case may properly be considered one in which there is a necessity for such action in order to obtain a settlement of the question involved, within the meaning of the act of February 8, 1899 (30 Stat. at L. 822, chap. 121, U. S. Comp. Stat. 1901, p. 697), authorizing substitution in actions brought by or against Federal public officers in their official capacity, or in relation to the discharge of their official duties.
2. The mere ownership of lands in New Mexico by a railroad company organized and existing under the act of Congress of March 3, 1897 (29 Stat. at L. 622, chap. 374), none of whose offices are located in the territory, or the bringing of suits in that territory to protect its land against trespasses, is not sufficient, under N. M. Comp. Laws 1897, § 450, to authorize the service of summons upon its president while passing through the territory on a railroad train, in a personal action in which an attachment may be levied upon the lands to satisfy any judgment that may be obtained, even assuming that the provisions of this statute could be made ap-

NOTE.—On the practice and procedure governing the transfer of causes to the Federal Supreme Court on writ of error or appeal—see note to *Wedding v. Meyer*, 66 L. R. A. 833.

As to service of process on foreign corporation—see notes to *Foster v. Charles Betcher Lumber Co.* 23 L. R. A. 490; and *Eldred v. American Palace-Car Co.* 45 C. C. A. 3.

pllicable to a corporation created by an act of Congress.

[No. 419.]

Argued January 27, 1905. Decided February 20, 1905.

APPEAL from the Supreme Court of the Territory of New Mexico denying an application for a writ of mandamus to compel the judge of the District Court of the Second Judicial District of that Territory to take jurisdiction of an action attempted to be brought in that court. *Affirmed.*

See same case below, 78 Pac. 624.

The facts are stated in the opinion.

Mr. Neill B. Field argued the cause and filed a brief for appellant:

A corporation created by or under authority of an act of Congress has its domicil in every place where it may lawfully exercise its corporate powers.

Bank of Augusta v. Earle, 13 Pet. 588, 10 L. ed. 307; 1 Thomp. Corp. § 681; 2 Morawetz, Priv. Corp. § 984; *Com. v. Texas & P. R. Co.* 98 Pa. 100; *California v. Central P. R. Co.* 127 U. S. 39, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073.

The Santa Fé Pacific Railroad Company holds its lands in New Mexico under the authority of Congress, and that authority is clearly not subject to be circumscribed by territorial legislation. The franchise to exist as a corporation is on the same footing.

Bank of Augusta v. Earle, 13 Pet. 588, 10 L. ed. 307; 1 Thomp. Corp. §§ 675, 681; 2 Morawetz, Priv. Corp. § 984; *Com. v. Texas & P. R. Co.* 98 Pa. 100; *California v. Central P. R. Co.* 127 U. S. 39, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; *Van Dresser v. Oregon R. & Nav. Co.* 48 Fed. 202; *Pacific R. Removal Cases*, 115 U. S. 1, 29 L. ed. 319, 5 Sup. Ct. Rep. 1113; *Bank of United States v. Roberts*, 4 Conn. 323, Fed. Cas. No. 934.

It affirmatively appears from the answer that the service on the Santa Fé Pacific Railroad Company was sufficient, and that appellant is entitled to the relief prayed for.

New Haven Pulp & Board Co. v. Downingtown Mfg. Co. 130 Fed. 605; *United States v. Southern P. R. Co.* 49 Fed. 297; N. M. Comp. Laws, 1897, §§ 450, 2963; *Kansas City, Ft. S. & M. R. Co. v. Daughtry*, 138 U. S. 298, 34 L. ed. 963, 11 Sup. Ct. Rep. 306; *Cosmopolitan Min. Co. v. Walsh*, 193 U. S. 460, 48 L. ed. 749, 24 Sup. Ct. Rep. 489.

Mr. Robert Dunlap argued the cause, and, with **Mr. E. D. Kenna**, filed a brief for appellee:

No court can exercise, at common law, jurisdiction over a party, unless he is served with process within the territorial juris-

diction of the court, or unless he voluntarily appears.

Goldey v. Morning News, 156 U. S. 521, 39 L. ed. 517, 15 Sup. Ct. Rep. 559; *Mexican C. R. Co. v. Pinkney*, 149 U. S. 209, 37 L. ed. 705, 13 Sup. Ct. Rep. 859; *Harris v. Harde-man*, 14 How. 339, 14 L. ed. 446.

Jurisdiction over a foreign corporation is not acquired by service of process upon its president while he is temporarily in the state for either business or pleasure.

Phillips v. Burlington Library Co. 141 Pa. 462, 23 Am. St. Rep. 304, 21 Atl. 640.

A corporation can be said to have a technical habitat or place of residence, only in the state or district where its corporate meetings are held.

Galveston, H. & S. A. R. Co. v. Gonzales, 151 U. S. 496, 38 L. ed. 248, 14 Sup. Ct. Rep. 401; *Interstate Commerce Commission v. Texas & P. R. Co.* 4 Inters. Com. Rep. 408, 6 C. C. A. 653, 20 U. S. App. 1, 57 Fed. 949; *Jones v. Scottish Acci. Ins. Co. L. R.* 17 Q. B. Div. 421; *Watkins v. Scottish Imperial Ins. Co. L. R.* 23 Q. B. Div. 285; *Frick Co. v. Norfolk & O. V. R. Co.* 32 C. C. A. 31, 57 U. S. App. 286, 86 Fed. 725; *St. Clair v. Cox*, 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 354; *Fitzgerald & M. Constr. Co. v. Fitzgerald*, 137 U. S. 106, 34 L. ed. 611, 11 Sup. Ct. Rep. 36; *Mecke v. Valleytown Mineral Co.* 35 C. C. A. 151, 93 Fed. 697; *Beale, Foreign Corp.* § 270; *Goldey v. Morning News*, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559.

Neither can it make any difference that the corporation at some period prior to the service had been engaged in business in the particular state or district, or that some officer of the corporation had at all times resided therein. The corporation has the right to withdraw from the state or district, and when it is no longer represented in such state or district by an agent transacting therein its ordinary business, it cannot be said to be present therein at the time.

Conley v. Mathieson Alkali Works, 190 U. S. 406, 47 L. ed. 1113, 23 Sup. Ct. Rep. 728; *Geer v. Mathieson Alkali Works*, 190 U. S. 428, 47 L. ed. 1122, 23 Sup. Ct. Rep. 807; *De Castro v. Compagnie Francaise Du Telegraphe Co.* 76 Fed. 426; *Earle v. Chesapeake & O. R. Co.* 127 Fed. 235; *Cady v. Associated Colonies*, 119 Fed. 420; *Eldred v. American Palace-Car Co.* 45 C. C. A. 1, 105 Fed. 455; *Beale, Foreign Corp.* §§ 279, 281.

It is claimed that the Santa Fé Pacific Railroad Company still owns lands within the territory of New Mexico. This it may do, however, without being represented therein by any authorized agency. By owning or holding lands in such district it is not to be regarded as doing or transacting its business therein.

Missouri Coal & Min. Co. v. Ladd, 160 Mo. 435, 61 S. W. 191.

The test is, Has the corporation an agency within the district, transacting therein its ordinary business, so that it may be said to be impersonated in or represented by such agency for general purposes, including its subjection to the service of process therein?

St. Clair v. Cox, 106 U. S. 351, 27 L. ed. 223, 1 Sup. Ct. Rep. 354; *United States v. American Bell Teleph. Co.* 29 Fed. 17.

Neither can it make any difference if it should appear that the corporation was still prosecuting pending suits against trespassers upon its lands; nor does it make much difference whether such suits were pending at the time of the service of process in the particular case, or were instituted thereafter.

McCall v. American Freehold Land Mortg. Co. 99 Ala. 427, 12 So. 806; *St. Louis, A. & T. R. Co. v. Fire Asso.* 55 Ark. 163, 18 S. W. 43; *Utley v. Clark-Gardner Lode Min. Co.* 4 Colo. 369.

A corporation is not deemed to be "found" within a district, unless it is transacting therein its ordinary business through an agent who is there representing it in the conduct of its business.

United States v. American Bell Teleph. Co. 29 Fed. 34; *Maxwell v. Atchison, T. & S. F. R. Co.* 34 Fed. 286; *Bentlif v. London & O. Finance Corp.* 44 Fed. 667; *Clews v. Woodstock Iron Co.* 44 Fed. 31; *St. Louis Wire-Mill Co. v. Consolidated Barb-Wire Co.* 32 Fed. 802; *Good Hope Co. v. Railway Barb Fencing Co.* 23 Blatchf. 43, 22 Fed. 635.

Mr. Justice **Harlan** delivered the opinion of the court:

This appeal brings up for review a final judgment of the supreme court of the territory of New Mexico denying an application to that court by the Caledonian Coal Company for a writ of mandamus to compel Benjamin S. Baker, judge of the district court of the second judicial district of that territory, to take cognizance of a certain action brought in *that court against the Santa Fé Pacific Railroad Company and others.

The petition for mandamus makes the following case:

On the 17th day of February, 1904, the Caledonian Coal Company, organized under the laws of New Mexico, commenced an action in the district court of the second judicial district of that territory against the Santa Fé Pacific Railroad Company, the Atchison, Topeka, & Santa Fé Railroad Company, the Colorado Fuel & Iron Company, and the American Fuel Company, to recover damages for alleged violations of the Interstate Commerce Act of 1887 and the anti-trust act of 1890.

By the 9th section of the above act of

1887 it is provided that "any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. . . ." 24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3159. And by § 7 of the above act of 1890 it was provided that "any person who shall be injured in his business or property by any other person or corporation, by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee." 26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3202.

A summons was issued against the Santa Fé Pacific Railroad Company, and was returned by the marshal of the territory, the return stating that it was served at the above district on *the 13th day of May, [434] 1904, by delivering a true copy thereof, with a copy of the complaint thereto attached, to E. P. Ripley, president of the defendant corporation.

The Santa Fé Railroad Company is a corporation organized and existing under the act of Congress of March 3d, 1897, defining the rights of purchasers under mortgages authorized by an act of Congress approved April 20th, 1871 [17 Stat. at L. 19, chap. 33], concerning the Atlantic & Pacific Railroad Company. 29 Stat. at L. 622, chap. 374.

When the grievances set out in the petition were committed, the Santa Fé Pacific Railroad Company was the owner of a line of railroad within the second judicial district of New Mexico and elsewhere within that territory, but which line, at the commencement of this action, had been sold and transferred to, and was being operated by, the Atchison, Topeka, & Santa Fé Railroad Company under a conveyance authorized by an act of Congress of June 27th, 1902 (32 Stat. at L. 405, chap. 1159); was the owner of several hundred thousand acres of land within that district; and, at the commencement of the action for damages, was prosecuting in one of the counties of the terri-

tory, within the same district, suits involving the company's title and possession of parts of those lands.

All of those lands, with the rights, privileges, and franchises appertaining thereto, were acquired by the Santa Fé Pacific Railroad Company as the successor of the Atlantic & Pacific Railroad Company, to which last-named company they were granted by the act of Congress of July 27th, 1866. 14 Stat. at L. 292, chap. 278.

The petition for mandamus alleged that, by reason of the above facts, the Santa Fé Pacific Railroad Company was an "inhabitant" of the second judicial district of New Mexico, and, by reason of the presence of Ripley, its president, in that territory and within that district, and the service of summons in the above action upon him as such president, the company was "found" in the district within the meaning of the acts of Congress.

[435] *Nevertheless, the defendant Baker, associate justice of the supreme court of the territory and judge of the district court of the second judicial district, quashed the return of the above summons, and refused to assume jurisdiction of the action, so far as the Santa Fé Pacific Railroad Company was concerned, or to require that company to answer the declaration or complaint filed by petitioner.

The defendant Baker made a return to a rule issued against him to show cause. From that return it appears that the Santa Fé Pacific Railroad Company specially appeared in the action for the purpose of moving, and did move, to quash the service of process, upon grounds set forth in an affidavit of its president. In that affidavit Ripley stated that, when served with summons, he was only a passenger on a railroad train passing through the territory; that the company had its office in the city of New York, while its land commissioner had an office at Topeka, Kansas, and its president an office at Chicago, Illinois; that the company had no property in the territory of New Mexico, except lands acquired by it under a foreclosure of a mortgage of the Atlantic & Pacific Railroad Company, and which lands were undisposed of; that it has had no office or place of business in the territory since the sale of its road. This affidavit was used on the hearing of the motion to quash, and the facts stated in it were not contradicted.

The contention of the company, therefore, was that the service in question was insufficient to bring the company, personally, before the court.

The return of the judge also stated that

the actions in ejectment brought by the railroad company against trespasses upon its property were instituted prior to the sale of its railroad property and franchises to the Atchison, Topeka, & Santa Fé Railroad Company; and that the refusal of the judge to assume jurisdiction in the case referred to was upon the ground that the service upon Ripley as president of the company was not, in his opinion, sufficient to subject it personally to the jurisdiction of the court.

*The relief sought was an alternative writ [436] of mandamus, directing Judge Baker to assume jurisdiction of the cause, so far as the Santa Fé Railroad Company was concerned, and to require that company to plead, answer, or demur.

The supreme court of the territory, after hearing the case, upon the pleadings, return, and the proofs, denied the petition for mandamus, and dismissed the application. From that order the present appeal was prosecuted.

At the present term the appellant suggested that Judge *Baker had been succeeded [440] in office by Judge Ira A. Abbott. And it moved that such order be made in the premises as would be conformable to the rules and practice of this court. Judge Abbott consents that the action may be revived against him as the successor of Judge Baker, and proceed to a hearing, without further summons or notice, upon the record as now presented to the court.

The first question to be considered is whether it is competent for this court, Judge Baker having ceased to be judge, to substitute the name of his successor, as the appellee.

In *United States v. Boutwell*, 17 Wall. 604, 607, 21 L. ed. 721, 722, which was a mandamus against Mr. Boutwell as Secretary of the Treasury, it appeared that after the case was brought to this court the defendant resigned his office. Thereupon a motion was made to substitute the name of his successor, Mr. Richardson. It did not appear that any previous application was made to the latter for leave to substitute his name, and he opposed the motion, which was denied.

Mr. Justice Strong delivered the opinion of the court, saying: "The office of a writ of mandamus is to compel the performance of a duty resting upon the person to whom the writ is sent. That duty may have originated in one way or in another. It may, as is alleged in the present case, have arisen from the acceptance of an office which has imposed the duty upon its incumbent. But no matter out of what facts or relations the duty has grown, what the law regards, and what it seeks to enforce by a writ of

mandamus, is the personal obligation of the individual to whom it addresses the writ. If he be an officer, and the duty be an official one, still the writ is aimed exclusively against him as a person, and he, only, can be punished for disobedience. The writ does not reach the office. It cannot be directed to it. It is therefore, in substance, a personal action, and it rests upon the averred and assumed fact that the defendant has neglected or refused to perform a personal duty, to the performance of which by him the relator has a clear right. Hence, it is an im-

[441]perative rule that, previous *to making application for a writ to command the performance of any particular act, an express and distinct demand or request to perform it must have been made by the relator or prosecutor upon the defendant, and it must appear that he refused to comply with such demand, either in direct terms, or by conduct from which a refusal can be conclusively inferred. Thus, it is the personal default of the defendant that warrants impetration of the writ, and, if a peremptory mandamus be awarded, the costs must fall upon the defendant." The court proceeded: "It necessarily follows from this that, on the death or retirement from office of the original defendant, the writ must abate in the absence of any statutory provision to the contrary. When the personal duty exists only so long as the office is held, the court cannot compel the defendant to perform it after his power to perform has ceased. And, if a successor in office may be substituted, he may be mulcted in costs for the fault of his predecessor, without any delinquency of his own. Besides, were a demand made upon him, he might discharge the duty and render the interposition of the court unnecessary. At all events, he is not in privity with his predecessor; much less is he his predecessor's personal representative. As might be expected, therefore, we find no case in which such a substitution as is asked for now has ever been allowed in the absence of some statute authorizing it."

That case was followed by *United States ex rel. Warden v. Chandler*, 122 U. S. 643, 30 L. ed. 1244; *United States ex rel. Long v. Lochren*, 164 U. S. 701, 41 L. ed. 1181, 17 Sup. Ct. Rep. 1001; *Warner Valley Stock Co. v. Smith*, 165 U. S. 28, 41 L. ed. 621, 17 Sup. Ct. Rep. 225, and *United States ex rel. Bernardin v. Butterworth*, 169 U. S. 600, 604, 605, 42 L. ed. 873, 874, 875, 18 Sup. Ct. Rep. 441. In the latter case the court, after referring to prior cases, concluded its opinion in these words: "In view of the inconvenience, of which the present case is a

striking instance, occasioned by this state of the law, it would seem desirable that Congress should provide for the difficulty by enacting that, in the case of suits against the heads of departments abating by death or resignation, it should be lawful for the successor in office to be brought into the case by petition, or some other appropriate method."

*Later, Congress, its attention being thus [442] called to the matter, passed the act of February 8th, 1899, chap. 121, by which it was provided "that no suit, action, or other proceeding lawfully commenced by or against the head of any department or bureau or other officer of the United States, in his official capacity, or in relation to the discharge of his official duties, shall abate by reason of his death, or the expiration of his term of office, or his retirement, or resignation, or removal from office; but in such event the court, on motion or supplemental petition filed at any time within twelve months thereafter, showing a necessity for the survival thereof to obtain a settlement of the questions involved, may allow the same to be maintained by or against his successor in office, and the court may make such order as shall be equitable for the payment of costs." 30 Stat. at L. 822, U. S. Comp Stat. 1901, p. 697.

In view of the reasons assigned, in the *Boutwell Case*, for the inability of the court, in mandamus proceedings, to substitute an existing public officer as a party in the place of his predecessor, who had ceased to be in office, we perceive no reason why, under the act of 1899, the successor of Judge Baker may not be now made a party in his stead. Certainly, the statute authorizes that to be done if, in the judgment of the court, there is a necessity for such action in order to obtain a settlement of the legal question involved. We think such a necessity exists in this case, and, as Judge Abbott waives any formal summons, and consents to the substitution of his name in place of that of Judge Baker, the motion of appellant is granted, and such substitution is ordered to be and is now made, subject, however, to the condition that he shall not be liable for any costs prior to this date.

We come now to the merits of the case.

The act under which the territory of New Mexico was created and organized, approved September 9th, 1850, provides that the legislative power of the territory of New Mexico should extend to all rightful subjects of legislation consistent with the Constitution of the United States. The same act *divides [443] the territory into three judicial districts, and requires a district court to be held in each of such districts by one of the justices

of the territorial supreme court. It also provides: "Each of the said district courts shall have and exercise the same jurisdiction, in all cases arising under the Constitution and laws of the United States, as is vested in the circuit and district courts of the United States. . . ." [9 Stat. at L. 450, chap. 49, § 10.] This provision was retained in the Revised Statutes of the United States. § 1910.

The present case clearly arises under the laws of the United States; for the action brought in the territorial district court was expressly based on the Interstate Commerce Act of 1887 and the anti-trust act of 1890.

And the question arises upon the very face of the record, whether the territorial district court could take cognizance at all of suits for damages authorized by those acts. We have seen that by § 9 of the above act of 1887 any person or persons alleged to have been damaged by a common carrier, embraced by the provisions of that act, may bring suit in his or their own behalf "in any district or circuit court of the United States of competent jurisdiction;" and, by the above act of 1890, any person injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by that act may sue therefor "in any circuit court of the United States in the district in which the defendant resides or is found."

Although by the statutes in force prior to the passage of the Interstate Commerce (1887) and anti-trust acts (1890), the territorial district courts of New Mexico were given the same jurisdiction in cases arising under the Constitution and laws of the United States as is vested in the circuit and district courts of the United States, are those acts to be construed as excepting from the general jurisdiction of the territorial district courts cases that may arise under them? In other words, can a suit for damages under either of those acts be brought in any court except, under the act of 1887, [444] in a circuit *or district court of the United States, and, under the act of 1890, in a circuit court of the United States? Did Congress intend that only courts of the United States, invested by the 3d article of the Constitution with the judicial power of the United States (*McAllister v. United States*, 141 U. S. 174, 35 L. ed. 693, 11 Sup. Ct. Rep. 949), should have original jurisdiction of suits of that character? The questions suggested by these inquiries were not much discussed by counsel, and we pass them as being, in our view of the case, not necessary to be now decided; for, if a controversy like that raised by the plaintiff is equally cognizable by a territorial district court, or by a circuit or district court of the United States, it would still remain to inquire whether the defendant company was brought before the court in which the suit was instituted in such a way that a personal judgment could be rendered against it?

It is firmly established that a court of justice cannot acquire jurisdiction over the person of a defendant, "except by actual service of notice within the jurisdiction upon him, or upon someone authorized to accept service in his behalf, or by his waiver, by general appearance or otherwise, of the want of due service." *Goldey v. Morning News*, 156 U. S. 521, 39 L. ed. 518, 15 Sup. Ct. Rep. 559; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Mexican C. R. Co. v. Pinkney*, 149 U. S. 209, 37 L. ed. 705, 13 Sup. Ct. Rep. 859; *United States v. American Bell Teleph. Co.* 29 Fed. 17. This principle is applicable to all courts.

We are of opinion that the service of summons upon Ripley, as president, while he was passing through the territory on a railroad train was insufficient as a personal service on the company of which he was president. It is true that the company owned lands in the territory, but its office, at the which the meetings of its directors were held, was in the city of New York, while the office of its land commissioner was at Topeka, Kansas, and the office of its president was at Chicago, Illinois. The mere ownership of lands in New Mexico, or the bringing of suits there to protect its lands against trespasses, could not have had the effect to put the company into that territory for the purposes of a personal action against it, based on service *of sum-[445] mons upon one of its officers while passing through the territory on a railroad train. If by the laws of New Mexico a party having a cause of action against the company, based on the acts of 1889 and 1890, could have sued out an attachment and caused it to be levied upon its lands in the territory in order to secure the satisfaction of any judgment he might finally obtain in such action,—upon which point we express no opinion,—it would not follow that a personal judgment could have been rendered against the company. In such case the judgment of the court could not affect anything except the lands attached. No personal judgment could have been rendered against the company by reason merely of such attachment.

It is contended that the case is covered by § 450 of the Compiled Laws of New Mexico, 1897. That section provides that, "in suits against any corporation, summons shall be

served in that county where the principal office of the corporation is kept, or its principal business carried on, by delivering a copy to the president thereof, if he may be found in said county, but, if he is absent therefrom, then the summons shall be served in like manner in the county, on either the vice president, secretary, treasurer, cashier, general agent, general superintendent or stockholder, or any agent of said corporation, within such time and under such rules as are provided by law for the service of such process in suits against real persons, and, if no such person can be found in the county where the principal office of the corporation is kept, or in the county where its principal business is carried on, to serve such process upon, a summons may issue from either one of such counties, directed to the sheriff of any county in this territory where any such person may be found and served with process. If such corporation keeps no principal office in any county, and there is no county in which the principal business of such corporation is carried on, then suit may be brought against it in any county where the above-mentioned officers, or any or either of them, may be found: *Provided*, That the plaintiff

[446] may, *in all cases, bring his action in the county where the cause of action accrued."

Counsel for appellant substantially concedes that this statute applies only to domestic corporations,—that is, corporations created by, or organized under, territorial enactments. But, if it is to be assumed that these provisions could be made applicable to a corporation created by an act of Congress, and that, for the purposes of suit, such a corporation may be deemed a domestic corporation in any state or territory which it might lawfully enter, still, it is evident that the above section cannot avail the plaintiff. The Santa Fé Railroad Company, when sued in the territorial district court, was not an inhabitant of the district within the meaning of the local statute; it had no principal or other office in the territory; nor did it have an officer who could, in a legal sense, be "found" there; nor did it, in any just sense, carry on business in the territory. The company simply owned lands there, and that fact was not sufficient by itself to bring the case within the provisions of the territorial statute. This state of the law may sometimes operate injuriously upon those who may wish to sue the railroad company in the territorial courts. But the situation cannot be changed by the courts. That can only be done by legislation.

For the reasons stated the judgment of the Supreme Court of the Territory must be affirmed.

*EDMUND J. SMILEY, *Plff. in Err.*, [447]
v.

STATE OF KANSAS.

(See S. C. Reporter's ed. 447-457.)

Error to state court—questions of fact—construction of state statute—constitutional law—freedom to contract—validity of Kansas anti-trust law.

1. The verdict of the jury settles all questions of fact on a writ of error from the United States Supreme Court to a state court.
2. The scope and meaning of a state statute as determined by the highest court of the state conclude the Federal Supreme Court in determining, on writ of error to the state court, whether or not such statute violates the Federal Constitution.
3. The freedom to contract protected by U. S. Const. 14th Amend. is not unduly abridged by so much of the Kansas anti-trust law of March 8, 1897, as is construed by the state courts to forbid inducing four competitive wheat buyers in a single town to enter into an agreement under which, if either should purchase more than one fourth of the wheat coming into the market, he should pay the others 3 cents a bushel for the excess.

[No. 13.]

Argued October 20, 21, 1904. Decided February 20, 1905.

IN ERROR to the Supreme Court of the State of Kansas to review a judgment which affirmed a conviction in the District

NOTE.—On the validity and effect of modern anti-trust laws—see note to *Whitwell v. Continental Tobacco Co.* 64 L. R. A. 689.

As to what questions generally the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to *Missouri ex rel. Hill v. Dockery*, 63 L. R. A. 571.

Review of questions of fact on writ of error to a state court.

The decision of a state court upon a pure question of fact cannot be reviewed by the Federal Supreme Court on writ of error to the state court. *Cornell University v. Flske*, 136 U. S. 152, 34 L. ed. 427, 10 Sup. Ct. Rep. 775; *Dower v. Richards*, 151 U. S. 658, 30 L. ed. 305, 14 Sup. Ct. Rep. 452; *Re Buchanan*, 158 U. S. 31, 39 L. ed. 884, 15 Sup. Ct. Rep. 723; *Bartlett v. Lockwood*, 160 U. S. 357, 40 L. ed. 455, 16 Sup. Ct. Rep. 334; *Central P. R. Co. v. California*, 162 U. S. 91, 40 L. ed. 903, 16 Sup. Ct. Rep. 766; *Noble v. Mitchell*, 164 U. S. 367, 41 L. ed. 472, 17 Sup. Ct. Rep. 110; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *Hedrick v. Atchison, T. & S. F. R. Co.* 167 U. S. 673, 42 L. ed. 320, 17 Sup. Ct. Rep. 922; *Turner v. New York*, 168 U. S. 90, 42 L. ed. 392, 18 Sup. Ct. Rep. 38; *Backus v. Fort Street Union Depot Co.* 169 U. S. 557, 42 L. ed. 853, 18 Sup. Ct. Rep. 445; *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488; *New York v. Roberts*, 171 U. S. 658, 43 L. ed. 323, 19

Court of Rush County, in that State, of a violation of the anti-trust law. *Affirmed.*

See same case below, 65 Kan. 240, 69 Pac. 199.

Statement by Mr. Justice Brewer:

On March 8, 1897, the legislature of Kansas passed an act, the 1st section of which is as follows:

"Sec. 1. A trust is a combination of capital, skill, or acts, by two or more persons, firms, corporations, or associations of persons, or either two or more of them, for either, any, or all of the following purposes: First.—To create or carry out restrictions in trade or commerce or aids to commerce,

or to *carry out restrictions in the full and [448] free pursuit of any business authorized or permitted by the laws of this state. Second.—To increase or reduce the price of merchandise, produce, or commodities, or to control the cost or rates of insurance. Third.—To prevent competition in the manufacture, making, transportation, sale, or purchase of merchandise, produce, or commodities, or to prevent competition in aids to commerce. Fourth.—To fix any standard or figure, whereby its price to the public shall be, in any manner, controlled or established, any article or commodity of merchandise, produce, or commerce intended for sale, use, or consumption in this state. Fifth.—

Sup. Ct. Rep. 58; Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co. 172 U. S. 475, 43 L. ed. 521, 19 Sup. Ct. Rep. 247; Kaokuk & H. Bridge Co. v. Illinois, 175 U. S. 626, 44 L. ed. 299, 20 Sup. Ct. Rep. 205; Louisville & N. R. Co. v. Schmidt, 177 U. S. 230, 44 L. ed. 747, 20 Sup. Ct. Rep. 620; Western U. Teleg. Co. v. Call Pub. Co. 181 U. S. 92, 45 L. ed. 765, 21 Sup. Ct. Rep. 561; Jenkins v. Neff, 186 U. S. 230, 46 L. ed. 1140, 22 Sup. Ct. Rep. 905; Thayer v. Spratt, 189 U. S. 346, 47 L. ed. 845, 23 Sup. Ct. Rep. 576; Kaufman v. Tredway, 195 U. S. 271, ante 190, 25 Sup. Ct. Rep. 33.

A finding of the court upon a question of fact, or upon a mixed question of law and fact, which would be concluded by the verdict of the jury, is as much within this rule as the verdict itself would be. Republican River Bridge Co. v. Kansas P. R. Co. 92 U. S. 315, 23 L. ed. 515.

Any doubt as to the application of this rule to equity cases, which might otherwise arise from the decisions in *Lytle v. Arkansas*, 22 How. 193, 16 L. ed. 306; *Barton v. Geller*, 108 U. S. 161, 27 L. ed. 687, 2 Sup. Ct. Rep. 387; *Republican River Bridge Co. v. Kansas P. R. Co.* 92 U. S. 315, 23 L. ed. 515; *Lammers v. Nissen*, 154 U. S. 650 Appx. and 25 L. ed. 562, 14 Sup. Ct. Rep. 1189; *Dower v. Richards*, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452; *Clipper Min. Co. v. Ell Min. & Land Co.* 194 U. S. 220, 48 L. ed. 944, 24 Sup. Ct. Rep. 632,—must be deemed resolved by the refusal, on the ground of lack of power, in *Egan v. Hart*, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300, to review the findings of fact on which the decree of the state court in an injunction suit rested.

The affirmance by the highest state court of the judgment of the court below, although by a divided court, constitutes such an affirmance of the findings of fact of the lower court as to conclude the Federal Supreme Court in reviewing the judgment of the highest state court. *Minneapolis & St. L. R. Co. v. Minnesota*, 193 U. S. 53, 48 L. ed. 614, 24 Sup. Ct. Rep. 396.

Whatever was a question of fact in the state court is a question of fact on writ of error from the Federal Supreme Court to that court. *Chicago & A. R. Co. v. Wiggins Ferry Co.* 119 U. S. 615, 30 L. ed. 519, 7 Sup. Ct. Rep. 398; *Hanley v. Donoghue*, 116 U. S. 1, 29 L. ed. 535, 6 Sup. Ct. Rep. 242; *Eastern Bldg. & L. Asso. v. Ebaugh*, 185 U. S. 114, 46 L. ed. 830, 22 Sup. Ct. Rep. 566.

The laws of one state being matters of fact to be proved in the courts of another state, a finding as to such laws, based upon the decisions of the courts of that state introduced in

evidence, is binding on writ of error from the Federal Supreme Court. *Eastern Bldg. & L. Asso. v. Ebaugh*, 185 U. S. 114, 46 L. ed. 830, 22 Sup. Ct. Rep. 566.

It is somewhat difficult to reconcile with this decision the action taken in *Laing v. Rigney*, 160 U. S. 531, 40 L. ed. 525, 16 Sup. Ct. Rep. 366, where the court went behind the finding of a state court as to the law of another state, based upon the opinion of an attorney, as an expert, that a decree could not be rendered upon a supplemental bill without new process served upon the defendant within the state, and reversed the judgment under review because full faith and credit were not given to such decree. The court's answer to the objection that the finding was conclusive was that the contention that there was no evidence to support a finding of fact presented a question of law reviewable in a court on error. But its decision rests on the ground that the expert opinion was insufficient to show the law of the state, as against an actual rendition of such a decree by the chancellor, which would seem rather to be a question of preponderance of evidence than one respecting the entire absence of evidence to support the finding.

This distinction between questions respecting the preponderance of testimony and the entire absence of evidence in support of the finding is recognized in *German Sav. & L. Soc. v. Dormitzer*, 192 U. S. 125, 48 L. ed. 373, 24 Sup. Ct. Rep. 221, where the fact that there was some evidence warranting a finding of the Washington supreme court that plaintiff in a divorce proceeding in Kansas was not domiciled therein, so as to confer jurisdiction on the Kansas court, was regarded as sufficient to conclude the Federal Supreme Court. "It may very well be," said Mr. Justice Holmes, "that, if the supreme court of Washington had undertaken to deny the jurisdiction of the Kansas tribunal without evidence impeaching it, such an evasion of the Constitution would not be upheld. . . . There was evidence warranting the finding, and, that being so, we take the facts as they were found."

A finding by a state court that warrants issued under and by virtue of certain acts of the state legislature were issued with intent to have them circulate as money is not a finding of fact, but is in the nature of a legal conclusion reviewable on writ of error from the Supreme Court of the United States. *Houston & T. C. R. Co. v. Texas*, 177 U. S. 66, 44 L. ed. 673, 20 Sup. Ct. Rep. 545.

To make or enter into, or execute or carry out, any contract, obligation, or agreement of any kind or description by which they shall bind or have to bind themselves not to sell, manufacture, dispose of, or transport any article or commodity, or article of trade, use, merchandise, commerce, or consumption below a common standard figure, or by which they shall agree in any manner to keep the price of such article, commodity, or transportation at a fixed or graded figure, or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves and others, to preclude a free and unrestricted competition among themselves or others in transportation, sale, or manufacture of any such article or commodity, or by which they shall agree to pool, combine, or unite any interest they may have in connection with the manufacture, sale, or transportation of any such article or commodity, that its price may in any manner be affected. And any such combinations are hereby declared to be against public policy, unlawful, and void." Laws of Kansas, 1897, p. 481. [2 Kan. Gen. Stat. 1897, p. 791.]

[449] Subsequent sections prescribe penalties, and provide procedure for enforcing the act. On September 27, 1901, the county attorney filed in the district court of Rush county, Kansas, an information charging that the defendant did, on November 20, 1900, "then and there unlawfully enter into an agreement, contract, and combination, in the county of Rush *and the state of Kansas, with divers and sundry persons, partnerships, companies, and corporations of grain dealers and grain buyers in the town of Bison, in the said county and state aforesaid, to wit, Humburg & Ahrens, the La Crosse Lumber & Grain Company, the Bison Milling Company, and George Weicken, who were at the said time and place competitive grain dealers and buyers, to pool and fix the price the said grain dealers and buyers should pay for grain at the said place, and to divide between them the net earnings of the said grain dealers and buyers, and to prevent competition in the purchase and sale of grain among the said dealers and buyers." A trial was had, the defendant was found guilty, and sentenced to pay a fine of \$500, and to imprisonment in the county jail for three months. On appeal to the supreme court of the state the judgment was affirmed. 65 Kan. 240, 69 Pac. 199. Whereupon this writ of error was sued out.

Mr. H. Whiteside argued the cause and filed a brief for plaintiff in error:

The statute in question is an unwarranted attempt upon the part of the legislature to

limit the rights of the individual in the matter of contracting and dealing with his fellow men.

2 Eddy, Combinations, §§ 679, 681, 905; *Niagara F. Ins. Co. v. Cornell*, 110 Fed. 816; *Re Grice*, 79 Fed. 627.

The fact that the Federal anti-trust law has been held constitutional is no argument in favor of the constitutionality of the Kansas statute.

Addyston Pipe & Steel Co. v. United States, 175 U. S. 211-228, 44 L. ed. 136-142, 20 Sup. Ct. Rep. 96.

The mode of construing a state act clear on its face, adopted by the court below, is against the great weight of authority.

Central Branch Union P. R. Co. v. Atchison, T. & S. F. R. Co. 28 Kan. 457; *Warren v. Charlestown*, 2 Gray, 84; *Slauson v. Racine*, 13 Wis. 399; *Meshmeier v. State*, 11 Ind. 482; *McCluskey v. Cromwell*, 11 N. Y. 601; *Waller v. Harris*, 20 Wend. 562, 32 Am. Dec. 590; *Newell v. People*, 7 N. Y. 97; *Hyatt v. Taylor*, 42 N. Y. 258; *Johnson v. Hudson River R. Co.* 49 N. Y. 455; *Alexander v. Worthington*, 5 Md. 485; *Sutherland, Stat. Constr.* p. 237; *United States v. Reese*, 92 U. S. 214, 23 L. ed. 563; *United States v. Harris*, 106 U. S. 629, 27 L. ed. 290, 1 Sup. Ct. Rep. 601; *Encking v. Simmons*, 28 Wis. 272; *State v. Lovell*, 23 Iowa, 304; *Woodbury v. Berry*, 18 Ohio St. 456; *Dudley v. Reynolds*, 1 Kan. 285; *Fitzpatrick v. Gebhart*, 7 Kan. 35; *Ayers v. Trego County*, 37 Kan. 240, 15 Pac. 229; *State v. Chapman*, 33 Kan. 134, 5 Pac. 768.

The Federal courts will not always follow state court constructions.

Burgess v. Seligman, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 44; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Railroad & Teleph. Cos. v. Board of Equalizers*, 85 Fed. 302; *Neal v. Delaware*, 103 U. S. 370, 26 L. ed. 567; *Ex parte Virginia*, 100 U. S. 339, 25 L. ed. 676; *Henderson v. New York (Henderson v. Wickham)* 92 U. S. 259, 23 L. ed. 543; *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627; *Myrick v. Michigan C. R. Co.* 107 U. S. 102, 27 L. ed. 325, 1 Sup. Ct. Rep. 425; *Missouri, K. & T. R. Co. v. Elliott*, 184 U. S. 531, 46 L. ed. 673, 22 Sup. Ct. Rep. 446; *Roller v. Holly*, 176 U. S. 408, 44 L. ed. 524, 20 Sup. Ct. Rep. 410.

They are disregarded in all matters of general law or of great importance.

See *James v. Bowman*, 190 U. S. 127, 47 L. ed. 979, 23 Sup. Ct. Rep. 678.

All agreements which may affect prices of commodities and the conduct of business are not unlawful, and cannot be made so by legislatures.

Jones v. Fell, 5 Fla. 510; *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350; *Central Shade Roller Co. v. Cushman*, 143 Mass. 353, 9 N. E. 629; *Herriman v. Menzies*, 115 Cal. 16, 35 L. R. A. 318, 56 Am. St. Rep. 82, 46 Pac. 730, 44 Pac. 660; *Leslie v. Lorillard*, 110 N. Y. 519, 1 L. R. A. 456, 18 N. E. 363; *Matthews v. Associated Press*, 136 N. Y. 333, 32 Am. St. Rep. 741, 32 N. E. 981; *Eddy, Combinations*, §§ 262, 288, 332; *Macaulay v. Tierney*, 19 R. I. 255, 37 L. R. A. 455, 61 Am. St. Rep. 770, 33 Atl. 1; *Bohn Mfg. Co. v. Hollis (Bohn Mfg. Co. v. Northwestern Lumbermen's Asso.)* 54 Minn. 223, 21 L. R. A. 337, 40 Am. St. Rep. 319, 55 N. W. 1119; *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; *Hopkins v. United States*, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; *Anderson v. United States*, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50.

The conviction of plaintiff in error was not obtained and sustained by due process of law, in a constitutional sense.

10 Am. & Eng. Enc. Law, 2d ed. p. 293; *Weimer v. Bunbury*, 30 Mich. 201; *Brown v. Levee Comrs.* 50 Miss. 468; *Re Ah Lee*, 6 Sawy. 410, 5 Fed. 899; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *Pennoyer v. Neff*, 95 U. S. 733, 24 L. ed. 572; *Rees v. Watertown*, 19 Wall. 107, 22 L. ed. 72; *Burton v. Platter*, 4 C. C. A. 95, 10 U. S. App. 657, 53 Fed. 901; *Lowc v. Kansas*, 163 U. S. 81, 41 L. ed. 78, 16 Sup. Ct. Rep. 1031.

Mr. D. R. Hite argued the cause, and, with *Messrs. H. J. Bone* and *C. C. Coleman*, filed a brief for defendant in error:

This court may only inquire whether the trial court prescribed any rule of law for the guidance of the jury, that was in absolute disregard of the defendant's right to be tried by due process of law.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226-246, 41 L. ed. 979-988, 17 Sup. Ct. Rep. 581.

Since the trial court had jurisdiction of the subject-matter and of the parties, the facts found by the jury are conclusive in this court.

Missouri, K. & T. R. Co. v. Haber, 169 U. S. 639, 42 L. ed. 887, 18 Sup. Ct. Rep. 488.

Investigation must be confined to the grievance of the plaintiff in error.

Waters-Pierce Oil Co. v. Texas, 177 U. S. 28-43, 44 L. ed. 657-663, 20 Sup. Ct. Rep. 518; *Clark v. Kansas City*, 176 U. S. 114, 44 L. ed. 392, 20 Sup. Ct. Rep. 284.

In the police power of the state there is abundant authority for the enactment of regulations to protect the citizens against the unreasonable exactions of those who, by reason of their position in the community and their relation to the public, are not en-

titled to insist upon the unrestricted rights of contract which otherwise might be conceded to them.

Munn v. Illinois, 94 U. S. 113-126, 24 L. ed. 77-84.

When it is conceded that the state has power to control and regulate its domestic commerce by prohibiting the entering into or carrying out of combinations to restrict the full and free pursuit of a lawful calling, it is purely a matter of legislative discretion whether it shall exert this power by prohibiting such combinations in relation to all lawful business or trade irrespective of the magnitude of such business or trade, or confine it to combinations affecting large enterprises.

Brass v. North Dakota, 153 U. S. 391-402, 38 L. ed. 757-760, 4 Inters. Com. Rep. 670, 14 Sup. Ct. Rep. 857; *Northern Securities Co. v. United States*, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436.

The act of 1897, as interpreted by the Kansas supreme court, is not repugnant to the Federal Constitution.

Waters-Pierce Oil Co. v. Texas, 177 U. S. 28-43, 44 L. ed. 657-663, 20 Sup. Ct. Rep. 518; *United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; *United States v. Addyston Pipe & Steel Co.* 46 L. R. A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271.

The ordinary lawful contract between natural persons for a legitimate purpose is not, in ordinary language, described by the word "combination."

Bouvier, Law Dict. Rawle's Revision, *Combination*; *Spelling*, *Trusts & Monopolies*, *Trust*, § 120; *Century Dict.* *Combine*, *Trust*; *Standard Dict.* *Combination*, *Combine*.

The Constitution nowhere assures to anyone the right to engage in such unlawful business transactions, or to enter into contracts injurious to the public. *Sic utere tuo ut alienum non lædas* is the limitation upon the right of contract, as well as upon every other conventional right.

Com. v. Alger, 7 Cush. 53.

The rule of interpretation applied by the state court to the statute here in question has been applied by this court, time and again, where the propriety of its use had much less excuse than to save a statute from the taint of unconstitutionality.

Church of Holy Trinity v. United States, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511; *United States v. Laws*, 163 U. S. 258, 41 L. ed. 151, 16 Sup. Ct. Rep. 998; *Hawaii v. Mankichi*, 190 U. S. 197, 47 L. ed. 1016, 23 Sup. Ct. Rep. 787.

The course of decision, by this court, of the great cases arising out of the govern-

ment's efforts to enforce the Sherman anti-trust act, furnishes a valuable and instructive argument in support of our contention that the exclusion from the act in question, by interpretation, of contracts and agreements only incidentally or remotely operating as restrictions upon trade, is wholly justifiable, and has been advocated by the most eminent counsel and acquiesced in by all of the members of this court without a thought or suggestion that such judicial interpretation would render the statute obnoxious to the principle that no person shall be deprived of his property except by due process of law. On the contrary, it was strenuously argued by eminent lawyers that even a more generous interpretation was essential to preserve the act from the taint of unconstitutionality.

United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; *United States v. Joint Traffic Asso.* 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; *Northern Securities Co. v. United States*, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436.

Mr. Justice **Brewer** delivered the opinion of the court:

The verdict of the jury settles all questions of fact.

In *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 639, 42 L. ed. 878, 887, 18 Sup. Ct. Rep. 488, it is said: "Much was said at [454] the bar about the finding of *the jury being against the evidence. We cannot enter upon such an inquiry. The facts must be taken as found by the jury, and this court can only consider whether the statute, as interpreted to the jury, was in violation of the Federal Constitution. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 242, 246, 41 L. ed. 979, 986, 988, 17 Sup. Ct. Rep. 581."

We pass, therefore, to a consideration of the questions of law. It is contended that the act of 1897 is in conflict with the 14th Amendment to the Federal Constitution, in that it unduly infringes the freedom of contract; that it is too broad, and not sufficiently definite, and that while some things are denounced which may be within the police power of the state, yet its language reaches to and includes matters clearly beyond the limits of that power, and that there is no such separation or distinction between those within and those beyond as will enable the courts to declare one part valid and another part void. We quote from the brief of counsel for plaintiff in error:

"Section one goes entirely too far, and is an unwarranted attempt upon the part of the legislature to limit the rights of the individual in the matter of contracting and dealing with his fellow men. The liberty to

contract is as much protected by the constitutional provisions above referred to as is the liberty of person, and any attempt to abridge or limit that right will be held void, unless such abridgment or limitation is necessary to preserve the peace and order of the community, or the life, liberty, and morals of individuals, in which cases it is held to be the proper exercise of the police power of the state."

It may be conceded, for the purposes of this case, that the language of the 1st section is broad enough to include acts beyond the police power of the state, and the punishment of which would unduly infringe upon the freedom of contract. At any rate we shall not attempt to enter into any consideration of that question. The supreme court of the state held that the acts charged and proved against the defendant were *clearly within the terms of the statute, as [455] well as within the police power of the state; and that the statute could be sustained as a prohibition of those acts irrespective of the question whether its language was broad enough to include acts and conduct which the legislature could not rightfully restrain.

It is well settled that in cases of this kind the interpretation placed by the highest court of the state upon its statutes is conclusive here. We accept the construction given to a state statute by that court. *St. Louis, I. M. & S. R. Co. v. Paul*, 173 U. S. 404, 408, 43 L. ed. 746, 19 Sup. Ct. Rep. 419; *Missouri, K. & T. R. Co. v. McCann*, 174 U. S. 580, 586, 43 L. ed. 1093, 1096, 19 Sup. Ct. Rep. 755; *Tullis v. Lake Erie & W. R. Co.* 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136. Nor is it material that the state court ascertains the meaning and scope of the statute as well as its validity by pursuing a different rule of construction from that we recognize. It may be that the views of the Kansas court in respect to this matter are not in harmony with those expressed by us in *United States v. Recse*, 92 U. S. 214, 23 L. ed. 563; *Trade-Mark Cases (United States v. Steffens)*, 100 U. S. 82, 25 L. ed. 550; *United States v. Harris*, 106 U. S. 629, 27 L. ed. 219, 1 Sup. Ct. Rep. 601; and *Baldwin v. Franks*, 120 U. S. 678, 30 L. ed. 766, 7 Sup. Ct. Rep. 656, 763. We shall not stop to consider that question nor the reconciliation of the supposed conflicting views suggested by the chief justice of the state. The power to determine the meaning of a statute carries with it the power to prescribe its extent and limitations, as well as the method by which they shall be determined.

The transaction, as shown by the testimony, was practically this: There were four dealers in wheat in Bison, a small village in Rush county, situated on the Missouri

Pacific Railroad. Three of them owned elevators and one a mill. They were competitors in the purchase of grain. The defendant was secretary of the State Grain Dealers' Association. He was not himself in the grain business, nor interested in that of either of the four dealers. He came to Bison for the purpose of investigating some claims of Bison firms against the Missouri Pacific Railroad. While there he induced these dealers to enter into an arrangement by which, if one bought and shipped more grain than the others, that excess purchaser would

[456] pay *them a certain per cent. As security for such agreement the parties deposited their checks for \$100 each with the defendant. They made to him weekly reports of the amount of grain purchased. If one had purchased more than his share, he paid the defendant three cents a bushel for the excess, and that amount was then divided among the other dealers. Upon these facts, under appropriate instructions, the jury found the defendant guilty.

That the transaction was within the letter of the statute, in that it tended to prevent competition in the purchase of merchandise, is not open to doubt. It is also within the spirit of the statute. It imposed an unreasonable restraint upon competition. It is stated by counsel for plaintiff in error in his brief that not far from Bison were a number of other small towns, at which the principal commercial business was the buying and selling of wheat. But where there were four buyers, as in Bison, apparently competing, farmers nearer to Bison than to other villages, if not farmers more remote, would naturally seek that place in order to benefit by the competition. They would find an apparent competition, and yet each buyer was restrained by this contract from seeking to purchase more than his fourth of the wheat coming to the market, or, if he purchased more, must necessarily, in order to make his profit, buy his wheat at least 3 cents a bushel less than what he might otherwise pay, that being the penalty for an excess purchase. It was not an open agreement in respect to price, nor one that enabled sellers to know in advance exactly what they could get for their wheat.

Undoubtedly there is a certain freedom of contract which cannot be destroyed by legislative enactment. In pursuance of that freedom parties may seek to further their business interests, and it may not be always easy to draw the line between those contracts which are beyond the reach of the police power and those which are subject to prohibition or restraint. But a secret arrangement, by which, under penalties, an apparently existing competition among all

[457] the dealers *in a community in one of the

necessaries of life is substantially destroyed, without any merging of interests through partnership or incorporation, is one to which the police power extends. That is as far as we need to go in sustaining the judgment in this case. That is as far as the supreme court of the state went. If other transactions are presented, in which there is an absolute freedom of contract beyond the power of the legislature to restrain, which come within the letter of any of the clauses of this statute, the courts will undoubtedly exclude them from its operation. As said by the supreme court of the state concerning the defendant's criticism of the breadth of this statute (p. 247, Pac. p. 201):

"He cannot be heard to object to the statute merely because it operates oppressively upon others. The hurt must be to himself. The case, under appellant's contention as to this point, is not a case of favoritism in the law. It is not a case of exclusion of classes who ought to have been included, the leaving out of which constitutes a denial of the equal protection of the law, but it is the opposite of that. It is a case of the inclusion of those who ought to have been excluded. Hence, unless appellant can show that he himself has been wrongfully included in the terms of the law, he can have no just ground of complaint. This is fundamental and decisively settled. *Kansas City v. Union P. R. Co.* 59 Kan. 427, 52 L. R. A. 321, 53 Pac. 468, affirmed under the title *Clark v. Kansas City*, 176 U. S. 114, 44 L. ed. 392, 20 Sup. Ct. Rep. 284; *Albany County v. Stanley*, 105 U. S. 305, 311, 26 L. ed. 1044, 1049; *Pittsburgh, C. C. & St. L. R. Co. v. Montgomery*, 152 Ind. 1, 71 Am. St. Rep. 301, 49 N. E. 582."

We see no error in the judgment of the Supreme Court of Kansas, and it is affirmed.

*ISAAC N. E. ALLEN *et al.*, *Plffs. in Err.*, [458]
v.

ALLEGHANY COMPANY.

(See S. C. Reporter's ed. 458-466.)

Error to state court—Federal question—full faith and credit—construction of statute of other state—sufficiency of pleadings—comity.

1. Whether or not a corporate contract entered

NOTE.—*Review of decisions of state courts presenting the question of full faith and credit.*

A Federal question which will sustain the exercise of the appellate jurisdiction of the Federal Supreme Court over state courts is presented by a contention in the state court that full faith and credit were not given to the judicial records and proceedings of a court of an-

into in contravention of the statutes regulating foreign corporations was, under the proper construction of such statutes, *ipso facto* void, and therefore unenforceable in the courts of another state, does not present a question under the full faith and credit clause of the Federal Constitution which will sustain the exercise by the Federal Supreme Court of its appellate jurisdiction over state courts.

2. A decision of the highest state court that a plea, when construed most strongly against the pleader, does not disclose the defense that the note in suit was given to a foreign corporation in pursuance of business carried on in another state without compliance with the statutory conditions upon which its right to do business there depended, involves purely a local question, which will not sustain a writ of error from the Federal Supreme Court.
3. Whether or not the courts of one state should, on principles of comity, permit an ac-

tion to be maintained on a contract entered into in contravention of the laws of another state, is not a Federal question which will sustain a writ of error from the Federal Supreme Court to a state court.

[No. 119.]

Argued January 11, 1905. Decided February 20, 1905.

IN ERROR to the Supreme Court of the State of New Jersey to review a judgment affirmed by the Court of Errors and Appeals of that State, enforcing a contract made in contravention of the statutes of another state regulating the conduct of business by foreign corporations. *Dismissed.*

See same case below, 69 N. J. L. 270, 55 Atl. 724.

other state. *Jacobs v. Marks*, 182 U. S. 583, 45 L. ed. 1241, 21 Sup. Ct. Rep. 865.

Whether a judgment or decree of one state has received full faith and credit in courts of another state is a Federal question. *Huntington v. Attrill*, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224; *Carpenter v. Strange*, 141 U. S. 87, 35 L. ed. 640, 11 Sup. Ct. Rep. 960; *Texas & P. R. Co. v. Southern P. R. Co.* 137 U. S. 48, 34 L. ed. 614, 11 Sup. Ct. Rep. 10; *Green v. Van Buskirk*, 5 Wall. 307, 18 L. ed. 599; *Great Western Teleg. Co. v. Purdy*, 162 U. S. 329, 40 L. ed. 986, 16 Sup. Ct. Rep. 810.

A question respecting full faith and credit is presented by a contention that a state court denied to the judgment of a circuit court of the United States, sitting in another state, the effect to which it is entitled by U. S. Const. art. 4, § 1, and U. S. Rev. Stat. § 905 (U. S. Comp. Stat. 1901, p. 677). *Hancock Nat. Bank v. Farnum*, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 506.

Whether a state court gave the same effect to a judgment of a circuit court of the United States as would be accorded to a judgment and decree of a state tribunal of equal authority is a Federal question. *Pendleton v. Russell*, 144 U. S. 640, 36 L. ed. 574, 12 Sup. Ct. Rep. 743.

A Federal question is presented by a contention that due effect to a decree of a Federal court was denied by the action of the court below in sustaining a plea of *res judicata* predicated on a decree of such Federal court, where a determination whether the court correctly applied the plea necessitates deciding whether, by sustaining such plea, rights were denied which were vested under another decree of the Federal court. *National Foundry & Pipe Works v. Oconto Water Supply Co.* 183 U. S. 216, 46 L. ed. 157, 22 Sup. Ct. Rep. 111.

The exercise of this jurisdiction, where the question is what effect shall be given by a state court to a judgment of a Federal court, might also be rested on the ground that the question is one respecting Federal authority. See, on this point, division IV. c, in note to *Apex Trausp. Co. v. Garbade*, 62 L. R. A. 513, on *What adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts.*

The correctness of a decision of a circuit court of the United States in another case between other parties, as to the liability of a town

on its bonds, is not a Federal question. *Winona & St. P. R. Co. v. Plainview*, 143 U. S. 371, 36 L. ed. 191, 12 Sup. Ct. Rep. 530.

A judicial state record must be authenticated as required by the act of Congress of May 26, 1790, or the Federal question whether the same effect has been given to it in another state as it has in its own cannot arise. *Caperton v. Bailard*, 14 Wall. 238, 20 L. ed. 885.

A claim that a state court did not give full faith and credit to the statute of another state, set out in the pleadings, and to the judicial decisions of that state thereon, does not raise a Federal question, where such statute and decisions were not proved. *Lloyd v. Matthews*, 155 U. S. 222, 39 L. ed. 128, 15 Sup. Ct. Rep. 70.

A question as to the full faith and credit which must, under the Federal Constitution, be accorded by the courts of one state to the statutes of another, is not raised by a contention respecting the proper construction of such statutes. *Glenn v. Garth*, 147 U. S. 360, 37 L. ed. 203, 13 Sup. Ct. Rep. 350; *Lloyd v. Matthews*, 155 U. S. 222, 39 L. ed. 128, 15 Sup. Ct. Rep. 70; *Banholzer v. New York L. Ins. Co.* 178 U. S. 402, 44 L. ed. 1124, 20 Sup. Ct. Rep. 972.

The question of the applicability, to the cause before the state court, of the statute of another state, is not one respecting the full faith and credit to be given such statute. *Johnson v. New York L. Ins. Co.* 187 U. S. 491, 47 L. ed. 273, 23 Sup. Ct. Rep. 194.

A controversy respecting the authority of a foreign corporation to make the contract in suit, under the general principles of law which govern corporate charters, irrespective of anything peculiar to the jurisprudence of the state by which the charter was granted, involves no question of the full faith and credit to be given to the legislation of such state. *Chicago & A. R. Co. v. Wiggins Ferry Co.* 119 U. S. 615, 30 L. ed. 519, 7 Sup. Ct. Rep. 398.

The question as to the effect which a state court should give to one of its own judgments is not Federal. *Phoenix F. & M. Ins. Co. v. Tennessee*, 161 U. S. 174, 40 L. ed. 660, 16 Sup. Ct. Rep. 471.

The question as to the construction to be given by the highest court of a state to its own judgment, in proceedings to charge a party thereto with contempt, is not Federal. *Newport Light Co. v. Newport*, 151 U. S. 527, 38 L. ed. 259, 14 Sup. Ct. Rep. 429.

A decision of a state court cannot be reviewed

Statement by Mr. Justice **Brown**:

This was a suit begun in the supreme court of New Jersey by the Alleghany Company, to recover the amount due upon a promissory note dated at New York, July 16, 1900, given by the plaintiffs in error, under the firm name of I. N. E. Allen & Co., for \$1,989.54, upon which payments amounting to \$1,000 were indorsed. The declaration was upon the common counts, but annexed was a copy of the note, with a notice that the action was brought to recover the amount due thereon. The defendants pleaded four several pleas:

1. General issue.

2. That the note was executed and delivered in the state of New York to the plaintiff company, a business corporation created

under the laws of North Carolina. That when said note was executed and delivered it was provided by the statute of the state of New York that—

“No foreign corporation . . . shall do[459] business in this state without having first procured from the secretary of state a certificate that it has complied with all the requirements of law to authorize it to do business in this state, and that the business of the corporation to be carried on in this state is such as may be lawfully carried on by a corporation incorporated under the laws of this state. . . . No foreign stock corporation doing business in this state shall maintain any action in this state, upon any contract made by it in this state,

in the Supreme Court of the United States as a denial of full faith and credit to an Hawaiian judgment, where the Federal right did not exist when the judgment of the trial court was rendered, because the Hawaiian Islands had not then been annexed to the United States, and such contention was not brought to the attention of the highest state court in any form. *Mutual L. Ins. Co. v. McGrew*, 188 U. S. 291, 47 L. ed. 480, 23 Sup. Ct. Rep. 375.

A decision of a state court which merely construes a statute of another state as inapplicable to the case before it, and does not deny the validity of such statute, does not amount to a decision against the full faith and credit claimed for such statute. *Johnson v. New York L. Ins. Co.* 187 U. S. 491, 47 L. ed. 273, 23 Sup. Ct. Rep. 194.

A decision by a state court that the notice required by a statute of another state in order to justify a forfeiture of a life insurance policy for nonpayment of the premium is not required on the maturity of a note given for an installment of the premium does not present any Federal question under the full faith and credit clause of the Federal Constitution, so as to give jurisdiction to the Supreme Court of the United States on writ of error, when such decision is based both on the authority of a decision of a court of such other state and upon an independent construction of the statute, even though the court erred in its construction both of the decision and of the statute. *Banholzer v. New York L. Ins. Co.* 178 U. S. 402, 44 L. ed. 1124, 20 Sup. Ct. Rep. 972.

The decision of the supreme court of South Carolina that a will probated in North Carolina was not a valid execution of a power of appointment given by a will executed in South Carolina by a citizen of that state rests upon the construction, alone, of the latter will, independent of any question with reference to the full faith and credit which should be accorded to the probate proceedings in North Carolina. *Blount v. Walker*, 134 U. S. 607, 33 L. ed. 1036, 10 Sup. Ct. Rep. 606.

But the fact that a state court, in addition to denying the effect claimed for a judgment of a sister state, decided the case upon a question of general law sufficiently broad to sustain the judgment, will not oust the Supreme Court of the United States of jurisdiction, where such question was not open to the state court to

decide, if it gave full faith and credit to the judicial proceedings of the state court, but had already been passed upon and determined by the court whose judgment was put in evidence. *Carpenter v. Strange*, 141 U. S. 87, 35 L. ed. 640, 11 Sup. Ct. Rep. 960.

And see note to *Mutual L. Ins. Co. v. McGrew*, 63 L. R. A. 33, on *How and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States*.

Where the Federal Supreme Court is reviewing a judgment of a state court on the ground that full faith and credit were not accorded the judicial proceedings of another state, it must judge for itself the true nature and effect of the order relied on. *Great Western Teleg. Co. v. Purdy*, 162 U. S. 329, 40 L. ed. 986, 16 Sup. Ct. Rep. 810.

Where a state court refused to enforce a judgment of a court of a sister state enforcing the statutory liability of a corporate director, because it was of the opinion that the statute was a penal one, the Federal Supreme Court is not bound by the construction given to such statute by the courts of the state in which it was enacted, but must determine for itself whether the original cause of action was penal in the international sense. *Huntington v. Attrill*, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224. “The case in this regard,” said Mr. Justice Gray, “is analogous to one arising under the clause of the Constitution which forbids a state to pass any law impairing the obligation of contracts. In which, if the highest court of a state decides nothing but the original construction and obligation of a contract, this court has no jurisdiction to review its decision; but if the state court gives effect to a subsequent law which is impugned as impairing the obligation of a contract this court has power, in order to determine whether any contract has been impaired, to decide for itself what the true construction of the contract is. *New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co.* 125 U. S. 18, 38, 31 L. ed. 607, 614, 8 Sup. Ct. Rep. 741. So, if the state court, in an action to enforce the original liability under the law of another state, passes upon the nature of that liability, and nothing else, this court cannot review its decision; but if the state court declines to give full faith and credit to a judg-

unless, prior to the making of such contract, it shall have procured such certificate."

The plea further averred that at the time of the making of the note the plaintiff was a business stock corporation, foreign to the state of New York, and had not theretofore procured from the secretary of state a certificate that it had complied with all the requirements of the law to authorize it to do business within the state, and that the business of said plaintiff was such as might be lawfully carried on by a corporation incorporated under the laws of said state for such or similar business, according to the form of the statute of New York in such case made and provided.

3. The third plea sets out that the note was made and executed in the state of Pennsylvania to the plaintiff company, a foreign corporation created under the laws of North Carolina.

That when said note was executed and delivered it was provided by the state of Pennsylvania that—

"1. No foreign corporation shall do any business in this commonwealth until said corporation shall have established an office or offices and appointed an agent or agents for the transaction of its business therein. 2. It shall not be lawful for any such corporation to do any business in this commonwealth until it shall have filed in the office of the secretary of the commonwealth a statement, under the seal of said corporation, and signed by the president or secretary thereof, showing the title and object of said corporation, the location of its office or offices, and the name or names of its attorney, *agent, or agents therein, and the certificate of the secretary of the commonwealth, under the seal of the commonwealth, of the filing of such statement, shall be preserved for public inspection by each of

[460]ment of another state, because of its opinion as to the nature of the cause of action on which the judgment was recovered, this court, in determining whether full faith and credit have been given to that judgment, must decide for itself the nature of the original liability."

The effect to be given by the courts of one state to provisions for bond, sequestration, receiver, and injunction, made in a decree for alimony of a court of another state, depends on local statutes and practice of that state, and cannot be inquired into by the Supreme Court of the United States in reviewing a judgment of a state court which is claimed to have denied full faith and credit to a judgment of a court of another state. *Lynde v. Lynde*, 181 U. S. 133, 45 L. ed. 810, 21 Sup. Ct. Rep. 555.

The interpretation of a state statute against usury, by a state court as applicable to a loan made by a foreign building and loan association to a resident of the state through a local agent, and as expressing the public policy of the state, which the parties could not by their contract contravene, is binding on the Supreme Court of the United States on a writ of error to review

said agents in each and every of said offices. 3. Any person or persons, agents, officers, or employees of any such foreign corporation, who shall transact any business within this commonwealth for any such foreign corporation, without the provisions of this act being complied with, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment, not exceeding thirty days, and by a fine not exceeding one thousand dollars, or either, at the discretion of the court trying the same."

The plea further averred that, at the making of the note, the plaintiff was a corporation foreign to the said commonwealth, and had not theretofore filed in the office of the secretary a statement showing the title and object of said plaintiff, the location of its office, and the name of its authorized agent therein, according to the form of said statute; yet, notwithstanding the premises, the plaintiff, at the time of the making of the said note, did business in the said commonwealth of Pennsylvania, contrary to the form of the said statute.

The plaintiff demurred to the second and third pleas, and, the demurrer being overruled, the cause was sent down to the Circuit Court of Hudson county for trial on an issue of fact raised by the fourth plea, which is not material here.

The trial judge there directed a verdict for the plaintiff, and upon appeal to the court of errors and appeals of New Jersey the judgment of the lower court was affirmed. 69 N. J. L. 270, 55 Atl. 724.

Mr. Alexander S. Bacon argued the cause and filed a brief for plaintiffs in error.

Mr. James A. Gordon argued the cause and filed a brief for defendant in error.

a judgment of the state court, which is claimed to have denied full faith and credit to the public records and acts of the state where the association is domiciled. *National Mut. Bldg. & L. Asso. v. Brahan*, 193 U. S. 635, 48 L. ed. 823, 24 Sup. Ct. Rep. 532.

See also note to Missouri *ex rel. Hill v. Dockery*, 63 L. R. A. 571, on *What questions the Federal Supreme Court will consider in reviewing the judgments of state courts.*

In addition to the notes hereinbefore referred to, other notes involving questions respecting the appellate jurisdiction of the Supreme Court of the United States over state courts are: *What the record must show respecting the presentation and decision of a Federal question in order to confer jurisdiction on the Supreme Court of the United States of a writ of error to a state court*, *Hooker v. Los Angeles*, 63 L. R. A. 471; *The record for this purpose*, *Home for Incurables v. New York*, 63 L. R. A. 329; *Practice and procedure governing the transfer of causes to the Federal Supreme Court on writ of error or appeal*, *Wedding v. Meyler*, 66 L. R. A. 833.

Mr. Justice **Brown** delivered the opinion of the court:

The defendants, plaintiffs in error here, pleaded that the note upon which suit was brought was executed in the state of New York, and that, under the laws of that state, no foreign corporation could do business there without a certificate of the secretary of state that it had complied with all the requirements of law to authorize it to do business there; and that no such corporation could maintain any action in that state unless, prior to the making of such contract, it had procured such certificate; that plaintiff was a foreign corporation within the meaning of the law, and had not procured a certificate.

The third plea was similar in terms, averring the note to have been made in Pennsylvania, whose statutes provided that foreign corporations should do no business in the state without filing a certain statement in the secretary's office and procuring the certificate of the secretary of the commonwealth, and further providing that the agent of any foreign corporation transacting business within the state, without complying with the provisions of the law, should be deemed guilty of a misdemeanor. The plea also averred noncompliance with those provisions.

Both the supreme court and the court of errors and appeals held that a contract made in contravention of these statutory regulations, though not enforceable in the [463] courts of New York and Pennsylvania, was not *ipso facto* void, and might be, notwithstanding such statutes, enforced in New Jersey.

Plaintiffs in error insist that by this ruling full faith and credit was denied by the courts of New Jersey to the statutes of New York and Pennsylvania, in contravention to § 1, article 4, of the Constitution.

By § 709 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 575), authorizing writs of error to the state courts, it is declared that final judgments, where is drawn in question the *validity* of a statute of any state, or any authority exercised under any state, on the ground of their being repugnant to the Constitution, etc., and the decision is in favor of their validity, may be re-examined here.

But the validity of these statutes was not denied. The case turned upon their construction and the effect to be given to them in another state. The New York statute directly, and the Pennsylvania indirectly, forbade the maintenance of actions "in this state." The Pennsylvania statute made it a misdemeanor to transact business without complying with the law. Neither statute declared the contract so made to be void, 196 U. S.

and it was apparently upon this ground that the New Jersey courts held that the case did not fall within those decisions where-in it is declared that a contract void by the *lex loci contractus* is void everywhere.

In several cases we have held that the construction of a statute of another state, and its operation elsewhere, did not necessarily involve a Federal question. The case is practically governed by that of the *Chicago & A. R. Co. v. Wiggins Ferry Co.* 119 U. S. 615, 30 L. ed. 519, 7 Sup. Ct. Rep. 398. In that case suit was brought in a state court by the ferry company against the railroad to recover damages for not employing the ferry company for the transportation of persons and property across the river, as by its contract it was bound to do. The defendant pleaded that it had no power to make the contract; that the same was in violation of the laws of Illinois, contrary to the public policy* thereof, and was [464] void. The statutes were put in evidence, but their construction and operative effect were disputed. The supreme court of the state held that the contract was interpreted correctly by the court below, and that it was not *ultra vires*, contrary to public policy, or in restraint of trade. It was argued here by the railroad company that, by law and usage of Illinois, the charter of the company in that state made the contract *ultra vires*. We held that the law of Illinois to that effect should have been proved as a fact, either by decisions of its courts or by law or usage in that state; that state courts are not charged with a knowledge of the laws of another state; but they have to be proved, and that, while Federal courts exercising their original jurisdiction are bound to take notice of the laws of the several states, yet this court, when exercising its appellate jurisdiction from state courts, whatever was the matter of fact in that court is matter of fact here (citing *Hanley v. Donoghue*, 116 U. S. 1, 29 L. ed. 535, 6 Sup. Ct. Rep. 242). We said: "Whether the charter of this company, in its operation on the contract now in suit, had any different effect in Illinois from what it would have, according to the principles of general law which govern like charters and like contracts in Missouri and elsewhere throughout the country, was, under this rule, a question of fact in the Missouri court, as to which no testimony whatever was offered."

No proof having been offered to support the averment that the contract was in violation of the laws of Illinois, the defense relying on the general claim that the contract was illegal, it was held that no Federal question was involved, and the case was dismissed. It was said that it should have

appeared on the face of the record that the facts presented for adjudication made it necessary for the court to consider the act of incorporation, in view of the peculiar jurisprudence in Illinois, rather than the general law of the land.

Since the above case we have repeatedly held that the mere construction by a state court of a statute of another state, without questioning its validity, does not, with possibly some *exceptions, deny to it the full faith and credit demanded by the statute in order to give this court jurisdiction. *Glenn v. Garth*, 147 U. S. 360, 37 L. ed. 203, 13 Sup. Ct. Rep. 350; *Lloyd v. Matthews*, 155 U. S. 222, 39 L. ed. 128, 15 Sup. Ct. Rep. 70; *Banholzer v. New York L. Ins. Co.* 178 U. S. 402, 44 L. ed. 1124, 20 Sup. Ct. Rep. 972; *Johnson v. New York L. Ins. Co.* 187 U. S. 491, 47 L. ed. 273, 23 Sup. Ct. Rep. 194; *Finney v. Guy*, 189 U. S. 335, 47 L. ed. 839, 23 Sup. Ct. Rep. 558.

The court of errors and appeals, conceding the general rule both in New Jersey and New York to be that a contract, void by the law of the state where made, will not be enforced in the state of the forum (*Columbia F. Ins. Co. v. Kinyon*, 37 N. J. L. 33, and *Hyde v. Goodnow*, 3 N. Y. 266), held that the state statute of New York did not declare the contract void, and that there was no decision in that state holding it to be so. In fact, the only case in the court of appeals in New York (*Neuchatel Asphalt Co. v. New York*, 155 N. Y. 373, 49 N. E. 1043) is the other way. The court of appeals in that case held that the purpose of the act was not to avoid contracts, but to provide effective supervision and control of the business carried on by foreign corporations; that no penalty for noncompliance was provided, except the suspension of civil remedies in that state, and none others would be implied. This corresponds with our rulings upon similar questions. *Fritts v. Palmer*, 132 U. S. 282, 33 L. ed. 317, 10 Sup. Ct. Rep. 93.

With respect to the Pennsylvania statute, the court held that, although the Pennsylvania courts had held that a contract made in violation of the Pennsylvania statute was void, yet that the third plea did not contain allegations which showed that the note was given in pursuance of business carried on in Pennsylvania, and not in consummation of a single transaction; and although it was averred that plaintiff did business in that state, it was not averred that the note had any connection with the business carried on in Pennsylvania, or that it was given for goods sold in Pennsylvania. The admitted averments may be true, and yet the note may have been given for an obligation contracted out of the state of Penn-

556

sylvania, and consequently, not in violation of its laws. *Construing the third plea most strongly against the pleader, the conclusion was that it disclosed no defense in the action. This was purely a local question, and is not assignable as error here.

Whether, aside from the Federal question discussed, the courts of New Jersey should have sustained this action upon principles of comity between the states, was also a question within the exclusive jurisdiction of the state court. *Finney v. Guy*, 189 U. S. 335, 47 L. ed. 839, 23 Sup. Ct. Rep. 558.

The writ of error must, therefore, be dismissed.

JAMES C. CORRY, *Plff. in Err.*,
v.

MAYOR AND COUNCIL OF BALTIMORE
et al.

(See S. C. Reporter's ed. 466-480.)

Constitutional law—due process of law—taxation of nonresident stockholder.

1. Due process of law is not denied a nonresident stockholder in a domestic corporation by the imposition, under Md. Code Pub. Gen. Laws, art. 81, as a condition of such ownership, of a personal liability for the taxes upon his stock, to be enforced by a personal action brought against him by the corporation to recover the amount of the tax which it is compelled to pay on his behalf.
2. Lack of any provision for notice to a nonresident stockholder in a domestic corporation of the assessment of taxes on his stock, or for opportunity for contest by him as to the correctness of the valuation, does not render invalid, as denying due process of law, so much of Md. Code Pub. Gen. Laws, art. 81, as imposes upon him, as a condition of such ownership, a personal liability for the taxes upon his stock, to be enforced by a personal action brought against him by the corporation to recover the amount of the tax which it is compelled to pay on his behalf, since that statute is construed by the state courts as constituting the corporation in legal effect the agent of the stockholders, to receive no-

NOTE.—As to what constitutes due process of law—see *Kuntz v. Sumption*, 2 L. R. A. 655, and note; *Re Gannon*, 5 L. R. A. 359, and note; *Ulman v. Baltimore*, 11 L. R. A. 224, and note; and *Gilman v. Tucker*, 13 L. R. A. 304, and note. And see notes to *People v. O'Brien*, 2 L. R. A. 255; *Pearson v. Yewdall*, 24 L. ed. U. S. 436; and *Wilson v. North Carolina*, 42 L. ed. U. S. 865.

On notice and hearing required to constitute due process of law—see notes to *Kuntz v. Sumption*, 2 L. R. A. 657; *Chauvin v. Vailton*, 3 L. R. A. 194; and *Ulman v. Baltimore*, 11 L. R. A. 225.

On taxation of nonresident shareholders in domestic corporations—see notes to *State Bd. of Equalization v. People*, 58 L. R. A. 580; and *Walker v. Jack*, 31 C. C. A. 467.

196 U. S.

tice and to represent them in proceedings for the correction of the assessment.

[No. 86.]

Argued December 8, 9, 1904. Decided February 20, 1905.

IN ERROR to the Court of Appeals of the State of Maryland to review a judgment which affirmed a judgment of the Circuit Court of Baltimore City, in that State, sustaining demurrers to, and dismissing, a bill to enjoin the collection of a tax on a non-resident stockholder in a domestic corporation. *Affirmed.*

See same case below, 96 Md. 310, 53 Atl. 942.

Statement by Mr. Justice **White**:

[467] *The New York & Baltimore Transportation Line was chartered in 1847 by the general assembly of Maryland, and it still exists by virtue of an extension in 1876 of its charter. At all times the corporation has maintained its principal office in the city of Baltimore.

James C. Corry, a resident and citizen of Pennsylvania, acquired 150 shares of the stock of the transportation line, having a face value of \$20 per share.

The 150 shares standing in Corry's name, as stated, were assessed for the years 1899 and 1900 for state and the municipal taxes of the city of Baltimore, the total taxes being \$43.27 for the year 1899 and \$36.49 for the year 1900. Conformably to the laws of Maryland, payment of said taxes was demanded of the transportation company. To restrain compliance with this demand, Corry commenced the present suit, making defendants to the bill of complaint the mayor and council of Baltimore, the treasurer of the city, the treasurer of the state, and the transportation company. The relief prayed was based on averments that the laws of Maryland under which the taxes were levied were repugnant to the state and Federal Constitutions, upon grounds specified in the bill. A decree was entered sustaining general demurrers, interposed by the various defendants, and dismissing the bill. This was affirmed by the court of appeals of Maryland. 96 Md. 310, 53 Atl. 942.

Messrs. William P. Maulsby and Edwin G. Baetjer argued the cause and filed a brief for plaintiff in error:

The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state.

State Tax on Foreign Held Bonds (Cleveland, P. & A. R. Co. v. Pennsylvania) 15 Wall. 319, 21 L. ed. 186; *Cooley, Taxn.* 3d 196 U. S.

ed. p. 249, 2d ed. pp. 159, 555; *Louisville & J. Ferry Co. v. Kentucky*, 188 U. S. 385, 397, 47 L. ed. 513, 518, 23 Sup. Ct. Rep. 463; *Dewey v. Des Moines*, 173 U. S. 193, 204, 43 L. ed. 665, 668, 19 Sup. Ct. Rep. 379; *M'Culloch v. Maryland*, 4 Wheat. 316, 429, 4 L. ed. 579, 607; *Fargo v. Hart*, 193 U. S. 490, 500, 48 L. ed. 761, 765, 24 Sup. Ct. Rep. 498; *Com. v. Standard Oil Co.* 101 Pa. 119; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 208, 29 L. ed. 158, 163, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *St. Louis v. Wiggins Ferry Co.* 11 Wall. 423, 20 L. ed. 192.

The state has no jurisdiction to assess a tax as a personal charge against a nonresident.

Cooley, Taxn. 3d ed. p. 24; *Dewey v. Des Moines*, 173 U. S. 193, 43 L. ed. 665, 19 Sup. Ct. Rep. 379; *Louisville & J. Ferry Co. v. Kentucky*, 188 U. S. 385, 47 L. ed. 513, 23 Sup. Ct. Rep. 463; *Baltimore v. Hussey*, 67 Md. 112, 9 Atl. 19.

Both the person and property may be within the state. The state has the full right of taxation *in personam* and *in rem*.

The person may be in the state and the property without.

(a) A tax may be levied *in personam* against the person on the basis of his worth, and the property included in ascertaining his worth.

Coe v. Errol, 116 U. S. 517, 524, 29 L. ed. 715, 717, 6 Sup. Ct. Rep. 475.

(b) The property so without the jurisdiction cannot be taxed *in rem*, either directly or indirectly.

Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385, 396, 397, 398, 47 L. ed. 513, 518, 519, 23 Sup. Ct. Rep. 463; *Fargo v. Hart*, 193 U. S. 490, 498, 48 L. ed. 761, 764, 24 Sup. Ct. Rep. 498.

The property may be within the state, but the person without.

(a) The property is subject to a tax *in rem*. This is directly within the power.

(b) The state has no power to tax the nonresident owner *in personam*.

Dewey v. Des Moines, 173 U. S. 193, 203, 204, 43 L. ed. 665, 668, 669, 19 Sup. Ct. Rep. 379; *New York v. McLean*, 170 N. Y. 374, 63 N. E. 380, 57 App. Div. 601, 68 N. Y. Supp. 606.

While a state may prescribe a variety of conditions under which such privileges may be enjoyed by a nonresident, and require him to submit to a number of conditions under which its own citizens enjoy the same privileges, there is one condition or duty of the citizen or resident to which the nonresident is not obliged to submit, *i. e.*, his personal subjection to its sovereignty.

Pennoyer v. Neff, 95 U. S. 733, 24 L. ed. 572; *Paul v. Virginia*, 8 Wall. 168, 180, 19

L. ed. 357, 360; *Corfield v. Coryell*, 4 Wash. C. C. 380, Fed. Cas. No. 3,230; *Slaughter-House Cases*, 16 Wall. 36, 76, 21 L. ed. 394, 408.

Even if it had the right, mere provisions for taxation in its Constitution and statutes, such as are here involved, would not indicate an intention to exercise such power.

Railroad Tax Case, 8 Sawy. 238, 13 Fed. 753.

The capital stock tax imposed by the revenue laws of the state of Maryland is a tax *in personam* on the stockholder, not a tax *in rem* on his shares.

Monticello Distilling Co. v. Baltimore, 90 Md. 416, 45 Atl. 210; *Carstairs v. Cochran*, 95 Md. 495, 52 Atl. 601; *The Tax Cases*, 12 Gill & J. 117; *Appeal Tax Court v. Patterson*, 50 Md. 354; *United States Electric Power & Light Co. v. State*, 79 Md. 63, 28 Atl. 768; *Crown Cork & Seal Co. v. State*, 87 Md. 696, 53 L. R. A. 417, 67 Am. St. Rep. 371, 40 Atl. 1074; *James Clark Distilling Co. v. Cumberland*, 95 Md. 468, 52 Atl. 661; *Hull v. Southern Development Co.* 89 Md. 8, 42 Atl. 943; *Donovan v. Firemen's Ins. Co.* 30 Md. 155; *American Coal Co. v. Allegany County*, 59 Md. 185.

The obligation to pay is imposed on the corporation. This, however, is not an obligation as taxpayer, but as tax collector; the primary tax obligation is on the shareholder.

Hull v. Southern Development Co. 89 Md. 8, 42 Atl. 943; *United States Electric Power & Light Co. v. State*, 79 Md. 63, 28 Atl. 768; *American Casualty Ins. Co's Case (Boston & A. R. Co. v. Mercantile Trust & D. Co.)* 82 Md. 535, 38 L. R. A. 97, 34 Atl. 778.

The obligations are in no way restricted in extent to dividends or to the stock.

New Orleans v. Houston, 119 U. S. 265, 276, 279, 30 L. ed. 411, 414, 415, 7 Sup. Ct. Rep. 198; *American Casualty Ins. Co's Case (Boston & A. R. Co. v. Mercantile Trust & D. Co.)* 82 Md. 535, 38 L. R. A. 97, 34 Atl. 778; *Stapylton v. Thaggard*, 33 C. C. A. 353, 62 U. S. App. 638, 91 Fed. 93.

The tax is, moreover, recoverable in assumption.

Dugan v. Baltimore, 1 Gill & J. 499; *Baltimore v. Howard*, 6 Harr. & J. 383; *Hull v. Southern Development Co.* 89 Md. 8, 42 Atl. 943; *American Casualty Ins. Co's Case (Boston & A. R. Co. v. Mercantile Trust & D. Co.)* 82 Md. 535, 38 L. R. A. 97, 34 Atl. 778; *American Coal Co. v. Allegany County*, 59 Md. 185.

This tax, it is to be noted, is not a tax on the corporation itself.

Donovan v. Firemen's Ins. Co. 30 Md. 155; *Hull v. Southern Development Co.* 89 Md. 8, 42 Atl. 943; *United States Electric Power & Light Co. v. State*, 79 Md. 63, 28 Atl. 768; *Crown Cork & Seal Co. v. State*, 87 Md.

696, 53 L. R. A. 417, 67 Am. St. Rep. 371, 40 Atl. 1074; *James Clark Distilling Co. v. Cumberland*, 95 Md. 468, 52 Atl. 661.

The tax is levied without due process of law, and is therefore in conflict with the 14th Amendment to the Constitution.

Cooley, Taxn. pp. 363, 364; *Railroad Tax Case*, 8 Sawy. 238, 13 Fed. 752.

Some opportunity must be afforded the owner to question the validity or amount of the assessment.

The notice need not be personal; it may be by publication, or a statute may give notice by fixing the time and place of hearing.

Winona & St. P. Land Co. v. Minnesota, 159 U. S. 526, 536, 40 L. ed. 247, 251, 16 Sup. Ct. Rep. 83; *Merchants' & M. Nat. Bank v. Pennsylvania*, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829; *Pittsburgh, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 421, 425, 38 L. ed. 1031, 1036, 14 Sup. Ct. Rep. 1114.

The time and place for hearing must be in some way prescribed.

State Railroad Tax Cases (Taylor v. Secor) 92 U. S. 575, 610, 23 L. ed. 663, 672; *Palmer v. McMahon*, 133 U. S. 669, 33 L. ed. 776, 10 Sup. Ct. Rep. 324; *Hagar v. Reclamation Dist.* 111 U. S. 701, 710, 28 L. ed. 569, 572, 4 Sup. Ct. Rep. 663. See also *Monticello Distilling Co. v. Baltimore*, 90 Md. 416, 45 Atl. 210.

The assessment of shareholders is not embraced in the general assessment law. The provisions for hearing and notice, in the general assessment law of property, are not applicable to the assessment of the shareholders. This assessment is the subject of a special proceeding before the state tax commissioner. His decision (subject only to the appeal provided for, to the treasurer and comptroller) is final. It is not subject to control by the courts, even in a case of mistake.

Salisbury Permanent Bldg. & L. Asso. v. Wicomico County, 86 Md. 615, 39 Atl. 425; *James Clark Distilling Co. v. Cumberland*, 95 Md. 468, 52 Atl. 661.

No hearing before assessment, other than the corporate return, was contemplated.

Monticello Distilling Co. v. Baltimore, 90 Md. 416, 45 Atl. 210; *Merchants' & M. Nat. Bank v. Pennsylvania*, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829; *Railroad Tax Case*, 8 Sawy. 238, 13 Fed. 750.

If any notice or opportunity is provided by the statute to the stockholders, it can only be on the theory that notice to the corporation is notice to the stockholders.

James Clark Distilling Co. v. Cumberland, 95 Md. 468, 52 Atl. 661.

But the question what constitutes an opportunity to be heard, or the elements of such opportunity, are Federal questions on

which the Supreme Court would not consider the decision of the state court conclusive.

Piqua Branch of State Bank v. Knoop, 16 How. 391, 14 L. ed. 986; *Wright v. Nagle*, 101 U. S. 793, 794, 25 L. ed. 922, 923; *McCullough v. Virginia*, 172 U. S. 109, 110, 43 L. ed. 384, 385, 19 Sup. Ct. Rep. 134.

We do not, of course, deny that the state may provide for notice of any assessment on the local agent of a nonresident owner. But there must be a real agency. The one relation which it has been uniformly held does not exist between the corporation and stockholders, or *vice versa*, or among the stockholders, is that of principal and agent,—especially with respect to the separate individual interests represented by the shares.

Cook, Corp. § 11.

In the state of Maryland, moreover, and for tax purposes, the corporation is the agent of the state, not of the stockholder.

Hull v. Southern Development Co. 89 Md. 8, 42 Atl. 943.

Mr. Albert C. Ritchie argued the cause, and, with *Mr. W. Cabell Bruce*, filed a brief for defendants in error:

The question before this court is one of the power and authority of the state of Maryland to declare that the situs, for purposes of taxation, of stock in Maryland corporations held by nonresidents of the state, shall be in Maryland, and that such stock shall be there taxed. Moreover, if the state possesses this power, its right to exercise it is in no way affected by the fact that the nonresident stockholder may or may not be taxed upon his stock in the state of his domicil.

Blackstone v. Miller, 188 U. S. 189, 205, 47 L. ed. 439, 444, 23 Sup. Ct. Rep. 277.

Movable personal property is always subject to taxation in the state where it is situated.

Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70, 43 L. ed. 899, 19 Sup. Ct. Rep. 599; *Union Refrigerator Transit Co. v. Lynch*, 177 U. S. 149, 44 L. ed. 708, 20 Sup. Ct. Rep. 631.

For the purposes of taxation, the situs of shares of stock may be separated from the person of the owner, and the stockholder, even though a nonresident, may be taxed on account of his stock at the place where its situs is thus established.

First Nat. Bank v. Kentucky, 9 Wall. 353, 19 L. ed. 701; *Tappan v. Merchants' Nat. Bank*, 19 Wall. 490, 22 L. ed. 189; *New Orleans v. Stempel*, 175 U. S. 309, 320, 44 L. ed. 174, 180, 20 Sup. Ct. Rep. 110; *Bristol v. Washington County*, 177 U. S. 133, 144, 44 L. ed. 701, 706, 20 Sup. Ct. Rep. 585; *Trav-*
196 U. S.

ellers' Ins. Co. v. Connecticut, 185 U. S. 364, 46 L. ed. 949, 22 Sup. Ct. Rep. 673.

It has been held that a statute giving shares of stock a situs for taxation at the location of the corporation may be passed even after the incorporation.

St. Albans v. National Car Co. 57 Vt. 68.

For purposes of taxation, personal property may be separated from its owner, and he may be taxed on its account at the place where it is, although not the place of his own domicil, and even if he is not a citizen or a resident of the state which imposes the tax.

Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876.

In *Adams Exp. Co. v. Ohio State Auditor*, 166 U. S. 185, 224, 41 L. ed. 965, 978, 17 Sup. Ct. Rep. 604, this court said that the maxim *Mobilia sequuntur personam* was never of universal application, and seldom interfered with the right of taxation.

In *Savings & Loan Soc. v. Multnomah County*, 169 U. S. 421, 42 L. ed. 803, 18 Sup. Ct. Rep. 392, this court held that the Oregon statute taxing mortgages on land in Oregon to the mortgagees in the county where the land lies was not unconstitutional because it applied to mortgages owned by nonresidents of the state.

In *Kirtland v. Hotchkiss*, 100 U. S. 491, 25 L. ed. 558, it was held lawful for a state to tax its resident citizens on debts held by them against nonresidents, secured by mortgages upon real estate in other states.

In *New Orleans v. Stempel*, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110, this court held that notes in the possession of an agent in New Orleans, who collected the interest and principal as they became due, and which notes were secured by mortgage on land in Louisiana, were taxable in Louisiana, although owned by a nonresident of the state.

Evidences of debts in the hands of an agent can be taxed in the state where they are so situated, although the creditor may be a citizen of another state.

Bristol v. Washington County, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585; *State Assessors v. Comptoir National D'Escompte*, 191 U. S. 388, 48 L. ed. 232, 24 Sup. Ct. Rep. 109.

Although the laws of Maryland make no provision for notice to the individual stockholders of a Maryland corporation, or for any opportunity to be heard by them upon the question of the valuation of their stock for purposes of taxation, yet ample provision is made for notice to, and an opportunity to be heard by, the corporation itself; and inasmuch as the corporation, under the Maryland system of taxation, acts for and as the

representative of the stockholders, the Maryland statute satisfies the requirement of due process of law.

James Clark Distilling Co. v. Cumberland, 95 Md. 468, 52 Atl. 661.

Mr. Justice **White**, after making the foregoing statement, delivered the opinion of the court:

The subjects and methods of taxation of property within the state of Maryland are regulated generally by article 81 of the Code of Public General Laws of that state.

A tax for state purposes and one for local purposes is laid upon all property. In each year the officers of domestic corporations are required to furnish information respecting the value of the shares of stock in such corporations to the state tax commissioner, who determines the aggregate value thereof, deducts therefrom the assessed value of the real estate owned by the corporation, and [472] the quotient, obtained by dividing *the remainder by the total number of shares of stock, is treated as the taxable value of each share, subject, however, to correction on appeal to the state comptroller and state treasurer after notice to the corporation or the valuation fixed by the tax commissioner. The rate of the state tax is determined by the general assembly, and that for municipal purposes in Baltimore is fixed by the mayor and council of that city. The levy on property in Baltimore, both for state and city purposes, is made by the municipal authorities. In case of stock in Maryland corporations owned by nonresidents the statutes declare that the situs of such stock, for the purpose of taxation, shall be at the principal office of the corporation in Maryland, and such shares are there assessed at their value to the owners. The statutes undoubtedly impose upon a Maryland corporation the duty of paying for and on account of the owners the taxes assessed in respect of the shares, and compel such payment without reference to the dividends, giving to the corporation a lien upon the shares of stock, and entitling the corporation, when it pays the taxes, to proceed by a personal action to recover the amount paid. *Dugan v. Baltimore*, 1 Gill & J. 499, 502; *Baltimore v. Howard*, 6 Harr. & J. 383, 394; *American Coal Co. v. Allegany County*, 59 Md. 197; *Hull v. Southern Development Co.* 89 Md. 8, 11, 42 Atl. 943.

The Maryland decisions have also settled that the tax is on the stockholder personally, because of his ownership of the stock, and is not on the stock *in rem* or on the corporation. The Maryland doctrine on the subject is shown by the opinion of the court of appeals of Maryland in *United States Electric Power & Light. Co. v. State*, 79

Md. 63, 28 Atl. 768, where the court said (p. 70, Atl. p. 768):

"But the tax is not a tax upon the stock or upon the corporation, but upon the owners of the shares of stock, though the officers of the corporation are made the agents of the state for the collection of the state tax. It is not material what assets or other property make up the value of the shares. *Those [473] shares are property, and, under existing laws, are taxable property. They belong to the stockholders respectively and individually, and when, for the sake of convenience in collecting the tax thereon, the corporation pays the state tax upon these shares into the state treasury, it pays the tax, not upon the company's own property, nor for the company, but upon the property of each stockholder, and for each stockholder respectively, by whom the company is entitled to be reimbursed. Hence, when the owner of the shares is taxed on account of his ownership, and the tax is paid for him by the company, the tax is not levied upon or collected from the corporation at all."

See, also, *Hull v. Southern Development Co.* 89 Md. 8, 11, 4 Atl. 943.

Substantially similar laws for the taxing of stock in Maryland corporations were in force in Maryland at the time of the incorporation of the transportation company, and have been in force ever since.

All the claims of Federal right here asserted are embraced in and will be disposed of by passing on two propositions, which we shall consider separately.

The first proposition is that, as the authority of the state of Maryland to tax is limited by the effect of the 14th Amendment to the Constitution of the United States to persons and property within the jurisdiction of the state, and as the tax in question was not *in rem* against the stock, but was *in personam* against the owner, the power attempted to be exercised, as it imposed a personal liability, was wanting in due process of law.

The court of appeals of Maryland disposed of this contention by deciding that it was in the power of the state of Maryland to fix, for the purposes of taxation, the situs of stock in domestic corporations held by a nonresident. It also held that, as such corporations were created by the state, and were subject to its regulating authority, it was within its power to impose, as a condition to the right to acquire stock in such corporations, the duty of paying the taxes assessed on the *stock, and, moreover, that the [474] state might compel the corporation to pay such taxes on behalf of the stockholder, and confer upon the corporation a right of action to obtain reimbursement from a stockholder when the payment was made. The court,

in its opinion in this case, did not expressly elaborate the foregoing considerations, but contented itself by referring to previous decisions by it made. Among the cases so referred to was the case of *American Coal Co. v. Allegany County*, 59 Md. 185, 193, where it was said:

"The appellant is a Maryland corporation, deriving its existence and all its powers and franchises from this state. And such being the case, it is settled that the sovereign power of taxation extends to everything which exists by the authority of the state, or which is introduced by its permission, except where such power is expressly, or by necessary implication, excluded. The separate shares of the capital stock of the corporation are authorized to be issued by the charter derived from the state, and are subject to its control in respect to the right of taxation, and every person taking such shares, whether resident or nonresident of the state, must take them subject to such state power and jurisdiction over them. Hence, the state may give the shares of stock held by individual stockholders a special or particular situs for purposes of taxation, and may provide special modes for the collection of the tax levied thereon."

That it was rightly determined that it was within the power of the state to fix, for the purposes of taxation, the situs of stock in a domestic corporation, whether held by residents or nonresidents, is so conclusively settled by the prior adjudications of this court that the subject is not open for discussion. Indeed, it was conceded in the argument at bar that no question was made on this subject. The whole contention is that, albeit the situs of the stock was in the state of Maryland for the purposes of taxation, it was nevertheless beyond the power of the state to personally tax the nonresident owner for and on account of the ownership [475] of the stock, and to compel the *corporation to pay, and confer upon it the right to proceed by a personal action against the stockholder in case the corporation did pay. Reiterated in various forms of expression, the argument is this: that as the situs of the stock within the state was the sole source of the jurisdiction of the state to tax, the taxation must be confined to an assessment *in rem* against the stock, with a remedy for enforcement confined to the sale of the thing taxed, and hence without the right to compel the corporation to pay, or to give it, when it did pay, a personal action against the owner.

But these contentions are also in effect long since foreclosed by decisions of this court. *First Nat. Bank v. Kentucky*, 9 196 U. S.

Wall. 353, 19 L. ed. 701; *Tappan v. Merchants' Nat. Bank*, 19 Wall. 490, 22 L. ed. 189. In *First Nat. Bank v. Kentucky* (pp. 361, 362, L. ed. p. 703,) it was said:

"If the state cannot require of the bank to pay the tax on the shares of its stock, it must be because the Constitution of the United States, or some act of Congress, forbids it.

"If the state of Kentucky had a claim against a stockholder of the bank who was a nonresident of the state, it could undoubtedly collect the claim by legal proceeding, in which the bank could be attached or garnisheed, and made to pay the debt out of the means of its shareholders under its control. This is, in effect, what the law of Kentucky does in regard to the tax of the state on the bank shares."

And it was further observed (p. 363, L. ed. p. 704):

"The mode under consideration is the one which Congress itself has adopted in collecting its tax on dividends, and on the income arising from bonds of corporations. It is the only mode which, certainly and without loss, secures the payment of the tax on all the shares, resident or nonresident; and, as we have already stated, it is the mode which experience has justified in the New England states as the most convenient and proper, in regard to the numerous wealthy corporations of those states."

*But it is insisted that these rulings concerned taxation by the states of the shares of stock in national banks, under the provisions of the national banking act, and are therefore not applicable. The contention is thus expressed:

"This act forms a part of the charter of the national banks, and provides for this liability. Charters can and frequently do undoubtedly provide for a personal liability of stockholders in various forms; the liability to creditors of the corporation is one of the common illustrations, and the liability may be thus imposed for a tax as well as for any other debt or obligation. The court therefore held [in the *Tappan Case*, page 500] that under the national banking act the shareholders were liable, because that act 'made it the law of the property.' The liability arose, not out of the taxing power of the sovereign, but from the subscription or charter contract of the subject."

In substance, the contention is that the conceded principle has no application to taxation by a state of shares of stock in a corporation created by it, because, by the Constitution of the United States, the states

are limited as to taxation to persons and things within their jurisdiction, and may not, therefore, impose upon a nonresident, by reason of his property within the state, a personal obligation to pay a tax. By the operation, therefore, of the Constitution of the United States, it is argued the states are restrained from affixing, as a condition to the ownership of stock in their domestic corporations by nonresidents, a personal liability for taxes upon such stock, since the right of the nonresident to own property in the respective states is protected by the Constitution of the United States, and may not be impaired by subjecting such ownership to a personal liability for taxation. But the contention takes for granted the very issue involved. The principle upheld by the rulings of this court to which we have referred, concerning the taxation by the states of stock in national banks, is that the sovereignty which creates a corporation has the incidental right to impose reasonable regula-

[477]tions *concerning the ownership of stock therein, and that a regulation establishing the situs of stock for the purpose of taxation, and compelling the corporation to pay the tax on behalf of the shareholder, is not unreasonable regulation. Applying this principle, it follows that a regulation of that character, prescribed by a state, in creating a corporation, is not an exercise of the taxing power of the state over persons and things not subject to its jurisdiction. And we think, moreover, that the authority so possessed by the state carries with it the power to endow the corporation with a right of recovery against the stockholder for the tax which it may have paid on his behalf. Certainly, the exercise of such a power is no broader than the well-recognized right of a state to affix to the holding of stock in a domestic corporation a liability on a nonresident as well as a resident stockholder *in personam*, in favor of the ordinary creditors of the corporation. *Flash v. Conn.*, 109 U. S. 371, 27 L. ed. 966, 3 Sup. Ct. Rep. 263; *Whitman v. National Bank*, 176 U. S. 559, 44 L. ed. 587, 20 Sup. Ct. Rep. 477; *Nashua Sav. Bank v. Anglo-American Land Mortg. & A. Co.* 189 U. S. 221, 230, 47 L. ed. 782, 786, 23 Sup. Ct. Rep. 517, and cases cited; *Platt v. Wilmot*, 193 U. S. 602, 612, 48 L. ed. 809, 813, 24 Sup. Ct. Rep. 542.

Whilst it is true that the liability of the nonresident stockholder in the case before us, as enforced by the laws of Maryland, was not directly expressed in the charter of the corporation, it nevertheless existed in the general laws of the state at the time the corporation was created, and, be this as it

may, certainly existed at the time of the extension of the charter. This is particularly the case, since the Constitution of Maryland, for many years prior to the extension of the charter of the transportation company, contained the reserved right to alter, amend, and repeal. From all the foregoing it resulted that the provisions of the general laws and of the Constitution of Maryland were as much a part of the charter as if expressly embodied therein. Nor can this conclusion be escaped by the contention that, as the provisions of the statute imposing on nonresident stockholders in domestic corporations a liability for taxes on their stock violated the Constitution of the United States, therefore such unconstitutional re-[478]quirements cannot be treated as having been incorporated in the charter, for this argument amounts only to reasserting the erroneous proposition which we have already passed upon.

Having disposed of the first proposition we come to consider the second, which is that the legislation of the state of Maryland is repugnant to the Constitution of the United States, because of the omission to directly require the giving of notice to the nonresident stockholder of assessments on his stock, and opportunity for contest by him as to the correctness of the valuation fixed by the taxing officers. The highest court of the state of Maryland has construed the statutory provisions in question as, in legal effect, constituting the corporation the agent of the stockholders to receive notice and to represent them in proceedings for the correction of an assessment. Thus, in *James Clark Distilling Co. v. Cumberland*, 95 Md. 468, 52 Atl. 661, the court said (p. 475, Atl. p. 663):

"A notice to each shareholder is unnecessary, because the corporation represents the shareholders. The officers of the corporation are required by the Code to make an annual return to the state tax commissioner, and upon the information disclosed by that return the valuation of the capital stock is placed each year. If the valuation is not satisfactory, an appeal may be taken by the corporation for the shareholders. An opportunity is thus afforded for the shareholders to be heard through the corporation, and that gratifies all the requirements of law. If each and every shareholder in the great number of companies throughout the state had a right to insist upon a notice before an assessment of his shares could be made, and if each were given a separate right of appeal, it would be simply impossible to fix annually a valuation on shares of capital. The policy of the law is to treat the corpo-

ration not merely as tax collector after the tax has been levied, but to deal with it as the representative of the shareholders in respect to the assessment of the shares, and when notice has been given to the corporation, and it has the right to be heard *on appeal, notice is thereby given to the shareholders, and they are accorded a hearing. This is so in every instance where the assessment is made by the state tax commissioner, because the revenue laws throughout treat the corporation as the representative of the shareholders, and as no official other than the tax commissioner has power to assess capital stock, no notice other than the one given by him is necessary; and, as no notice other than the one given by him is necessary, a notice by the municipality to each shareholder is not requisite."

If a tax was expressly imposed upon the corporation, the stockholders, though interested in the preservation of the assets of the corporation, could not be heard to object that the statute did not provide for notice to them of the making of the assessment. The condition attached by the Maryland law to the acquisition of stock in its domestic corporations, that the stockholders, for the purpose of notice of the assessment of the stock and proceedings for the correction of the valuation thereof, shall be represented by the corporation, is not, in our opinion, an arbitrary and unreasonable one, when it is borne in mind that the corporation, through its officers, is, by the voluntary act of the stockholders, constituted their agent, and vested with the control and management of all the corporate property,—that which gives value to the shares of stock, and in respect to which the taxes are but mere incidents in the conduct of the business of the corporation. The possibility that the state taxing officials may abuse their power, and fix an arbitrary and unjust valuation of the shares, and that the officers of the corporation may be recreant in the performance of the duty to contest such assessments, does not militate against the existence of the power to require the numerous stockholders of a corporation chartered by the state, particularly those resident without the state, to be represented in proceedings before the taxing officials through the agency of the corporation.

As we conclude that the legislation of the [480] state of Maryland *in question does not contravene the due process clause of the 14th Amendment to the Constitution of the United States, the judgment of the Court of Appeals of Maryland is affirmed.

196 U. S.

WILLIAM K. VANDERBILT *et al.*, as
Executors, etc.,

v.

FERDINAND EIDMAN, as United States
Collector of Internal Revenue.

(See S. C. Reporter's ed. 480-502.)

*War revenue act—inheritance tax—interest
not vested in possession or enjoyment.*

1. The interest of a residuary legatee, conditioned on his attaining a certain age, cannot be deemed taxable under the war revenue act of June 13, 1898 (30 Stat. at L. 464, chap. 448, U. S. Comp. Stat. 1901, pp. 2307, 2308), §§ 29, 30, before the happening of the contingency, in view of the express provisions of those sections as to "possession or enjoyment" and "beneficial interest" and "clear value," and of the absence of any express language exhibiting an intention to tax a mere technically vested interest in a case where the right to possession or enjoyment is subordinated to an uncertain contingency.
2. A legacy not capable of being immediately possessed or enjoyed, and therefore not taxable under the war revenue act of June 13, 1898 (30 Stat. at L. 464, chap. 448, U. S. Comp. Stat. 1901, pp. 2307, 2308), §§ 29, 30, as construed by the administrative officers prior to the amendatory act of March 2, 1901 (31 Stat. at L. 946, chap. 806, U. S. Comp. Stat. 1901, p. 2307), cannot be deemed to have been subjected to such taxation by the provision of the later act making the inheritance tax due and payable one year after the death of the testator, and requiring the executor to make return of the estate in his control within thirty days after taking charge thereof,—especially in view of the legislative affirmance in the subsequent act of June 27, 1902 (32 Stat. at L. 406, chap. 1160, U. S. Comp. Stat. Supp. 1903, p. 281), of the construction given to the original statute before the amendment.

[No. 206.]

Argued October 13, 14, 1904. Decided February 20, 1905.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Second Circuit, presenting questions as to the taxability, under the war revenue act, of the interest of a residuary legatee, conditioned on attaining a certain age. *Answered in the negative.*

Statement by Mr. Justice **White**:

Cornelius Vanderbilt died in the city of New York on September 12, 1899, leaving a will, which was admitted to probate, the

NOTE.—As to taxes on succession and collateral inheritances—see *Re Howe*, 2 L. R. A. 825, and note; *Wallace v. Myers*, 4 L. R. A. 171, and note; *Com. v. Ferguson*, 10 L. R. A. 240; and *Re Romaine*, 12 L. R. A. 401. See also note to *Magoun v. Illinois Trust & Sav. Bank*, 42 L. ed. U. S. 1037.

seventeenth clause of which provides as follows:

"Seventeenth: All the rest, residue, and [481] remainder of all *the property and estate, real, personal, and mixed, of every description, and wheresoever situated, of which I may die seised or possessed, or to which I may be entitled at the time of my decease, including all lapsed legacies and the principal of any annuities which may terminate, and any part of my estate which may not have been effectually devised or bequeathed, or from any other source, I give, devise, and bequeath to my executors, hereinafter named, and the survivors and survivor of them, IN TRUST, to hold said estate, and invest and reinvest the same, and to collect the rents, issues, income, and profits therefrom for the use of my son Alfred G., and to apply so much of said net income as may be in their judgment advisable, to his support, maintenance, and education, and for the care and maintenance of his property during his minority, and to accumulate any surplus income, such accumulations to be paid to him when he arrives at the age of twenty-one years, and thereafter to pay the net income of said estate to him as received until he arrives at the age of thirty years, when he shall be put in full possession of one half the portion of said estate to be set apart for that purpose by my executors and survivors of them. And upon further trust thereafter to pay to my said son, Alfred G., the income from the balance remaining of said estate until he shall arrive at the age of thirty-five years, when he shall be put in possession of the balance of said trust estate, and the said trustees shall be discharged from any and all liability and responsibility in respect thereof. If my son Alfred G. should die before attaining the age of thirty-five years, leaving issue, such portion of the estate as shall not then have come into his possession shall be divided by my executors into as many equal shares as he may leave children surviving, and one share shall be held by my executors to the use of each such child or children until he or she shall attain the age of twenty-one years, when it shall be paid to such child; but if he shall die without child or children, or if none of his children shall attain majority, then it is my will that my son Reginald C. shall in all respects, as to [482] *said residuary estate stand in the place and stead of his brother Alfred G., and that if Alfred G. shall die without issue before he attains the age of thirty years, then Reginald C. shall receive the income from said estate until he attains the age of thirty years, when he shall be put in possession of one half of the residuary estate, and thereafter Reginald C. shall receive the net income of the remaining one half of my estate,

and on arriving at the age of thirty-five years he shall be put in possession of the whole of said estate, and my said executors shall hold said estate upon such trust, and I give and devise the same accordingly. If Alfred G. and Reginald C. shall both die before being put into possession of said estate, and without issue, I give whatever then remains of my residuary estate to my daughters Gertrude and Gladys Moore, share and share alike; and if either of my said daughters be then dead leaving issue, her issue to take his or her mother's share, *per stirpes* and not *per capita*; and in default of issue, the survivor shall take the principal."

This clause contains the only provisions in the will relating to or in any manner affecting the disposition of the residuary estate of the testator, and determining the extent and character of the interests therein.

All of the children of Cornelius Vanderbilt, named in the seventeenth clause of his will, were living at the time this suit was brought. At the time of the death of Cornelius Vanderbilt his son Alfred G. Vanderbilt was between twenty-two and twenty-three years of age, and his son Reginald C. Vanderbilt was between nineteen and twenty years of age, and both were unmarried.

The appraised value of the residuary personal estate at the time of the testator's death was \$18,972,117.46.

The right of Alfred G. Vanderbilt to the beneficial enjoyment, as provided in the will until he became thirty years of age, was appraised at \$5,119,612.43, and upon this sum the executors paid a death duty under §§ 29 and 30 of the act of June 13, 1898 (30 Stat. at L. 464, chap. 448, U. S. Comp. Stat. 1901, pp. 2307, 2308), at the rate of 2½ *per cent, [483] the tax amounting to \$115,191.28. After payment of this amount, and subsequently to the passage, on March 2, 1901 (31 Stat. at L. 946, chap. 806, U. S. Comp. Stat. 1901, p. 2307), of an amendment to the war revenue act of 1898, the commissioner of internal revenue, considering that by that amendment Alfred G. Vanderbilt had become immediately liable for a tax on his right to succeed to the whole residue if he lived to the ages of thirty and thirty-five years respectively, assessed a death duty based upon that hypothesis. In making this assessment, as by the mortality tables it was shown that Alfred G. Vanderbilt had a life expectancy beyond the ages of thirty and thirty-five years, the commissioner assessed the interest as a vested estate equal in value to the sum of the entire residuary estate; viz., \$18,972,117.46. Upon this valuation a tax was levied of 2½ per cent, producing \$426,872.64. On this amount, however, credit was allowed for the sum of the tax previously paid, leaving the balance due \$311,-

681.36. On September 3, 1901, this balance was paid by the executors under protest, "and upon compulsion of the collector's threat of distraint and sale." The executors thereupon made the statutory application to the commissioner of internal revenue for the refunding of the amount, and, it being refused, commenced in the circuit court of the United States for the southern district of New York this action to recover the payment.

The facts, as above stated, were averred and the right to recover was based upon the ground that, as Alfred G. Vanderbilt only had the enjoyment presently of the revenues of the residuary estate up to the period when he might attain the age of thirty years, he was only liable to be assessed upon that beneficial interest. For this reason it was charged that the assessment made of the bequest to Alfred G. Vanderbilt of the whole residuary estate, upon condition that he reached the ages of thirty and thirty-five years respectively, was unwarranted.

The circuit court, on the ground that the [484] complaint did not state a cause of action, sustained a demurrer to that effect filed by the government, and dismissed the action. 121 Fed. 590. The circuit court of appeals stated the facts as above recited, and certified certain questions.

Mr. Howard Taylor argued the cause, and, with *Messrs. Henry B. Anderson* and *Chandler P. Anderson*, filed a brief for *Vanderbilt et al.*:

Congress could not have intended to provide that a tax on the right of one legatee to receive property should be paid out of the property of any other legatee.

Fitzgerald v. Rhode Island Hospital Trust Co. 24 R. I. 59, 52 Atl. 814.

Contingent or defeasible interests, or future interests which may never vest in possession, are not taxable under laws imposing a tax upon successions, until all uncertainty as to their actual value and the ultimate right of succession has been removed.

Re Curtis, 142 N. Y. 219, 36 N. E. 887; *Re Roosevelt*, 143 N. Y. 120, 25 L. R. A. 695, 38 N. E. 281; *Re Cager*, 111 N. Y. 343, 18 N. E. 866; *Re Hoffman*, 143 N. Y. 327, 38 N. E. 311; *Billings v. People*, 189 Ill. 472, 59 L. R. A. 807, 59 N. E. 798; *People v. McCormick*, 208 Ill. 437, 64 L. R. A. 775, 70 N. E. 350; *Howe v. Howe*, 179 Mass. 546, 55 L. R. A. 626, 61 N. E. 225.

Assistant Attorney General Robb argued the cause and filed a brief for *Eidman*, Collector:

The law places a tax upon a legacy consisting of a vested interest, upon its passage from the decedent to the trustee, and 196 U. S. U. S., Book 49.

not at the time of payment by the trustee to the legatee.

Land Title & T. Co. v. McCoach, 127 Fed. 381; *Philadelphia Trust, S. D. & Ins. Co. v. McCoach*, 127 Fed. 386; *Brown v. Kinney*, 128 Fed. 310; *Peck v. Kinney*, 128 Fed. 313; *Pennsylvania Co. for Ins. on Lives & G. A. v. McClain*, 105 Fed. 367.

Such a tax results in no injustice.

United States v. Perkins, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073; *Plummer v. Coler*, 178 U. S. 115, 44 L. ed. 998, 20 Sup. Ct. Rep. 829; *Snyder v. Bettman*, 190 U. S. 249, 47 L. ed. 1035, 23 Sup. Ct. Rep. 803.

To construe the act as taxing vested remainders at the time of vesting, and not as awaiting the time the legatee comes into possession or enjoyment of the same, does not violate the constitutional requirement that the tax shall be uniform.

Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; *United States v. Singer*, 15 Wall. 111, 21 L. ed. 49; *Head Money Cases (Edye v. Robertson)* 112 U. S. 580, 28 L. ed. 798, 5 Sup. Ct. Rep. 247.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court:

The four questions certified are as follows:

"I. Is the tax imposed by §§ 29 and 30 of the act of Congress of June 13, 1898, entitled 'An Act to Provide Ways and Means to Meet War Expenditures, and for Other Purposes,' with respect to Alfred G. Vanderbilt's interest under the seventeenth clause of the will of Cornelius Vanderbilt, a tax upon the transmission to and receipt by the trustees of the property passing to them as trustees under the legacy out of which such interest arises?

"II. If the preceding question is answered in the negative, is the tax imposed under said act with respect to Alfred G. Vanderbilt's interest under said seventeenth clause a tax upon the transmission to and receipt by said Alfred G. Vanderbilt of his beneficial interest in the property passing under such legacy?

"III. Did §§ 29 and 30 of said act authorize the assessment and collection of a tax with respect to any of the rights or interests of Alfred G. Vanderbilt as a residuary legatee of the personal estate of Cornelius Vanderbilt under the seventeenth clause of the will, with the exception of his present right to receive the income of such estate until he attains the age of thirty years, prior to the time when, if ever, such rights or interests shall become absolutely vested in possession or enjoyment?

"IV. If the tax under §§ 29 and 30 of

said act was presently assessable and collectible upon all the interests of *Alfred G. Vanderbilt in said legacy, was the clear value of all such interests, for the purposes of computing the tax, equal to the full value of the property comprised in the legacy out of which such interests arose?"

Whilst the questions, apparently, present distinct matters, yet underlying and involved in them all is the fundamental consideration whether the burden imposed by the war revenue act was confined to the interest of which Alfred G. Vanderbilt had the beneficial right of immediate enjoyment, or whether that burden also bore upon the right to the residue which Alfred G. Vanderbilt might possess or enjoy in the future, if he lived to the ages specified in the will, upon the theory that the right so to possess or enjoy in the future was technically vested. To avoid repetition we therefore come at once to the consideration of this subject in order that when we have disposed of it we may be able, in the light of the correct construction of the statute, to respond to the questions propounded, in so far as it may be found necessary to do so.

Before coming to the statute we put aside, as not directly decisive of the question here presented, a case referred to by both parties; that is, *Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747. Whilst that case involved the constitutionality of the act of Congress with whose meaning we are here concerned, it required a construction of that act only to the extent necessary to enable it to be decided what was the subject upon which the law levied the tax, and whether the statute required the tax levied to be progressively increased by reference to the whole amount of the estate of the decedent, or alone by reference to the particular legacy or distributive share upon the right to succeed to which the tax bore. The case did not, therefore, pass on the controversies here arising.

To state briefly the conflicting contentions of the parties as to the meaning of the statute may serve to accentuate and narrow the question for decision. The proposition of the government is thus stated in the argument:

"First, vested remainders are taxed by the [490] law of June 13, *1898, the tax attaching at the time of vesting; second, the tax is to be assessed and collected at the time of vesting; third, the interest of Alfred G. Vanderbilt in the principal of the residue, which the will provides he shall be put in full possession of, one half at the age of thirty, and the other half at the age of thirty-five, is a vested remainder."

The contrary contentions are as follows: First. That Congress, in the act in question,

did not concern itself with the mere technical vesting of the title to possibly possess or enjoy in the future personal property; but, on the contrary, the act subjected to the death duties which it imposed only real and beneficial interests. In other words, the proposition is that the act did not make subject to taxation a gift, which, even if technically vested in title, was yet subject to be defeated in possession or enjoyment by the happening of a contingency stated in the will. The argument, therefore, is that where such a gift was made by will, no tax could be imposed until the time when, by the happening of the contingency stated, the right to possess or enjoy had accrued. Second. That, even if the statute imposed a tax upon vested remainders, the interest in question was a contingent, and not a vested, remainder.

The provisions of the act of 1898 which require elucidation for the purpose of disposing of these contentions are contained in §§ 29 and 30. They are reproduced in the margin.†

†Act of June 13, 1898, chap. 448.

Sec. 29. That any person or persons having in charge or trust, as administrators, executors, or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of \$10,000 in actual value, passing, after the passage of this act, from any person possessed of such property, either by will or by the intestate laws of any state or territory, or any personal property or interest therein, transferred by deed, grant, bargain, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainor, to any person or persons, or to any body or bodies, public or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax, to be paid to the United States, as follows—that is to say: Where the whole amount of said personal property shall exceed in value \$10,000, and shall not exceed in value the sum of \$25,000, the tax shall be—

First. Where the person or persons entitled to any beneficial interest in such property shall be the lineal issue or lineal ancestor, brother, or sister to the person who died possessed of such property, as aforesaid, at the rate of seventy-five cents for each and every \$100 of the clear value of such interest in such property.

Second. Where the person or persons entitled to any beneficial interest in such property shall be the descendant of a brother or sister of the person who died possessed, as aforesaid, at the rate of one dollar and fifty cents for each and every \$100 of the clear value of such interest.

Third. Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the father or mother, or a descendant of a brother or sister of the father or mother, of the person who died possessed as aforesaid, at the rate of three dollars for each and every one hundred dollars of the clear value of such interest.

Fourth. Where the person or persons entitled to any beneficial interest in such property shall

- [491] *It will be observed that the duties imposed in § 29 have relation to two classes; first, legacies or distributive shares passing by death and arising from personal property; and, second, any personal property
- [492] or interest therein transferred *by deed, grant, bargain, sale, or gift, to take effect in possession or enjoyment after the death of the grantor or bargainor, in favor of any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise.
- [493] As to this *second class, the statute specifically makes the liability for taxation depend, not upon the mere vesting, in a technical sense, of title to the gift, but upon the actual possession or enjoyment thereof. By any fair construction the limitation as to possession or enjoyment expressed as to one
- class must be applied to the other, unless it be found that the statute, whilst treating the two as one and the same for the purpose of the imposition of the death duty, has yet subjected them *to different rules. A con-[494] sideration of the subsequent provisions of the section leaves no room for such a contention, since immediately following the designation of the two classes there are five distinct paragraphs, subjecting the passing of the property taxed in both classes to a different rate of tax, dependent upon the degree of relationship of the beneficiary to the decedent, and in each it is specifically provided that a tax is to be levied in respect only of a beneficial interest having a clear value. Moreover, the meaning of the statute, fairly to be deduced from the reiteration in each of

be the brother or sister of the grandfather or grandmother, or a descendant of the brother or sister of the grandfather or grandmother, of the person who died possessed as aforesaid, at the rate of four dollars for each and every hundred dollars of the clear value of such interest.

Fifth. Where the person or persons entitled to any beneficial interest in such property shall be in any other degree of collateral consanguinity than as hereinbefore stated, or shall be a stranger in blood to the person who died possessed, as aforesaid, or shall be a body politic or corporate, at the rate of five dollars for each and every hundred dollars of the clear value of such interest: *Provided*, That all legacies or property passing by will, or by the laws of any state or territory, to husband or wife of the person who died possessed, as aforesaid, shall be exempt from tax or duty.

Where the amount or value of said property shall exceed the sum of \$25,000, but shall not exceed the sum or value of \$100,000, the rates of duty or tax above set forth shall be multiplied by one and one half; and where the amount or value of said property shall exceed the sum of \$100,000, but shall not exceed the sum of \$500,000, such rates of duty shall be multiplied by two; and where the amount or value of said property shall exceed the sum of \$500,000, but shall not exceed the sum of \$1,000,000, such rates of duty shall be multiplied by two and one half; and where the amount or value of said property shall exceed the sum of \$1,000,000, such rates of duty shall be multiplied by three.

Sec. 30. That the tax or duty aforesaid shall be a lien and charge upon the property of every person who may die as aforesaid for twenty years, or until the same shall, within that period, be fully paid to and discharged by the United States; and every executor, administrator, or trustee, before payment and distribution to the legatees, or any parties entitled to beneficial interest therein, shall pay, to the collector or deputy collector of the district of which the deceased person was a resident, the amount of the duty or tax assessed upon such legacy or distributive share, and shall also make and render to the said collector or deputy collector a schedule, list, or statement, in duplicate, of the amount of such legacy or distributive share, together with the amount of duty which has accrued, or shall accrue there-

on, verified by his oath or affirmation, to be administered and certified thereon by some magistrate or officer having lawful power to administer such oaths, in such form and manner as may be prescribed by the commissioner of internal revenue, which schedule, list, or statement shall contain the names of each and every person entitled to any beneficial interest therein, together with the clear value of such interest, the duplicate of which schedule, list, or statement shall be by him immediately delivered, and the tax thereon paid to such collector; and upon such payment and delivery of such schedule, list, or statement, said collector or deputy collector shall grant to such person paying such duty or tax a receipt or receipts for the same in duplicate, which shall be prepared as hereinafter provided. Such receipt or receipts, duly signed and delivered by such collector or deputy collector, shall be sufficient evidence to entitle such executor, administrator, or trustee to be credited and allowed such payment by every tribunal which, by the laws of any state or territory, is, or may be, empowered to decide upon and settle the accounts of executors and administrators. And in case such executor, administrator, or trustee shall refuse or neglect to pay the aforesaid duty or tax to the collector or deputy collector, as aforesaid, within the time hereinbefore provided, or shall neglect or refuse to deliver to said collector or deputy collector the duplicate of the schedule, list, or statement of such legacies, property, or personal estate under oath, as aforesaid, or shall neglect or refuse to deliver the schedule, list, or statement of such legacies, property, or personal estate, under oath as aforesaid, or shall deliver to said collector or deputy collector a false schedule or statement of such legacies, property, or personal estate, or give the names and relationship of the persons entitled to beneficial interest therein untruly or shall not truly and correctly set forth and state therein the clear value of such beneficial interest, or where no administration upon such property or personal estate shall have been granted or allowed under existing laws, the collector or deputy collector shall make such lists and valuation as in other cases of neglect or refusal, and shall assess the duty thereon; and the collector shall commence appropriate proceedings before any court of the United States, in the name of the United States, against such person or persons as may have the actual or construc-

the five paragraphs of the beneficial interest and clear value as the subject of the tax, is greatly strengthened by the inference to be drawn from the fact that nowhere in the section is there contained language referring to technical estates in personalty, or treating them as subjects of taxation, despite the absence of the right to immediate possession or enjoyment. And coming to consider § 30, relating to the collection of the duty or tax imposed by § 29, the meaning of § 29, as just indicated, is made clearer. Thus, by § 30 it is provided that "every executor, administrator, or trustee, before payment and distribution [of a legacy or distributive share] to the legatees, or any parties entitled to beneficial interest therein, shall pay to the collector . . . of the district of which the deceased person was a resident the amount of the duty or tax assessed upon such legacy or distributive share." It also requires that the schedule, etc., to be furnished by an executor, administrator, or trustee to a collector or deputy collector shall contain the name of each person having a beneficial interest in the property in the charge or custody of the executor, etc., with a statement "of the clear value of such interest."

These provisions harmonize with the meaning which we have ascribed to § 29, since they clearly import that the tax is to be deducted from a beneficial interest which the beneficiary was entitled to enjoy, and from which, before payment or distribution, a deduction of the duty was to be made.

[495] *In view of the express provisions of the statute as to possession or enjoyment and beneficial interest and clear value, and of the absence of any express language exhibiting an intention to tax a mere technically vested interest in a case where the right to possession or enjoyment was subordinated to an uncertain contingency, it would, we

think, be doing violence to the statute to construe it as taxing such an interest before the period when possession or enjoyment had attached. And such is the construction which has been affixed to some state statutes, the text of which lent themselves more strongly to the construction that it was the intention to subject to immediate taxation merely technical interests, without regard to a present right to possess or enjoy. *Re Curtis*, 142 N. Y. 219, 222, 36 N. E. 887; *Re Roosevelt*, 143 N. Y. 121, 25 L. R. A. 695, 38 N. E. 781.

In *Re Hoffman*, 143 N. Y. 327, 38 N. E. 311, the court was called upon to construe the meaning of a statute, enacted in 1892, providing that "all taxes imposed by this act shall be due and payable at the time of the transfer; provided, however, that taxes upon the transfer of any estate, property, or interest therein limited, conditioned, dependent, or determinable upon the happening of any contingency or future event, by reason of which the fair market value thereof cannot be ascertained at the time of the transfer as herein provided, shall accrue and become due and payable when the persons or corporations beneficially entitled thereto shall come into actual possession or enjoyment thereof (Laws 1892, chap. 399, § 3);" the court said:

"We are obliged to follow one of two lines of construction. We must open all the nice and difficult questions which arise under a will as to the vesting of technical legal estates, although future and contingent, and assess the tax upon what are in reality only possibilities and chances, and so complicate the statute with the endless brood of difficult questions which gather about the construction of wills; or, we must construe it in view of its aim and purpose and the object it seeks to accomplish, *and so sub-[496] ordinate technical phrases to the facts of ac-

tive custody or possession of such property or personal estate, or any part thereof, and shall subject such property or personal estate, or any portion of the same, to be sold upon the judgment or decree of such court, and from the proceeds of such sale the amount of such tax or duty, together with all costs and expenses of every description to be allowed by such court, shall be first paid, and the balance, if any, deposited according to the order of such court, to be paid under its direction to such person or persons as shall establish title to the same. The deed or deeds, or any proper conveyance of such property or personal estate, or any portion thereof, so sold under such judgment or decree, executed by the officer lawfully charged with carrying the same into effect, shall vest in the purchaser thereof all the title of the delinquent to the property or personal estate sold under and by virtue of such judgment or decree, and shall release every other portion of such property or personal estate from the lien or charge thereon created by this act. And every person

or persons who shall have in his possession, charge, or custody any record, file, or paper containing, or supposed to contain, any information concerning such property or personal estate, as aforesaid, passing from any person who may die, as aforesaid, shall exhibit the same at the request of the collector or deputy collector of the district, and to any law officer of the United States, in the performance of his duty under this act, his deputy or agent, who may desire to examine the same. And if any such person, having in his possession, charge, or custody any such records, files, or papers, shall refuse or neglect to exhibit the same on request, as aforesaid, he shall forfeit and pay the sum of \$500: *Provided*, That in all legal controversies where such deed or title shall be the subject of judicial investigation, the recital in said deed shall be prima facie evidence of its truth, and that the requirements of the law had been complied with by the officers of the government.

tual and practical ownership. For taxation is a hard fact, and should attach only to such ownership, and may properly be compelled to wait until chances and possibilities develop into the truth of an actual estate possessed, or to which there exists an absolute right of future possession. I am not shutting my eyes to the statutory language, which is quite broad. The property taxed may be an estate 'for a term of years, or for life, or determinable upon any future or contingent estate,' or 'a remainder, reversion, or other expectancy,' and the tables of mortality may be resorted to for the ascertainment of values. And yet, it is the 'fair market value,' the 'fair and clear market value,' which is to be assessed, and with the proviso that if that value cannot be at once ascertained, the appraisal is to be adjourned. I can scarcely imagine a contingency depending upon lives which mathematics could not solve by the doctrine of chances and the average of mortality, and there could hardly be an adjournment unless upon some rare contingency having no averages, and the results in cases dependent upon lives might still leave the 'fair and clear market value' in doubt and yield sums which no sale in the market would produce."

So, also, the supreme court of Illinois, in construing an inheritance tax law of that state, containing language identical in some respects with that found in the act of Congress, observed (*Billings v. People*, 189 Ill. 472, 486, 59 L. R. A. 807, 59 N. E. 798):

"The tax imposed by § 1 of our statute is fixed upon the 'clear market value of the property received by each person' at the prescribed rate,—that is, as shown by the context, the clear market value of the beneficial interest so received. Surely, by such language it was not intended by the legislature that the courts should undertake to ascertain the clear market value of a mere possible interest which, from its very nature, could not have any market value, and which, for all practical purposes, such as taxation, is incapable of valuation. The courts, in order to enforce the immediate collection of

[497] such *taxes, as the statute seems to contemplate shall be done, cannot change the tax from one on succession to one on property; nor can they classify such remote and contingent interests, and fix the tax or rate of tax upon the whole class, as possibly the lawmaking power might do or provide for. No other course is left open in the practical administration of the statute than to postpone, as was done in this case, the assessing and collecting of the tax upon such remote and contingent interests as are incapable of valuation, and as to which the rate and the exemptions cannot be determined."

196 U. S.

And see also *Howe v. Howe*, 179 Mass. 546, 550, 55 L. R. A. 626, 61 N. E. 225.

Indeed, in accord with its text, and in harmony with the principles of construction expounded in the cases just cited, the act of 1898 was primarily construed by the officers charged with its administration as taxing only beneficial interests where the right to possess or enjoy had accrued. The rulings of the Internal Revenue Department to this effect were without deviation for several years.

The practice followed in carrying out the statute was illustrated by the assessment which was made in the case considered in *Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747, as exhibited in the schedule on page 44 of the report of that case. It was also by this construction that the tax in this case was originally assessed only upon the beneficial interest which was being enjoyed by Alfred G. Vanderbilt.

The change of construction was made because the administrative officers deemed it was required by the amendment of March 2, 1901, to the act of 1898. 31 Stat. at L. 946, chap. 806, U. S. Comp. Stat. 1901, p. 2307. This is shown by a ruling made by the Commissioner of Internal Revenue on October 17, 1901, in which it was said (Treasury Decisions, Internal Revenue, vol. 4, p. 209):

"This office formerly held that the tax on reversionary interests was payable when the beneficiaries entered into the possession and enjoyment of their legacies.

"The amendment to § 30 of the war-revenue law, approved March 2, 1901, which went into effect July 1, 1901,*necessitated a[498] change in this ruling, and on July 20, 1901, this office ruled that reversionary interests which are vested are taxable on their present worth."

The case therefore reduces itself to this: Did the amendatory act of 1901 enlarge the act of 1898 so as to cause that act to embrace subjects of taxation which were not included prior to the amendment? The amendatory act, so far as necessary to be considered for the purposes of this question, reenacted §§ 29 and 30 of the original act. The amendments which the administrative officers decided made subject to taxation vested interests where the right of immediate possession or enjoyment had not accrued, and which had been treated as not taxable prior to the amendment, were that the tax or duty should be due and payable in one year after the death of the person from whom the estate had passed, and that the executor, administrator, or trustee should make return of the estate in his control within thirty days after taking charge thereof. Giving to these provisions their

natural import, they imply only that a uniform period was fixed within which the obligation should arise of paying the tax authorized to be levied by the original act; that is, the obligation of paying the duty on each beneficial interest which in effect had vested in possession or enjoyment. The amendments, therefore, did not, in our opinion justify the construction that Congress intended, by adopting them, to cause death duties to become due within one year as to legacies and distributive shares which were not capable of being immediately possessed or enjoyed, and were therefore not subject to taxation under the original act. This conclusion irresistibly follows when it is observed that no word is found in the amendatory act importing an intention to change the administrative construction which had theretofore prevailed from the beginning. On the contrary, the amendatory act reiterated, without alteration, the provisions found in the original act as to possession or enjoyment and beneficial interest and clear value. Indeed, the amendatory act contained new provisions not expressly found [499] in the original act, *supporting and adding cogency to the prior administrative construction, such as the proviso at the close of § 30, as follows:

"Any tax paid under the provisions of sections twenty-nine and thirty shall be deducted from the particular legacy or distributive share on account of which the sum is charged;"

a provision plainly importing a practically contemporaneous right to receive the legacy or distributive share, and one which would be impracticable of execution if the tax was to be assessed and collected before the beneficiary and the rate of tax could certainly be ascertained.

Further elucidation as to the meaning of the amendatory act of 1901 is unnecessary in view of the subsequent legislation of Congress. By the act of April 12, 1902 (32 Stat. at L. 96, chap. 500), § 29 of the act of 1898, as amended on March 2, 1901, was repealed, to take effect on July 1, 1902. The repealing act, however, saved "all taxes or duties imposed by section 29 of the act of June 13, 1898, and the amendments thereto prior to the taking effect of this act." On June 27, 1902 (32 Stat. at L. 406, chap. 1160) an act was adopted, the 3d section of which reads as follows:

"Sec. 3. That in all cases where an executor, administrator, or trustee shall have paid, or shall hereafter pay, any tax upon any legacy or distributive share of personal property under the provisions of the act approved June thirteenth, eighteen hundred and ninety-eight, entitled 'An Act to Pro-

vide Ways and Means to Meet War Expenditures, and for Other Purposes,' and amendments thereof, the Secretary of the Treasury be, and he is hereby, authorized and directed to refund, out of any money in the Treasury, not otherwise appropriated, upon proper application being made to the Commissioner of Internal Revenue, under such rules and regulations as may be prescribed, so much of said tax as may have been collected on contingent beneficial interests which shall not have become vested prior to July first, nineteen hundred and two. And no tax shall hereafter be assessed or imposed under said act, *approved June [500] thirteenth, eighteen hundred and ninety-eight, upon or in respect of any contingent beneficial interest which shall not become absolutely vested in possession or enjoyment prior to said July first, nineteen hundred and two."

In view of the provision for refunding we see no escape from the conclusion that this statute was in a sense declaratory of what we hold was the true construction of the act of 1898, and which, as we have seen, had prevailed prior to the amendment of March 2, 1901, and which was only departed from by the administrative officers under a misconception of the import of that amendatory act. There is no suggestion that any prior practice prevailed in the enforcement of the act of 1898, calling for the enacting of the refunding clause, except the mistaken construction placed on the amendatory act of 1901. The act of 1902 was, therefore, a legislative affirmance of the construction given to the act of 1898, prior to the amendment of 1901. It follows that the act of 1902 was, moreover, a legislative repudiation of the construction of the act of 1898, now insisted on by the government. It is, we think, incontrovertible that the taxes which the 3d section of the act of 1902 directs to be refunded and those which it forbids the collection of in the future are one and the same in their nature. Any other view would destroy the unity of the section, and cause its provisions to produce inexplicable conflict. From this it results that the taxes which are directed in the first sentence to be refunded, because they had been wrongfully collected on contingent beneficial interests which had not become *vested* prior to July 1, 1902, where taxes levied on such beneficial interests as had not become *vested in possession or enjoyment* prior to the date named, within the intendment of the subsequent sentence. In other words, the statute provided for the refunding of taxes collected under the circumstances stated, and at the same time forbade like collections in the future.

In view of the text of the act of 1898 and
196 U. S.

the other considerations to which we have referred, we have not deemed it *necessary to advert to a contention made by the government in argument, that the true meaning of the act of 1898 is shown by the administrative construction placed upon the act of July 1, 1862, levying legacy taxes (12 Stat. at L. 485, chap. 119), of which, in effect the act of 1898 was a reproduction. It is undoubtedly true that both under the act of 1862 and the act of June 30, 1864 (13 Stat. at L. 285, chap. 173, U. S. Comp. Stat. 1901, p. 2268), there was an administrative construction by which vested interests, although unaccompanied with the right of immediate possession or enjoyment, were treated as at once taxable. Without entering into details on the subject, we content ourselves with saying that it is also true that the correctness of that construction was in effect repudiated by legislative action (act of July 13, 1866, 14 Stat. at L. 140, chap. 184), and was, moreover, in substance, treated as unsound by the reasoning of the opinion in *Clapp v. Mason*, 94 U. S. 591, 24 L. ed. 213.

Thus, by legislative action and judicial interpretation, it came to pass that the acts of 1862 and 1864 signified exactly what we now construe the act of 1898 to mean. It was doubtless this concordance of legislative action and judicial interpretation concerning the earlier acts which caused the administrative department of the government, when the act of 1898 was adopted, to interpret that act, not as the acts of 1862 and 1864 had been originally erroneously interpreted in administration, but in accord with the subsequent legislative and judicial construction which had been placed upon the language of those acts, and which language in effect was repeated in the act of 1898.

Concluding, as we do, that there was no authority under the act of 1898 for taxing the interest of Alfred G. Vanderbilt, given him by the residuary clause of the will, conditioned on his attaining the ages of thirty and thirty-five years, respectively, it is unnecessary to determine whether such interest was technically a vested remainder, as claimed by counsel for the government. In passing, however, we remark that in a case recently decided by the court of appeals of New York (*Re Tracy*, 179 N. Y. 506, 72

[502] N. E. 519), it was declared *that such interest was a contingent, and not a vested, remainder.

Coming to apply the construction which we have given the statute to the solution of the questions propounded by the Court of Appeals, it follows that *the first, second, and fourth questions are unnecessary to be answered, and the third question should be answered in the negative.*

And it is so ordered.

196 U. S.

WESTERN TIE & TIMBER COMPANY,
Appt.,
v.

BEN A. BROWN, Trustee of the Estate of
S. F. Harrison, a Bankrupt.

(See S. C. Reporter's ed. 502-511.)

Appeal in bankruptcy cases—preference—set-off.

1. The assertion of a right of set-off in a proceeding in bankruptcy presents a claim of Federal right which will sustain an appeal from a decision of a circuit court of appeals, rejecting the claim, to the Supreme Court of the United States, under the bankrupt act of July 1, 1898 (30 Stat. at L. 553, chap. 541, U. S. Comp. Stat. 1901, p. 3432), § 25, cl. (b) 1, authorizing such appeals when the question involved is one which might have been reviewed on writ of error from the latter court to a state court.
2. A sum retained by a corporate creditor with knowledge of the debtor's insolvency, and within four months of the filing of the petition in bankruptcy, which sum was due and owing the bankrupt under an agreement by which the corporation, in paying its employees, was to deduct from their wages the amounts due from such employees to the bankrupt for supplies furnished them by him, and was to remit to him the amount so deducted, irrespective of any indebtedness otherwise due by him to the corporation, is not a voidable preference under the bankrupt act of July 1, 1898 (30 Stat. at L. 553, chap. 541, U. S. Comp. Stat. 1901, pp. 3443, 3445), §§ 57g, 60b, which must be surrendered before the corporation can prove its claim against the bankrupt debtor's estate.
3. A corporate creditor is not entitled to set off, in proving its claim against the bankrupt debtor's estate, a sum retained by it with knowledge of the debtor's insolvency, and within four months of the filing of the petition in bankruptcy, which sum was due and owing the bankrupt under an agreement by which, in paying its employees, the corporation was to deduct from their wages the amount due from such employees to the bankrupt for supplies sold them by him, and to remit to him the amount thus deducted, irrespective of any indebtedness otherwise due from him to the corporation.

[No. 232.]

Submitted January 5, 1905. Decided February 20, 1905.

A PPEAL from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which affirmed, as modified, an order of the District Court for the Eastern District of Arkansas, directing that the claim of a creditor against a bankrupt's estate be expunged unless the creditor pay

NOTE.—On appeal and review in bankruptcy cases—see note to *Re Eggert*, 43 C. C. A. 9.

As to set-off in bankruptcy cases—see note to *Morgan v. Wordell*, 55 L. R. A. 33.

to the trustee in bankruptcy a specified sum, found to have been transferred to the creditor by the bankrupt, and decided to have operated as a voidable preference. Decrees of both courts *reversed*, and the cause remanded to the District Court, with directions to allow the proof of claim, and to deny any right of set-off, and for further proceedings.

See same case below, 129 Fed. 728.

Statement by Mr. Justice White:

This is an appeal from a decree of the circuit court of appeals for the eighth circuit, affirming, as modified, an order of the district court of the United States for the eastern district of Arkansas, directing that the claim of the Western Tie & Timber Company against the estate of S. F. Harrison, a bankrupt, be expunged unless the company paid to the trustee in bankruptcy a specified sum, found to have been transferred to the company by the bankrupt, and decided to have operated a voidable preference. 129 Fed. 728.

The facts were thus found by the circuit court of appeals:

"1. On February 24, 1903, a petition to procure an adjudication that S. Frank Harrison was a bankrupt was filed in the district court of the United States for the eastern district of Arkansas, and Harrison was then adjudged a bankrupt.

"2. The Western Tie & Timber Company was a corporation and a creditor of Harrison. It presented a claim against his estate in bankruptcy of \$24,358. The trustee moved to expunge this claim on the ground that the tie company had secured a voidable preference. The district court ordered the claim expunged unless the tie company should pay to the trustee \$2,210.73, and an appeal from this order was taken.

"3. For some years prior to February 24, 1903, the tie company and Harrison had been engaged in removing timber from land of the former, and converting it into ties, which the company received and sold. For many months prior to October, 1902, Harrison had owned and conducted stores in the vicinity of the places where the work of cutting and hauling the ties was carried on, and had furnished the laborers engaged in that work with groceries and other supplies. These laborers and Harrison were paid by the tie company in this way: Once in two or four weeks an inspector sent to the tie

[504] company a pay *roll, on which the name of each laborer, the amount he had earned, and the value of the supplies he had received from Harrison, appeared. The company deducted from the earnings of each laborer the value of the supplies the laborer had received, and sent him a check for the balance.

572

At the same time it sent to Harrison a check for the aggregate amount of the supplies which he had furnished to the laborers.

"4. Four months before the filing of the petition in bankruptcy, or October 24, 1902, Harrison owed the tie company more than \$20,000.

"5. Between December 27, 1902, and February 24, 1903, the company refused to pay to Harrison, retained and credited on its claim against him \$2,210.73, which was due him for supplies he had furnished to the laborers subsequent to November 30, 1902.

"6. At all times, when the amounts which aggregate \$2,210.73 became due and were retained by the company, Harrison was insolvent, the tie company knew that fact, and it intended, by retaining these amounts, to secure to itself a preference over the other creditors of the insolvent, but Harrison had no such intention.

"7. After the company had retained several hundred dollars of the amount due Harrison for the supplies, it advanced to him \$75 under a new and further credit."

An appeal to this court was allowed by the presiding circuit judge of the circuit court of appeals.

Mr. Joseph Wheless submitted the cause for appellant. *Messrs. George M. Block, F. H. Sullivan, and Charles Erd* were on his brief:

This court has jurisdiction of this appeal upon the finding of facts and conclusions of law below.

Pirie v. Chicago Title & T. Co. 182 U. S. 438, 45 L. ed. 1171, 21 Sup. Ct. Rep. 906; *New York County Nat. Bank v. Massey*, 192 U. S. 138, 48 L. ed. 380, 24 Sup. Ct. Rep. 199.

The bankrupt had no intention to prefer appellant, and without such intention on his part there could be no preference arising from his sale of goods to appellant's employees.

Buckingham v. McLean, 13 How. 169, 14 L. ed. 98; *Wilson v. City Bank*, 17 Wall. 487, 21 L. ed. 728; *Clark v. Iselin*, 21 Wall. 375, 22 L. ed. 573; *Barbour v. Priest*, 103 U. S. 293, 26 L. ed. 478; *Rice v. Grafton Mills*, 117 Mass. 228.

The sale of the supplies here in question by the bankrupt resulted in an indebtedness from appellant to him, was not payment of, nor security for, appellant's demand, and hence was not a preference, but a case of mutual debts to be set off, the one against the other.

Hendrick v. Lindsay, 93 U. S. 149, 23 L. ed. 857; *Hecht v. Caughron*, 46 Ark. 132; *Century Digest*, vol. II. title *Contracts*, § 798; *New York County Nat. Bank v. Mas-*

196 U. S.

sey, 192 U. S. 138, 48 L. ed. 380, 24 Sup. Ct. Rep. 199.

Mr. John M. Moore submitted the cause for appellee. Messrs. C. F. Henderson, H. L. Ponder, M. M. Stuckey, and S. M. Stuckey were on his brief:

This court does not have jurisdiction of this appeal.

Hutchinson v. Otis, 59 C. C. A. 94, 123 Fed. 14; *First Nat. Bank v. Klug*, 186 U. S. 202, 46 L. ed. 1127, 22 Sup. Ct. Rep. 899; *Holden v. Stratton*, 191 U. S. 115, 48 L. ed. 116, 24 Sup. Ct. Rep. 45.

An intention on the part of the bankrupt to give a preference by means of a transfer he makes is not indispensable to the existence of a voidable preference.

Collier, Bankr. 4th ed. pp. 387-389, 537; *Swarts v. Fourth Nat. Bank*, 54 C. C. A. 387, 117 Fed. 1.

The sale of supplies by the bankrupt to the laborers, and the appellant's deducting the amounts of them from the pay rolls and retaining the same, did not create an indebtedness from the appellant to the bankrupt, but was a voidable transfer of the bankrupt's property and a preference, and was not a case of mutual debts to be set off, the one against the other.

Re Christensen, 101 Fed. 802; *Re Ryan*, 105 Fed. 760; *Libby v. Hopkins*, 104 U. S. 303, 26 L. ed. 769; *Re Tacoma Shoe & Leather Co.* 3 N. B. N. & Rep. 9; *Sawyer v. Hoag*, 17 Wall. 610-622, 21 L. ed. 731-736.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court:

Before coming to the merits we dispose of an objection to the jurisdiction.

The appeal was prosecuted under clause (b) 1 of § 25 of the bankrupt act of July 1, 1898 (30 Stat. at L. 553, chap. 541, U. S. Comp. Stat. 1901, p. 3432), providing that from any final decision of a court of appeals, allowing or rejecting a claim under the act, an appeal may be had "where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a state to the Supreme Court of the United States."

The provision of the Revised Statutes regulating the revision of judgments and decrees of state courts, which is relied upon, in conjunction with the portion of the bankruptcy act just quoted, is that portion of § 709 (U. S. Comp. Stat. 1901, p. 575) which authorizes the re-examination of a final judgment or decree in any suit in the highest court of a state in which a decision in the suit can be had, "where any title, right, privilege, or immunity is
196 U. S.

claimed under . . . any . . . statute of . . . the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed, by either party, under such . . . statute, . . ."

The appellee does not question that this appeal is from a decree rejecting a claim, within the meaning of the statute, and that the requisite jurisdictional amount is involved, but the particular objection urged is that a right was not claimed under an act of Congress, nor was a right of that nature denied by the lower courts.

The objection is not tenable. It clearly appears from the record that in the claim filed on behalf of the tie company there*was[507] embodied, as an integral part thereof, as a proper credit or set-off, the sum retained from the wages of employees for supplies furnished by the bankrupt, and the rejection of the claim was based upon the denial of the right to set-off. As the right of set-off is controlled by the provisions of § 68 of the bankrupt act, the assertion of such a right, in a proceeding in bankruptcy, as was the case here, is necessarily based upon those provisions of the act of Congress, and in this case the construction of such statutory provision was undoubtedly involved. That the circuit court of appeals understood that reliance was had by the tie company upon the set-off clauses of the act is shown by its opinion, where, after sustaining the claim of the trustees that the credits in question constituted a preference, it prefaced a particular discussion of the contention as to a right of set-off by the following statement:

"Finally, it is said that this \$2,210.73 was a credit to Harrison, and that the company should be permitted to set it off against his debt to it, and should be allowed to prove its claim for the balance remaining without restriction, on the ground that these claims were mutual debts and credits under § 68 of the bankrupt law."

The record, we think, sufficiently presented a claim of Federal right (*Home for Incurables v. New York*, 187 U. S. 157, 47 L. ed. 117, 23 Sup. Ct. Rep. 84), and the objection to the jurisdiction is therefore overruled.

Passing to the merits of the controversy—

We must, at the outset, in the light of the facts found below, determine the exact relation existing between the bankrupt and the tie company, in order to fix the true import of the transactions by which the tie company, in making its claim against the bankrupt estate, asserted a right to retain and set off the sums which, in its proof of claim, it described as "deductions from pay rolls."

We think the findings establish that Har-

rison sold the goods, not to the tie company, but to the laborers, and therefore the result of the sale was to create an indebtedness [508] for the price *alone between Harrison and the employees. This is not only the necessary consequence of the facts stated, but likewise conclusively flows from the nature of the proof of claim made by the tie company, since that proof, so far as the items concerning the price of the goods sold to the employees are concerned, based the indebtedness by the tie company to Harrison, not upon any supposed original obligation on the part of the tie company towards Harrison to pay for the goods, but upon the "deductions from pay rolls," made by the tie company in paying its employees. The effect of this was to trace and limit the origin of the debt due by the tie company to Harrison solely to the fact that the tie company had deducted, in paying its employees, money due to Harrison by the employees, which, from the fact of the deduction, the tie company had become bound to pay to Harrison. We think, also, the facts found establish that the course of dealing between Harrison and the tie company concerning the deductions from pay rolls was that the tie company, when it made the deductions, was under an obligation to remit the money collected from the laborers for account of Harrison to him, irrespective of any debt which he might owe the tie company. This follows from the finding that, although there was a debt existing between Harrison and the tie company, the course of dealing between them was that when the tie company made deductions from the wages of the laborers of sums of money due by them to Harrison the tie company regularly remitted the proceeds of the deductions to Harrison. This conclusion, moreover, is the result of the finding that Harrison had no intention to give the tie company a preference, for if Harrison, being insolvent, to the knowledge of the company, within the prohibited period, gave to the tie company authority to collect the sums due to him by the laborers for goods sold them, with the right, or even the option to apply the money to a prior debt due by Harrison to the company, the necessary result of the transaction would have been to create a voidable preference. And if the inevitable result of the [509] transaction would have been to *create such a preference, then the law would conclusively impute to Harrison the intention to bring about the result necessarily arising from the nature of the act which he did. *Wilson v. City Bank*, 17 Wall. 486, 21 L. ed. 727. To give effect, therefore, to the finding that there was no intention on the part of Harrison to prefer, we must consider that the authority given by him to the tie

company to collect from the laborers did not give that company the right, or endow it with the option, when it had collected, to retain the money for its exclusive benefit, and to the detriment of the other creditors of Harrison.

The result of the facts found, then, is this: Harrison sold his goods to the laborers, and agreed with the tie company that that company, when it paid the laborers, should deduct the amount due by the laborers from the wages which the tie company owed them, and, after making the deduction, should remit to Harrison the amount thus deducted, irrespective of any indebtedness otherwise due by Harrison to the tie company. Did this give rise to a voidable preference within the intendment of §§ 57*g* and 60*b* of the bankrupt act?

In view of the necessary result of the findings which we have previously pointed out, it is, we think, beyond doubt that the agreement was not a voidable preference within the meaning of the statute, since, considering the agreement alone, it brought about no preference whatever. This leaves only for consideration the question whether the tie company was entitled to prove its claim, as it sought to do, for the balance owing, after crediting as a set-off the "deductions from pay rolls," to which we have referred. Now, as we have seen, from the facts found, it must be that the agreement between Harrison and the tie company obligated the latter, when it made the deductions from pay rolls, to remit to Harrison the amount of such deductions, irrespective of the account between itself and Harrison. It follows that as to such deductions the tie company stood towards Harrison in the relation of a trustee; and, therefore, the case was not one of mutual credits and debts, within the meaning of the set-off clause of the bankrupt law. **Libby v. Hopkins*, 104 U. S. 303, [510] 26 L. ed. 769. And, irrespective of the trust relation which the findings establish, it is equally clear from the general considerations that the right to set-off did not exist. To allow the set-off under the circumstances disclosed would violate the plain intendment of the inhibition contained in clause *b* (2) of § 68 of the bankrupt act, which forbids the allowance to any debtor of a bankrupt of a set-off or counter-claim which "was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use, and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy." That is to say, whether or not the trust relation was engendered, the result would still be that the

tie company, within the prohibited period, and with knowledge of the insolvency of Harrison, acquired the claims of the latter against the laborers, with a view to using the same by way of payment or set-off, so as to obtain an advantage over the other creditors, which it was not lawfully entitled to do.

As we have concluded that, under the findings, there was no voidable preference, we think the court below erred in refusing to allow the tie company to prove its claim, unless it surrendered the sums which it owed Harrison and his bankrupt estate. Section 57g of the bankrupt act, as amended by the act of February 5, 1903 (32 Stat. at L. 799, chap. 487), empowering the court to compel creditors to surrender preferences as a prerequisite to the proof of claims against the estate of the bankrupt, relates only to those creditors "who have received preferences voidable under section sixty, subdivision b." But it also is demonstrated, from what we have said, that the tie company was not entitled to prove its claim as it sought to do, embracing, as it did, the assertion of a right to set-off, and thus extinguish the sum which it owed to the bankrupt estate, resulting from the deductions from pay rolls. Whilst, therefore, because of the error in imposing the condition of prerequisite surrender of the alleged preference, the judgment below was erroneous, nevertheless the court was correct in refusing *to allow the alleged set-off, and in refusing to permit proof to be made which embraced and asserted such set-off. It follows that although the judgment below must be reversed for the reasons stated, the case should be remanded with directions to disregard the alleged claim of set-off, to reject any proof of claim asserting the same, and to permit a claim to be filed for the gross indebtedness to the tie company, with the alleged set-off eliminated. The result will be that the tie company will be a creditor of the estate for the whole amount of its claim, and will be, at the same time, a debtor to the estate for the amount of the deductions from the pay rolls collected by it, the court below, of course, having power to take such steps as may be lawful to protect the estate in respect to the payment of dividends to the tie company, in the event that company does not discharge its obligations to the bankrupt estate.

The decrees of both courts are reversed and the case is remanded to the District Court with directions to allow the proof of claim, rejecting the alleged set-off, and for further proceedings in conformity with this opinion.

196 U. S.

UNITED STATES, *Appt.*,

v.

ALBERT C. ENGARD.

(See S. C. Reporter's ed. 511-516.)

Navy—sea pay for shore duty—presumption of temporary character of shore duty.

Shore duty performed by a naval officer in obedience to an order of the Navy Département which expressly imposed upon him the continued discharge of his sea duty, and qualified the shore duty as merely temporary and ancillary to such sea duty, will be presumed not to be so incompatible with his permanent sea assignment as to cause the latter to terminate and defeat his right to sea pay while engaged on such shore duty.

[No. 136.]

Argued January 18, 1905. Decided February 20, 1905.

APPEAL from the Court of Claims to review an award of sea pay to a naval officer while engaged on shore duty. *Affirmed.* See same case below, 38 Ct. Cl. 712.

Statement by Mr. Justice **White**:

Somewhat condensing the facts below found, they are as follows: In February, 1897, Chief Engineer Albert C. Engard was performing duty as the chief engineer of the United States receiving ship Richmond, at League Island, Pennsylvania. On the 11th of February he received the following order from the Navy Department:

Navy Department,
Washington, February 11, 1897.

Sir:—

Report by letter, to the president of the steel inspection board, Navy Yard, Washington, D. C., for temporary duty in connection with the inspection of steel tubes for the boilers of torpedo boat No. 11, at Findlay, Ohio, and at Shelby, Ohio.

You are authorized to perform such travel between League Island, Pa., and Findlay, Ohio, and between League Island, Pa., and Shelby, Ohio, as may be necessary in the performance of this duty.

Keep a memorandum of the travel so performed by you, certifying to its necessity, and submit the same to the Department, from time to time, for its approval.

This duty is in addition to your present duties.

Very respectfully,

W. McAdoo, Acting Secretary.

Chief Engineer Albert C. Engard, U. S. Navy, U. S. R. S. Richmond, Navy Yard, League Island, Pa.

Complying with this order, Chief Engineer Engard made two round trips between

575

League Island and Ohio, in order to discharge the additional duty referred to in the order. The total number of days in which he was engaged in this work between February 24, 1897, and August 14, 1897, was 122. On the application to be allowed mileage for the trips amounting to \$172.80, the auditor of the Navy Department deducted from the claim \$133.70, and allowed only [513] \$39.10. The sum *disallowed was deducted on the theory that the chief engineer was only entitled to be paid for shore duty instead of for sea service during the time referred to. This suit was brought to recover the amount of the deduction, and the right to so recover was sustained by the court of claims. 38 Ct. Cl. 712.

Mr. John Q. Thompson argued the cause, and, with *Assistant Attorney General Pradt*, filed a brief for appellant:

Pay is not determined by the order.

Symonds v. United States, 21 Ct. Cl. 148; *United States v. Bishop*, 120 U. S. 51, 30 L. ed. 558, 7 Sup. Ct. Rep. 413; *United States v. Strong*, 125 U. S. 656, 31 L. ed. 823, 8 Sup. Ct. Rep. 1021; *United States v. Barnette*, 165 U. S. 174, 41 L. ed. 675, 17 Sup. Ct. Rep. 286; *McRitchie v. United States*, 23 Ct. Cl. 23; *Aulick v. United States*, 27 Ct. Cl. 109; *Pierce v. United States*, 33 Ct. Cl. 294; *Wyckoff v. United States*, 34 Ct. Cl. 288; *McGowan v. United States*, 36 Ct. Cl. 69; *Hannum v. United States*, 36 Ct. Cl. 99; *Taussig v. United States*, 38 Ct. Cl. 112.

Paramount duty should determine pay.

McGowan v. United States, 36 Ct. Cl. 69; *Taussig v. United States*, 38 Ct. Cl. 104; *Schoonmaker v. United States*, 19 Ct. Cl. 170.

Mr. William B. King argued the cause, and, with *Messrs. George A. King* and *Joseph C. Stebbins*, filed a brief for appellee:

An officer sent temporarily to hospital, without detachment from his vessel, is held, even by the Treasury Department, entitled to sea pay.

2 Comp. Dec. 299.

That decision in its application to temporary absence on account of illness has been followed by the court of claims.

Collins v. United States, 37 Ct. Cl. 222.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court:

A higher rate of pay is allowed to a chief engineer as well as to other naval officers when performing sea duty than when engaged on shore duty. Rev. Stat. 1556, U. S. Comp. Stat. 1901, p. 1067. And Rev. Stat. 1571, U. S. Comp. Stat. 1901, p. 1079, provides as follows:

"No service shall be regarded as sea serv-

ice except such as shall be performed at sea, under the orders of a department, and in vessels employed by authority of law."

The government did not dispute at bar, however, that where an officer assigned to sea duty within the purview of the foregoing provision is called upon, without a change in his sea assignment, to perform merely temporary service ashore, he is entitled to sea pay. And this is in accord with the naval regulations, wherein it is provided:

Paragraph 1154:

"(1) Officers shall be entitled to sea pay while attached to, and serving on board of, any ship in commission under control of the Navy Department, the Coast Survey, or the Fish Commission. . . ."

*"(3) Any officer temporarily absent from [515] a ship in commission to which he is attached shall continue to receive sea pay. . . ."

Paragraph 1168:

"A temporary leave of absence does not detach an officer from duty nor affect his rate of pay."

It is settled that the Navy Department has no power to disregard the statute, and to deprive an officer of sea pay by assigning him to a duty mistakenly qualified as shore duty, but which is, in law, sea duty. *United States v. Symonds*, 120 U. S. 46, 30 L. ed. 557, 7 Sup. Ct. Rep. 411; *United States v. Barnette*, 165 U. S. 174, 41 L. ed. 675, 17 Sup. Ct. Rep. 286. And, of course, the converse is also true, that the Navy Department has no power to entitle an officer to receive sea pay by assigning him to duty which is essentially shore duty, and mistakenly qualifying it as sea duty. But there is no conflict between these rulings, and the conceded principle that, where an officer is assigned to a duty which is essentially a sea service, that he does not lose his right to sea pay whenever he is called upon to perform a mere temporary service ashore. In the present case it cannot be denied that the officer was assigned to sea duty, and that the order of the Department, instead of detaching him therefrom, simply ordered him to discharge a temporary service ashore in addition to his sea service. The whole contention of the government is that this temporary shore service was necessarily incompatible with the continued performance of the officer's duty on the ship to which he continued to be attached, and therefore that the shore duty was paramount to the sea service, and necessarily, by operation of law, affected the detachment of the officer so as to permanently relieve him from the sea duty to which he continued to be regularly assigned.

There is no finding in the record, however, which justifies this argument, and as urged at bar it rests upon the mere assumption of

the incompatibility between the sea duty to which the officer was regularly assigned and the temporary shore duty which he was [516] called upon by the Department to *discharge. In effect, the proposition is that it must be assumed as a matter of law, in the absence of a finding to that effect, that the temporary shore duty was of such a permanent character as to render it impossible for the officer to continue to perform duty under his permanent sea assignment, and, therefore, as a matter of law, caused such assignment to terminate. We think the converse is true; and that where the assignment of an officer to duty by the Navy Department expressly imposed upon him the continued discharge of his sea duties, and qualified his shore duty as merely temporary and ancillary to the regular sea duty, that the presumption is that the shore duty was temporary, and did not operate to interfere with or discharge the officer from the responsibilities of his sea duty, to which he was regularly assigned.

Affirmed.

FRANK D. THOMPSON, Trustee in Bankruptcy of Herbert E. Moore, Bankrupt, Plff. in Err.,

v.

HENRY FAIRBANKS.

(See S. C. Reporter's ed. 516-528.)

Courts—when Federal courts will follow decisions of state courts—bankruptcy—preference—enforcement of mortgage lien on after-acquired property.

1. Whether and to what extent a chattel mortgage covering after-acquired property is valid is a local question on which the decisions of

NOTE.—On mortgage lien on after-acquired property—see notes to Pennock v. Coe, 16 L. ed. U. S. 436; and Deeley v. Dwight, 18 L. R. A. 298.

Review of decisions of state courts in cases involving questions of bankruptcy.

For the purpose of defining the appellate jurisdiction of the Supreme Court of the United States over state courts, the question whether an assignee in bankruptcy is entitled to certain property of a bankrupt is a Federal one. *Dushane v. Beall*, 161 U. S. 513, 40 L. ed. 791, 16 Sup. Ct. Rep. 637; *Williams v. Heard*, 140 U. S. 529, 35 L. ed. 550, 11 Sup. Ct. Rep. 885.

But where the question is not whether, if a bankrupt has title, it will pass to his assignee by the operation of the bankrupt act, but whether he has title at all, a decision thereon by the state court is not reviewable in the Federal Supreme Court. *Scott v. Kelly*, 22 Wall. 57, 22 L. ed. 729.

A decision in a state court against a party who sets up title to the property in controversy in assignees in bankruptcy, not to protect his own title, but to defeat that of the receiver of the bankrupt, appointed by the state court, is 196 U. S.

the state courts will be followed by the Federal Supreme Court in determining whether the taking possession of the mortgaged chattels after condition broken amounted to a preference voidable by the mortgagor's trustee in bankruptcy.

2. The decision of a state court as to whether a conveyance by a bankrupt was made with intent to defraud creditors does not present a Federal question which can be considered by the Federal Supreme Court on writ of error to a state court.
3. The enforcement in Vermont of the inchoate lien of a valid recorded chattel mortgage covering after-acquired property, by taking possession of such property with the mortgagor's consent after condition broken, as authorized by the mortgage, without fraud, but with knowledge of the mortgagor's insolvency and contemplated bankruptcy, and with the intent to make the lien available for the payment of the mortgage debt before other complications by way of attachment or bankruptcy should arise, does not amount to a preference voidable by the trustee in bankruptcy, although such action was taken within four months of the filing of the petition in bankruptcy, where the mortgage was executed long before that time.
4. The trustee in bankruptcy has no greater rights as against the bankrupt's chattel mortgagee, who has taken possession of after-acquired property under the mortgage, than he otherwise would have, because of the existence, at the time of taking such possession, of an attachment and second chattel mortgage which were both dissolved by the bankruptcy proceedings, being respectively levied and given within four months of the filing of the petition in bankruptcy.

[No. 117.]

Submitted January 6, 1905. Decided February 20, 1905.

IN ERROR to the Supreme Court of the State of Vermont to review a judgment which affirmed a judgment of the County

not reviewable in the Supreme Court of the United States. *Long v. Converse*, 91 U. S. 105, 23 L. ed. 233.

A decision of a state court that a discharge in bankruptcy was not a bar to the action is reviewable in the Supreme Court of the United States as a denial of a right claimed under the laws of the United States. *Dimock v. Revcre Copper Co.*, 117 U. S. 559, 29 L. ed. 994, 6 Sup. Ct. Rep. 855.

And the effect of a discharge in bankruptcy upon a right to enforce a lien upon property in existence when the proceedings in bankruptcy were commenced is a Federal question. *Long v. Bullard*, 117 U. S. 617, 29 L. ed. 1004, 6 Sup. Ct. Rep. 917.

A Federal question is presented by the claim of immunity, under U. S. Rev. Stat. § 5117, from the operation of a discharge in bankruptcy because of the fraudulent and fiduciary character of the debt. *Palmer v. Hussey*, 119 U. S. 96, 30 L. ed. 362, 7 Sup. Ct. Rep. 158.

In an earlier case where a bankrupt had pleaded his discharge in bankruptcy as a defense to a suit in a state court upon a debt, and the judgment was rendered in his favor,

Court of Caledonia County, in that State, in favor of defendant in an action by the trustee in bankruptcy to recover from the bankrupt's mortgagee the proceeds of a sale of the mortgaged property. *Affirmed.*

See same case below, 75 Vt. 361, 56 Atl. 11.

Statement by Mr. Justice Peckham:

The plaintiff in error, by this writ, seeks to review a judgment of the supreme court of the state of Vermont in favor of the defendant in error. 75 Vt. 361, 56 Atl. 11.

[517] The facts upon which the judgment rests are as follows: On the 30th day of June, 1900, Herbert E. Moore, of St. Johnsbury, in the state of Vermont, filed his voluntary petition in bankruptcy in the United States district court for the district of Vermont,

and on the 3d day of July, 1900, Moore was by the court duly adjudged a bankrupt, and on the 15th of September, 1900, the plaintiff in error was appointed a trustee in bankruptcy of Moore's estate, and duly qualified. He commenced this action in the county court of Caledonia county, in the state of Vermont, on the first Tuesday of June, 1901, against the defendant Fairbanks, to recover from him the value of certain personal property alleged to have belonged to the bankrupt Moore on the 16th day of May, 1900, and which was, as alleged, sold and converted by Fairbanks, on that day, to his own use, the value of the property being \$1,500, as averred in the declaration. The defendant filed his plea and gave notice that upon the trial of the case he would give in evi-

the Supreme Court of the United States, without noticing that the decision was also against a right or immunity set up by the plaintiff under the clause excepting fiduciary debts from the effect of the discharge, dismissed a writ of error to the state court because the decision was in favor of the right set up under that statute. *Strader v. Baldwin*, 9 How. 261, 13 L. ed. 130. But this case, though not referred to in *Palmer v. Hussey*, 119 U. S. 96, 30 L. ed. 362, 7 Sup. Ct. Rep. 158, *supra*, is obviously, in view of that decision, no longer an authority for dismissing a writ of error on a similar record, and is declared in *McCormick v. Market Nat. Bank*, 165 U. S. 538, 41 L. ed. 817, 17 Sup. Ct. Rep. 433, to have been overruled by *Palmer v. Hussey* and *Hennequin v. Clews*, 111 U. S. 676, 28 L. ed. 565, 4 Sup. Ct. Rep. 576, in which latter case the court, on a similar state of facts, assumed jurisdiction without discussing that question.

And a denial by a state court of a claim of immunity, under U. S. Rev. Stat. § 711, U. S. Comp. Stat. 1901, p. 577, from the operation of a decree of a state court because that statute made the jurisdiction of the courts of the United States over bankruptcy proceedings exclusive, gives the Supreme Court of the United States jurisdiction to review the decision of the state court. *Winchester v. Heiskell*, 119 U. S. 450, 30 L. ed. 462, 7 Sup. Ct. Rep. 281.

A writ of error lies from the Supreme Court of the United States to review the decision of the highest court of a state against the validity of a title claimed under a sale in bankruptcy. Such a decision is against a right, title, privilege, or immunity specially set up and claimed under Federal law. *New Orleans, S. F. & L. R. Co. v. Delamore*, 114 U. S. 501, 29 L. ed. 244, 5 Sup. Ct. Rep. 1009.

The question as to the validity of a transfer by a trustee in bankruptcy appointed under and deriving his authority from the bankrupt act is a Federal one. *Traer v. Clews*, 115 U. S. 528, 29 L. ed. 467, 6 Sup. Ct. Rep. 155.

A contention that a sale under an order of a Federal court in bankruptcy proceedings to sell mortgaged property free from an encumbrance extinguished the lien of a mortgagor not made a party to the proceedings is a claim of a right under Federal authority. *Factors' & T. Ins. Co. v. Murphy*, 111 U. S. 738, 28 L. ed. 582, 4 Sup. Ct. Rep. 679.

A sheriff's claim to protection against suit in

a state court to recover moneys arising out of a sale under an execution because he had paid over such moneys to the clerk of a Federal court under an order made by it in a proceeding in bankruptcy involves a question respecting the authority of the Federal court to make the order. *O'Brien v. Weld*, 92 U. S. 81, 23 L. ed. 675.

The Supreme Court of the United States has no jurisdiction to review the decision of a state court in an action to set aside a conveyance as fraudulent against creditors, merely because the suit was brought by an assignee in bankruptcy. *McKenna v. Simpson*, 129 U. S. 506, 32 L. ed. 771, 9 Sup. Ct. Rep. 365.

And the decision of a state court in such suit, as to what shall be deemed a fraudulent conveyance, does not present a Federal question; nor does the application by the state court of the evidence in reaching that decision raise such a question, when no question was raised as to the assignee's power under the acts of Congress, or the rights vested in him as assignee. *McKenna v. Simpson*, 129 U. S. 506, 32 L. ed. 771, 9 Sup. Ct. Rep. 365.

The contention that a conveyance was either in fraud of creditors under the state law, or that a residuary estate remained in the grantor which would pass under an assignee's sale in proceedings in bankruptcy, presents a local, and not a Federal, question, and cannot, therefore, be considered by the Federal Supreme Court on writ of error to a state court. *Cramer v. Wilson*, 195 U. S. 408, *ante*, 258, 25 Sup. Ct. Rep. 94.

A decision of a state court against a party who claims that the title to his demand comes through a bankrupt assignee cannot be reviewed by the Supreme Court of the United States where no construction of such bankrupt act was called in question. *Calcote v. Stanton*, 18 How. 243, 15 L. ed. 348.

A decision of a state court that the presentation of a check drawn on a bank by a depositor transferred to the holder so much of the debt due the drawer as was sufficient to pay the check presents no Federal question which will give the Supreme Court of the United States jurisdiction, notwithstanding the subsequent bankruptcy of the drawer, and a claim by the bank to a set-off under the bankruptcy act, against the obligation of the bankrupt arising out of an acceptance of an unpaid draft; as, the only dispute being over the amount of the credit

dence and rely upon, in defense of the action, certain special matters set up in the plea. The case was, by order of the county court, and by the consent of the parties, referred to a referee to hear the cause and report to the court. It was subsequently heard before the referee, who filed his report, finding the facts upon which the decision of the case must rest. He found that before June, 1886, the bankrupt Moore bought a livery stock and business in St. Johnsbury village, in the state of Vermont. At the time of this purchase the defendant was the lessor of the buildings in which the business was conducted, and it continued to be carried on in those buildings. Moore, in making the purchase, had assumed a mortgage then outstanding on the property, and a short time

before March 1, 1888, the defendant assisted him to pay this mortgage by signing a note with him for \$1,425, payable to the Passumpsic Savings Bank of St. Johnsbury. Subsequently defendant signed notes, which, with accrued interest, were merged in one, dated March 1, 1900, for \$2,510.75, due on demand to said savings bank, signed by the bankrupt *and by the defendant as his sure-^[518]ty. This note had not been paid when the case was referred to the referee. The defendant also signed other notes payable to the First National Bank of St. Johnsbury, which were merged into one, and, by various payments made by Moore, it was reduced to \$525, and on June 4, 1900, it was paid by the defendant. All these notes had been signed by the defendant to assist Moore in

which the bank was entitled to set off against the amount due on the draft, the bankruptcy law is not involved. *Boatmen's Sav. Bank v. State Sav. Asso.* 114 U. S. 265, 29 L. ed. 174, 5 Sup. Ct. Rep. 878.

The decision of a state court upon the legal effect of promises alleged to have been made by a banker after his discharge under the bankrupt law of the United States cannot be reviewed by the Supreme Court of the United States, as the legal obligation as to promises depends upon the law of the state in which they were made. *Linton v. Stanton*, 12 How. 423, 13 L. ed. 1050.

The refusal of the highest court of a state to permit the defense of a discharge in bankruptcy to be set up in that court as a new defense raises no Federal question. *Wolf v. Stix*, 96 U. S. 541, 24 L. ed. 640.

Where a stockholder and creditor of a corporation commenced proceedings in bankruptcy, and two others, to stop such proceedings, purchased his stock and assumed his debt, these facts, set up as a defense to their obligation, present no Federal question under the bankrupt law which will give the Supreme Court of the United States jurisdiction to review a judgment for plaintiff in the state court. *Van Norden v. Benner*, 131 U. S. cxlv. Appx., and 24 L. ed. 247.

The question whether a suit brought by the assignee of a trustee in bankruptcy against a prior purchaser was barred by the limitation prescribed by the bankrupt act is a Federal one. *Traer v. Clews*, 115 U. S. 528, 29 L. ed. 467, 6 Sup. Ct. Rep. 155.

The decision of a state court that a writ of error from one state court to another is the beginning of a new suit within the meaning of the limitation clause of the Federal bankrupt law would seem not to be reviewable in the Supreme Court of the United States, or, if reviewable, should be followed by that court. *Jenkins v. International Bank*, 106 U. S. 571, 27 L. ed. 304, 2 Sup. Ct. Rep. 1.

Whether a bankrupt was insolvent at the time of giving an alleged preference, and whether the creditor had reasonable cause to believe that it was intended thereby to give a preference, are questions of fact, as to which the Supreme Court of the United States is concluded by the verdict of the jury in a suit by the trustee to recover the amount of such preference. *Kaufman v. Treadway*, 195 U. S. 271, ante, 190, 25 Sup. Ct. Rep. 33.

196 U. S.

The action of the court in *Barton v. Geiler*, 108 U. S. 161, 27 L. ed. 687, 2 Sup. Ct. Rep. 387, in examining the testimony, in a suit in equity to set aside a conveyance by a bankrupt, to see whether the state court should have found that the conveyance was in fraud of the bankrupt law, is not in accord with the later decisions; *c. g.*, *Egan v. Hart*, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300, which applies to an equity cause the principle that questions of fact cannot be reviewed on writ of error to a state court. See also, on this point, *div. II.*, *e.*, in note to *Missouri ex rel. Hill v. Dockery*, 63 L. R. A. 571, on *What questions the Federal Supreme Court will consider in reviewing the judgments of state courts.*

Where a state court reverses a judgment in favor of one defendant on the ground that he was not entitled to the exemption which he claimed under the bankrupt act, and affirms a judgment against his codefendants as his sureties on the ground that they were not entitled to the benefit of his discharge, both judgments are final, and may be brought to the Supreme Court of the United States by writ of error. *O'Dowd v. Russell*, 14 Wall. 402, 20 L. ed. 857.

See also, on this point, *div. III.*, *a.*, in note to *Apex Transp. Co. v. Garbade*, 62 L. R. A. 513, on *What adjudications of state courts can be brought up for review in the Supreme Court of the United States on writ of error to those courts.*

An assignee in bankruptcy may be substituted as plaintiff in error for the original plaintiffs in error, who had sued out the writ to the state court after receiving their discharge in bankruptcy. *Gates v. Goodloe*, 101 U. S. 612, 25 L. ed. 895.

And where a writ of error to the state court, which had been sued out by the judgment debtor, who had obtained a discharge in bankruptcy after the suit was instituted, was dismissed because of his lack of interest in the suit, the court said the assignee in bankruptcy might be substituted on an application to reinstate the cause, made during the term, were it not for the fact that no jurisdictional fact was contained in the record. *Knox v. Exchange Bank*, 12 Wall. 379, 20 L. ed. 414.

But an assignee in bankruptcy will not be substituted as a party to a writ of error to review a judgment rendered against a person after his adjudication in bankruptcy, since the bankrupt may prosecute such writ in his own name,

carrying on, building up, and equipping his livery stable and livery business, and as between them the notes belonged to Moore to pay. On April 15, 1891, Moore gave the defendant a chattel mortgage on the livery property to secure him for these and other debts and liabilities. The property was described in the mortgage as follows: "All my livery property, consisting of horses, wagons, sleighs, vehicles, harnesses, robes, blankets, etc., also all horses and other livery property that I may purchase in my business or acquire by exchange."

The condition contained in the mortgage was, that if Moore should "well and truly pay, or cause to be paid, to the said Henry Fairbanks all that I now owe him, or may owe him hereafter by note, book account, or in any other manner, and shall well and truly save the said Henry Fairbanks harmless, and indemnify him from paying any commercial paper on which he has become or may hereafter become holden in any manner for my benefit as surety, indorser, or otherwise, then this deed shall be void; otherwise of force."

This mortgage was acknowledged, and the affidavit, as provided by the Vermont statute, was appended, showing the justice of the debt and the liability contemplated to be secured by the mortgage, and the mortgage was duly recorded on the 18th day of April, 1891, in the St. Johnsbury clerk's office, by the town clerk thereof. On March 5, 1900, Moore gave the defendant another chattel mortgage on this livery stock, which, on March 23, 1900, defendant assigned to the Passumpsic Savings Bank, and that bank has ever since been its holder and owner. This mortgage was given to secure defendant against all his liabilities for Moore.

[519] *On the 7th of May, one John Ryan sued out a writ in assumpsit against Moore to recover some \$500, and an attachment on the livery stock was levied in that suit by the deputy sheriff. This attachment remained in force until dissolved by the bankruptcy proceedings, and the suit is still pending in the state court of Vermont.

Under the agreement contained in the chattel mortgage of April, 1891, Moore made sales, purchases, and exchanges of livery

stock to such an extent that on March 5, 1900, there only remained of the livery property on hand April 15, 1891, two horses. These sales, exchanges, and purchases were sometimes made by Moore without communication with or advice from the defendant, and frequently after consultation with him. The livery stock, as it existed on May 16, 1900, was all acquired by exchange of the original stock, or with the avails of the old stock, or from the money derived from the business. Some years after the execution of the chattel mortgage of April 15, 1891, Moore became embarrassed, and finally, shortly prior to March 5, 1900, he became and continued wholly insolvent. On May 16, 1900, the defendant, acting under the advice of counsel, and with the consent of Moore, took possession, under the mortgage of April 15, 1891, of all the livery property then on hand, and on June 11, 1900, caused the same to be sold at public auction by the sheriff. It is for the net avails of this sale, amounting to \$922.08, which the sheriff paid over to the defendant, that this suit is brought. The Passumpsic Savings Bank on September 15, 1900, proved its note of \$2,510.75 as an unsecured claim against the bankrupt estate of Moore, as the mortgage held by the bank as security had been given by Moore in March, 1900, to defendant, and by him assigned to the bank within four months of the filing of the petition in bankruptcy.

For the purpose of defeating the effect of the defendant taking possession of the livery property under his chattel mortgage of April, 1891, the trustee in bankruptcy presented a petition to the United States district court of Vermont for *leave to inter-[520] vene as plaintiff in the Ryan attachment suit, and to have the lien of Ryan's attachment preserved for the benefit of the general creditors. This petition was dismissed by that court. The referee found that the defendant and his counsel knew, when he took possession of the livery property, under his mortgage, that Moore was insolvent, and was considering going into bankruptcy. The referee also found that he did not intend to perpetrate any actual fraud on the other creditors, or any of them, but he did intend thereby to perfect his lien on the livery

and the assignee, if any of the questions involved may affect the bankrupt's estate, will be heard on such questions by his counsel when the case comes up for argument. *Hill v. Harding*, 121 U. S. cc., Appx., and 26 L. ed. 310.

See also div. VIII. c, in note to *Wedding v. Meyler*, 66 L. R. A. 833, on *Practice and procedure governing the transfer of causes to the Federal Supreme Court on writ of error or appeal*.

Other notes involving questions respecting the appellate jurisdiction of the Supreme Court of the United States over state courts, not here-

inbefore referred to, are: *How and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States*,—*Mutual L. Ins. Co. v. McGrew*, 63 L. R. A. 33; *What the record must show respecting the presentation and decision of a Federal question in order to confer jurisdiction on the Supreme Court of the United States of a writ of error to a state court*,—*Hooker v. Los Angeles*, 63 L. R. A. 471; *The record for this purpose*,—*Home for Incurables v. New York*, 63 L. R. A. 329.

property, and make it available for the payment of his debt before other complications by way of attachment or bankruptcy arose, and he understood at that time that it was probable that the Ryan attachment would hold good as against his mortgage. All the property of which defendant took possession was acquired by Moore with the full understanding and intent that it should be covered by the defendant's mortgage of April 15, 1891.

Mr. Edward H. Deavitt submitted the cause for plaintiff in error:

At the time the petition was filed the avails of the sale were in the hands of the officer awaiting whoever was entitled to them, which person was the plaintiff, as at that time those avails could have been levied upon under judicial process against the bankrupt.

Re Allen, 65 Vt. 392, 26 Atl. 591.

The Ryan attachment was superior to the title the defendant secured by taking possession of the property under his mortgage; and, as the attachment was not dissolved until the bankrupt was adjudicated a bankrupt, at the time the bankrupt filed his petition in bankruptcy, and prior thereto, this property could have been taken and sold under judicial process against him. The plaintiff, therefore, took title to the property under the bankrupt act, § 70a, subd. 5, and can recover the value of the same from the defendant.

Page v. Edmunds, 187 U. S. 596, 47 L. ed. 318, 23 Sup. Ct. Rep. 200; *Re Butterwick*, 131 Fed. 371; *Desany v. Thorp*, 70 Vt. 31, 39 Atl. 309; *Collender Co. v. Marshall*, 57 Vt. 232; *Stafford v. Adair*, 57 Vt. 63.

The mortgage of April 15, 1891, was invalid as against the creditors of the bankrupt until possession was taken by the defendant. So long as Ryan's attachment remained in force Ryan could have avoided any transfer of the property by the bankrupt, and especially the attempt to perfect the defendant's mortgage of 1891, and no sale of the property by the defendant could make it valid as against Ryan.

Thorp v. Robbins, 68 Vt. 53, 33 Atl. 896.

Therefore, since Ryan, a creditor of the bankrupt, could have avoided the taking possession and sale of the bankrupt's livery property by the defendant, and could have recovered the proceeds of the sale from the defendant, at least to the amount of the attachment, the plaintiff, as the bankrupt's trustee, has the same right under § 70e of the bankruptcy law.

Re Howland, 109 Fed. 869; *Skillen v. Endelmen*, 39 Misc. 261, 79 N. Y. Supp. 413.

The defendant's mortgage of April 15, 1891, was not a valid claim as against the

claim of Ryan, because of want of possession before Ryan sued out his attachment.

Rice v. Courtis, 32 Vt. 460, 78 Am. Dec. 597.

As Ryan's attachment was valid and binding until the bankrupt was adjudicated a bankrupt, at the time the petition in bankruptcy was filed the defendant's mortgage of April 15, 1891, was not a valid lien as against the claim of Ryan, a creditor of the bankrupt, and it therefore is not a valid lien against the estate of the bankrupt, and the plaintiff can recover the proceeds of the sale of the property from the defendant.

Re H. G. Andrae Co. 117 Fed. 561; *Re Frazier*, 117 Fed. 746; *Torrance v. Winfield Nat. Bank*, 66 Kan. 177, 71 Pac. 235; *Re Pekin Plow Co.* 50 C. C. A. 257, 112 Fed. 308; *Re Thorp*, 130 Fed. 371.

One cannot convey by mortgage, or absolutely, personal property which has no express or potential existence as his property at the time of the conveyance.

Peabody v. Landon, 61 Vt. 318, 15 Am. St. Rep. 903, 17 Atl. 781.

But a stipulation in a mortgage that future-acquired property shall be covered by the mortgage is an executory agreement of such a character that the creditor with whom it is made may, under it, take the property into his possession when it comes into existence and is the subject of transfer by his debtor, and hold it for his security. Whenever he does so take it into his possession before any attachment has been made of the same, or any alienation thereof, such creditor, under his executory agreement, may hold the same; but, until such an act done by him, he has no title to the same. Such act being done, and the possession thus acquired, the executory agreement of the debtor authorizing it, it will then become holden by virtue of a valid lien or pledge.

Moody v. Wright, 13 Met. 17, 46 Am. Dec. 706; *Griffith v. Douglass*, 73 Me. 532, 40 Am. Rep. 395; *Cook v. Corthell*, 11 R. I. 482, 23 Am. Rep. 518; *Looker v. Peckwell*, 38 N. J. L. 253.

As between the defendant and the bank, the bank was the owner of all the livery property; and, after the defendant took possession of and sold the property under his mortgage of April 15, 1891, as aforesaid, the bank could have maintained a suit against him to recover the value of the property.

Longey v. Leach, 57 Vt. 377.

The plaintiff, as trustee of the bankrupt's estate, by the provisions of § 67b was subrogated to the rights of the Passumpsic Savings Bank and Ryan, and in this action is entitled to recover the proceeds of the sale.

Re Howland, 109 Fed. 869; *Re New York Economical Printing Co.* 49 C. C. A. 133, 110 Fed. 514; *Patten v. Carley*, 69 App. Div.

425, 74 N. Y. Supp. 994; *Skillen v. Endelman*, 39 Misc. 261, 79 N. Y. Supp. 413; *Gove v. Morton Trust Co.* 96 App. Div. 177, 89 N. Y. Supp. 247.

The attachment of the livery property on Ryan's writ by the officer by copy lodged in the town clerk's office had the effect to vest the possession of the property in the officer so as to hold it against all subsequent sales or interference, as though it had been actually removed and taken into the officer's actual possession.

Thorp v. Robbins, 68 Vt. 53, 33 Atl. 896; *Barron v. Smith*, 63 Vt. 121, 21 Atl. 269; *West River Bank v. Gorham*, 38 Vt. 649; *Angell v. Keith*, 24 Vt. 371.

As the mortgage of 1891 was a common-law chattel mortgage, and as the property in existence in May, 1900, was after-acquired property, so long as the Ryan attachment was in force it was impossible for the defendant to perfect his lien by taking possession, as the rights of third parties had intervened, and the possession of the property was already in another person.

Peabody v. Landon, 61 Vt. 318, 15 Am. St. Rep. 903, 17 Atl. 781; *Moody v. Wright*, 13 Met. 17, 46 Am. Dec. 706; *Re Allen*, 65 Vt. 392, 26 Atl. 591.

The taking possession of the livery property by the defendant, and the sale of the same under his mortgage of April 15, 1891, was, therefore, an unlawful act, a trespass, and the attaching officer could have maintained trespass, trover, or replevin against him for the property.

National Bank v. Miller, 67 Vt. 66, 30 Atl. 700; *Barron v. Smith*, 63 Vt. 121, 21 Atl. 269; *Arnold v. Maroney*, 17 R. I. 579, 23 Atl. 1101; *Drake*, Attachm. § 291.

The main purpose which the bankruptcy law of 1898 seeks to accomplish is the equal distribution of the bankrupt's property *pro rata* among his creditors, and, to further that equal distribution, certain liens obtained within four months of the filing of the petition in bankruptcy are declared null and void upon the debtor being adjudicated a bankrupt.

Swarts v. Fourth Nat. Bank, 54 C. C. A. 387, 117 Fed. 1; *Buchanan v. Smith*, 16 Wall. 277, 21 L. ed. 280.

And the rights of all claimants to the estate of the bankrupt are fixed by the status of their claims at the time of the filing of the petition in bankruptcy.

Swarts v. Fourth Nat. Bank, 54 C. C. A. 387, 117 Fed. 1; *Re Bingham*, 94 Fed. 796.

To hold, as the supreme court of Vermont did, that Moore's being adjudicated a bankrupt gave vitality to the defendant's taking possession of the livery property, an act which when made was a trespass, and was ineffectual for any purpose of priority

over the bank's mortgage or Ryan's attachment, and to then employ that act, thus vitalized, to defeat the primary object of the adjudication, which was the distribution of the bankrupt's effects for the equal benefit of all his creditors, is placing a construction upon the bankruptcy act which is demanded neither by its letter nor its spirit.

Reed v. McIntyre, 98 U. S. 507, 25 L. ed. 171; *Re Badenheim*, 15 Nat. Bankr. Reg. 370, Fed. Cas. No. 716; *Re Beisenthal*, 14 Blatchf. 146, Fed. Cas. No. 1,236; *Re Steele*, 7 Biss. 504, Fed. Cas. No. 13,345; *Re H. G. Andrae Co.* 117 Fed. 561; *Beamer v. Freeman*, 84 Cal. 554, 24 Pac. 169.

At the time the defendant took possession of the bankrupt's livery property the bankrupt was insolvent, and the evident effect of such possession will be to give to the defendant, a creditor, a greater percentage of his debt than to any other creditor of the same class.

Mathews v. Hardt, 79 App. Div. 570, 80 N. Y. Supp. 462.

In deciding the case at bar the supreme court of Vermont, in construing §§ 60a and 60b, followed the rule established by the United States bankruptcy law of 1867, and the state insolvency law, which we think was error. Under the law of 1898 the trustee in bankruptcy stands more in the shoes of the creditors of the bankrupt, and any transfer of property, though perfectly good as between the parties thereto, if not good as against the creditors of the transferor for want of recording or change of possession, is not good as against the trustee in bankruptcy of the transferor. So in the case at bar, if the defendant had failed to take possession of the livery property until after the bankrupt had filed his petition in bankruptcy, the plaintiff, as trustee, would have taken all the property in dispute.

Re Allen, 65 Vt. 392, 26 Atl. 591; *Page v. Edmunds*, 187 U. S. 596, 47 L. ed. 318, 23 Sup. Ct. Rep. 200; *Re Pekin Plow Co.* 50 C. C. A. 257, 112 Fed. 308; *Haskell v. Merrill*, 179 Mass. 120, 60 N. E. 485.

Under the law of 1898 the intent of the parties to the transfer is not material. It is the result obtained by the transferee as against the creditors of the transferor that is controlling.

Wilson Bros. v. Nelson, 183 U. S. 191, 46 L. ed. 147, 22 Sup. Ct. Rep. 74; *Re Ed. W. Wright Lumber Co.* 114 Fed. 1011.

One of the great objects of the bankruptcy law is the equal distribution of the debtor's property among his creditors.

Buckingham v. McLean, 13 How. 151, 14 L. ed. 91; *Whitley Grocery Co. v. Roach*, 115 Ga. 918, 42 S. E. 282.

The four months within which a voidable preference can be given begin to run from

the date of the recording or registering of the transfer, or from the date when the beneficiary takes notorious, exclusive, or continuous possession of the transferred property.

Wilson Bros. v. Nelson, 183 U. S. 191, 46 L. ed. 147, 22 Sup. Ct. Rep. 74; *Re Sheridan*, 98 Fed. 406; *Re Klingaman*, 101 Fed. 691; *Re Ronk*, 111 Fed. 154; *Babbitt v. Kelley*, 96 Mo. App. 529, 70 S. W. 384; *Landis v. McDonald*, 88 Mo. App. 335; *Mathews v. Hardt*, 79 App. Div. 570, 80 N. Y. Supp. 462; *Re Ball*, 123 Fed. 164; *Re Mandel*, 127 Fed. 863; *Anniston Iron & Supply Co. v. Anniston Rolling Mill Co.* 125 Fed. 974; *Tatman v. Humphrey*, 184 Mass. 361, 63 L. R. A. 738, 100 Am. St. Rep. 562, 68 N. E. 844.

In the case at bar the defendant knew that his own intention and purpose were to secure a preference by making his debtor's property available for the payment of his debt before the debtor went into bankruptcy. He clearly had reasonable cause to know that a preference was intended, because he must have known and intended the consequences of his own acts.

Western Tie & Timber Co. v. Brown, 64 C. C. A. 256, 129 Fed. 728.

At the time the bankrupt delivered the livery property to the defendant he was insolvent and contemplating bankruptcy, and the defendant knew this. The necessary and logical consequence of that act was to prefer the defendant over the bankrupt's other creditors, and such a transfer is conclusive evidence of an intent to prefer, as every man is presumed to intend the necessary consequences of his acts.

Toof v. Martin, 13 Wall. 40, 20 L. ed. 481; *Wager v. Hall*, 16 Wall. 584, 21 L. ed. 504; *Goldman v. Smith*, 93 Fed. 182; *Re Rome Planing Mill*, 96 Fed. 812; *Johnson v. Wald*, 35 C. C. A. 522, 93 Fed. 640; *Re McLam*, 97 Fed. 922; *Re McGee*, 105 Fed. 895; *Re Bloch*, 48 C. C. A. 650, 109 Fed. 790; *Re Ed. W. Wright Lumber Co.* 114 Fed. 1011; *Read v. Moody*, 60 Vt. 668, 15 Atl. 345.

He cannot now be heard to say that he did not have reasonable cause to believe that by such transfer of property a preference was intended.

Re Ed. W. Wright Lumber Co. 114 Fed. 1011.

Furthermore, the facts that at the time the bankrupt delivered his livery property to the defendant he was insolvent, that he delivered his entire stock, that he was at that time contemplating bankruptcy, that the defendant knew all this, and, by taking possession of the property, intended to make it available for the payment of his debt before the proceedings in bankruptcy were begun, necessarily include the further fact that at that time the defendant had reasonable

cause to believe that by the change of possession of the livery property a preference was intended.

Lewis v. Burlington Sav. Bank, 64 Vt. 626, 25 Atl. 835; *Read v. Moody*, 60 Vt. 668, 15 Atl. 345; *Buchanan v. Smith*, 16 Wall. 277, 21 L. ed. 280; *Wager v. Hall*, 16 Wall. 584, 21 L. ed. 504; *Toof v. Martin*, 13 Wall. 40, 20 L. ed. 481; *Sebring v. Wellington*, 63 App. Div. 498, 71 N. Y. Supp. 788.

The bankrupt delivered the livery property to the defendant with the intent on his part to hinder, delay, and defraud his other creditors, for that was the logical and legal consequence of his act.

Toof v. Martin, 13 Wall. 40, 20 L. ed. 481; *Wager v. Hall*, 16 Wall. 584, 21 L. ed. 504; *Goldman v. Smith*, 93 Fed. 182; *Re Rome Planing Mill*, 96 Fed. 812; *Re McLam*, 97 Fed. 922; *Johnson v. Wald*, 35 C. C. A. 522, 93 Fed. 640; *Re McGee*, 105 Fed. 895; *Re Bloch*, 48 C. C. A. 650, 109 Fed. 790; *Re Ed. W. Wright Lumber Co.* 114 Fed. 1011.

Mr. C. A. Prouty submitted the cause for defendant in error. *Messrs. Harry Blodgett and Jonathan Ross* were on his brief:

The after-produced articles coming from the proper handling and management of the property originally mortgaged were potentially in the original when mortgaged, and not property, in the eye of the law, which did not exist when the mortgage was executed.

Smith v. Atkins, 13 Vt. 461; *Bellows v. Wells*, 36 Vt. 599; *Brainard v. Peck*, 34 Vt. 496; *Paris v. Vail*, 18 Vt. 277; *Baxter v. Bush*, 29 Vt. 465, 70 Am. Dec. 429; *Re Allen*, 65 Vt. 395, 26 Atl. 591; *Moody v. Wright*, 13 Met. 17, 46 Am. Dec. 706, and note; *Mitchell v. Winslow*, 2 Story, 630, Fed. Cas. No. 9,673; *Gregg v. Sanford*, 24 Ill. 17, 76 Am. Dec. 719, and note; *Peabody v. Landon*, 61 Vt. 318, 15 Am. St. Rep. 803, 17 Atl. 781; *Francisco v. Ryan*, 54 Ohio St. 307, 56 Am. St. Rep. 711, and note, 43 N. E. 1045.

The mortgage of April 15, 1891, gave the defendant the right to take possession of the after-acquired livery property at any time, whether the debt and liability secured were under or over due, without the consent of the bankrupt.

Peabody v. Landon, 61 Vt. 318, 15 Am. St. Rep. 903, 17 Atl. 781; *Longey v. Leach*, 57 Vt. 377; *McLoud v. Wakefield*, 70 Vt. 558, 43 Atl. 179.

A transfer of property to a creditor by a debtor within four months prior to his adjudication as a bankrupt does not constitute a preference under the bankrupt law in the absence of fraud, where the transfer was made pursuant to the terms of a prior contract under which the transferee advanced money with which property was acquired,

reserving a lien thereon and an option, in case of default in payment, to purchase the property at a fixed price, deducting therefrom his advances.

Sabin v. Camp, 98 Fed. 974.

To the same effect are *Re Chapman*, 99 Fed. 395; *Chattanooga Nat. Bank v. Rome Iron Co.* 102 Fed. 755; 3 Pom. Eq. Jur. §§ 1236, 1283, 1288, note 3; *Walker v. Brown*, 165 U. S. 654, 41 L. ed. 865, 17 Sup. Ct. Rep. 453; *Ketchum v. St. Louis*, 101 U. S. 306, 25 L. ed. 999; *Paris v. Vail*, 18 Vt. 277; *Coty v. Barnes*, 20 Vt. 78.

The plaintiff in error having first elected to make his application to the court of bankruptcy for an order from that court that the attachment lien be preserved for the benefit of the estate, and that application having been denied, the court of Vermont was correct in holding that, unless the attachment lien is preserved by an order of the court, the property, as in the case at bar, may be held upon some other lien, and not passed to the trustee.

Re Sentenne & G. Co. 120 Fed. 436.

There was no finding of fact that the bankrupt's parting with possession of the mortgaged property was with the purpose on his part to hinder, delay, or defraud his creditors, or either of them; and, without a finding to that effect, it cannot be said that there was any invalid transfer of the property within the provisions of § 67e of the bankrupt law.

Sabin v. Camp, 98 Fed. 974; *Mays v. Fritton*, 20 Wall. 414, 22 L. ed. 389.

Mr. Justice **Peckham**, after making the foregoing statement of facts, delivered the opinion of the court:

This is a contest between a trustee in bankruptcy representing the creditors of the bankrupt, and the defendant, the mortgagee in a chattel mortgage dated and executed April 15, 1891, and duly recorded April 18 of that year. The defendant has paid some \$500 of the indebtedness of the bankrupt for which defendant was liable as indorser on a note, and he remains liable to pay the note of \$2,510.75, held by the Passumpsic Savings Bank, which was signed by him as surety.

The property taken possession of by the defendant under the chattel mortgage was [521] sold by a deputy sheriff on the 11th of June, 1900, and the net avails of the sale, amounting to \$922.08, have been paid over by the officer who made the sale, to the defendant.

This suit is brought by the trustee to recover from the defendant those net avails on the theory that the action of the defendant in taking possession and making the sale of the property was unlawful under the provisions of the bankrupt act.

The defendant had assisted the bankrupt

in the purchase of the property and had indorsed notes for him in order to enable him to carry on the business of conducting a livery stable. This mortgage, to secure him for these payments and liabilities, was given some seven years before the passage of the bankrupt act, and at the time it was given it was agreed by the parties to it that the bankrupt might sell or exchange any of the livery stock covered by it, as he might desire, and should, by purchase or exchange, keep the stock good, so that the defendant's security should not be impaired, and it was also agreed that all after-acquired livery property should be covered by the mortgage as security for the debts specified therein.

Under this agreement the bankrupt made sales, purchases, and exchanges of livery stock to such an extent that on May 16, 1900, there remained but two horses of the property originally on hand. The stock as it existed on the above date was all acquired by exchange of the original stock, or with the avails of the old stock sold, or the money derived from the business.

There is no pretense of any actual fraud being committed or contemplated by either party to the mortgage. Instead of taking possession at the time of the execution of the mortgage, the defendant had it recorded in the proper clerk's office, and the record stood as notice to all the world of the existence of the lien as it stood when the mortgage was executed, and that the defendant would have the right to take possession of property subsequently acquired, as provided for in the mortgage. The bankrupt was, therefore, not holding himself out *as un-[522] conditional owner of the property, and there was no securing of credit by reason of his apparent unconditional ownership. The record gave notice that he was not such unconditional owner. There was no secret lien, and if defendant cannot secure the benefit of this mortgage, which he obtained in 1891, as a lien upon the after-acquired property, yet prior to the title of the trustee for the benefit of creditors, it must be because of some provision of the bankruptcy law, which we think the court ought not to construe or endeavor to enforce beyond its fair meaning.

In Vermont it is held that a mortgage such as the one in question is good. The supreme court of that state has so held in this case, and the authorities to that effect are also cited in the opinion of that court. And it is also there held that when the mortgagee takes possession of after-acquired property, as provided for in this mortgage, the lien is good and valid as against every one but attaching or judgment creditors prior to the taking of such possession.

At the time when the defendant took possession of this after-acquired property, cov-

ered by the mortgage, there had been a breach of the condition specified therein, and the title to the property was thereby vested in the mortgagee, subject to the mortgagor's right in equity to redeem. This has been held to be the law in Vermont (aside from any question as to the effect of the bankrupt law), both in this case and in the cases also cited in the opinion of the supreme court of Vermont. The taking of possession of the after-acquired property, under a mortgage such as this, is held good, and to relate back to the date of the mortgage, even as against an assignee in insolvency. *Peabody v. London*, 61 Vt. 318, 15 Am. St. Rep. 903, 17 Atl. 781, and other cases cited in the opinion of the supreme court.

Whether and to what extent a mortgage of this kind is valid is a local question, and the decisions of the state court will be followed by this court in such case. *Dooley v. Pease*, 180 U. S. 126, 45 L. ed. 457, 21 Sup. Ct. Rep. 308.

[523] The question that remains is whether the taking of possession, *after condition broken, of these mortgaged chattels before although within four months of filing the petition in bankruptcy, was a violation of any of the provisions of the bankrupt act.

The trustee insists that such taking possession of the after-acquired property, under the mortgage of 1891, constituted a preference under that act. He contends that the defendant did not have a valid lien against creditors, under that act; that his lien might, under other circumstances, have been consummated by the taking of possession, but, as that was done within four months of the filing of the petition in bankruptcy, the lien was not valid.

Did this taking of possession constitute a preference within the meaning of the act?

It was found by the referee that when the defendant took possession of the property he knew that the mortgagor was insolvent and was considering going into bankruptcy, but that he did not intend to perpetrate any actual fraud on the other creditors, or any of them, but did intend thereby to perfect his lien on the property, and make it available for the payment of his debts before other complications, by way of attachment or bankruptcy, arose. He then understood that Ryan's attachment would probably hold good against his mortgage. The question whether any conveyance, etc., was in fact made with intent to defraud creditors, when passed upon in the state court, is not one of a Federal nature. *McKenna v. Simpson*, 129 U. S. 506, 32 L. ed. 771, 9 Sup. Ct. Rep. 365; *Cramer v. Wilson*, 195 U. S. 408, ante, 256, 25 Sup. Ct. Rep. 95. It can scarcely be said that the enforcement of a lien by the taking possession, with the consent of the

mortgagor, of after-acquired property covered by a valid mortgage, is a conveyance or transfer within the bankrupt act. There is no finding that, in parting with the possession of the property, the mortgagor had any purpose of hindering, delaying, or defrauding his creditors, or any of them. Without a finding to the effect that there was an intent to defraud, there was no invalid transfer of the property within the provisions of § *67e of the bankruptcy law. *Sabin v. Camp*, 98 Fed. 974.

In the case last cited the court, upon the subject of a preference, held that though the transaction was consummated within the four months, yet it originated in October, 1897, and there was no preference under the facts of that case. "What was done was in pursuance of the pre-existing contract, to which no objection is made. Camp furnished the money out of which the property, which is the subject of the sale to him, was created. He had good right, in equity and in law, to make provisions for the security of the money so advanced, and the property purchased by his money is a legitimate security, and one frequently employed. There is always a strong equity in favor of a lien by one who advances money upon the property which is the product of the money so advanced. This was what the parties intended at the time, and to this, as already stated, there is, and can be, no objection in law or in morals. And so when, at a later date, but still prior to the filing of the petition in bankruptcy, Camp exercised his rights, under this valid and equitable arrangement, to possess himself of the property, and make sale of it in pursuance of his contract, he was not guilty of securing a preference under the bankruptcy law."

The principle that the taking possession may sometimes be held to relate back to the time when the right so to do was created is recognized in the above case. So in this case, although there was no actual existing lien upon this after-acquired property until the taking of possession, yet there was a positive agreement, as contained in the mortgage and existing of record, under which the inchoate lien might be asserted and enforced, and when enforced by the taking of possession, that possession under the facts of this case, related back to the time of the execution of the mortgage of April, 1891, as it was only by virtue of that mortgage that possession could be taken. The supreme court of Vermont has held that such a mortgage gives an existing lien by contract, which may *be enforced by the actual tak-[525] ing of possession, and such lien can only be avoided by an execution or attachment creditor whose lien actually attaches before the

taking of possession by the mortgagee. Although this after-acquired property was subject to the lien of an attaching or an execution creditor, if perfected before the mortgagee took possession under his mortgage, yet, if there were no such creditor, the enforcement of the lien by taking possession would be legal, even if within the four months provided in the act. There is a distinction between the bald creation of a lien within the four months, and the enforcement of one provided for in a mortgage executed years before the passage of the act, by virtue of which mortgage, and because of the condition broken, the title to the property becomes vested in the mortgagee, and the subsequent taking possession becomes valid, except as above stated. A trustee in bankruptcy does not, in such circumstances, occupy the same position as a creditor levying under an execution, or by attachment, and his rights, in this exceptional case, and for the reasons just indicated, are somewhat different from what they are generally stated. *Mueller v. Nugent*, 184 U. S. 1, 46 L. ed. 405, 22 Sup. Ct. Rep. 269.

It is admitted on the part of the counsel for the plaintiff in error that the rule in Vermont, in cases of chattel mortgages of after-acquired property (where possession by the mortgagee is necessary to perfect his title as against attaching or execution creditors), is that, although such possession be not taken until long after the execution of the mortgage, yet the possession, when taken (if it be before the lien of the attaching or execution creditor), brings the property under the cover and operation of the mortgage as of its date,—the time when the right of possession was first acquired. It was also admitted that the supreme court of Vermont has held that when a chattel mortgage requiring possession of the mortgaged property to perfect it as to third persons was executed more than four months before the commencement of insolvency proceedings, the taking of actual possession of the mortgaged property within the four months' [526] period brought that property *under the mortgage as of its date, and so did not constitute a preference voidable by the trustee, although the other elements constituting a preference were present. Many decisions of the supreme court of Vermont are cited to this effect. It will be observed, also, that the provisions of the state insolvency law in regard to void and voidable preferences and transfers were identical with similar provisions of the bankruptcy act of 1867. *Gilbert v. Vail*, 60 Vt. 261, 14 Atl. 542.

Under that law it was held that the assignee in bankruptcy stood in the shoes of the bankrupt, and that "except where, with-

in a prescribed period before the commencement of proceedings in bankruptcy, an attachment has been sued out against the property of the bankrupt, or where his disposition of his property was, under the statute, fraudulent and void, his assignees take his real and personal estate, subject to all equities, liens, and encumbrances thereon, whether created by act or by operation of law." *Yeatman v. New Orleans Sav. Inst.* 95 U. S. 764, 24 L. ed. 589. See also *Stewart v. Platt*, 101 U. S. 731, 25 L. ed. 816; *Hauselt v. Harrison*, 105 U. S. 401, 26 L. ed. 1075. Under the present bankrupt act, the trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt, except in cases where there has been a conveyance or encumbrance of the property which is void as against the trustee by some positive provision of the act. *Re Garcewich*, 53 C. C. A. 510, 115 Fed. 87, 89, and cases cited.

It is true that in the case in 95 U. S. 764, 24 L. ed. 589, the savings institution had a special property in the certificates which were the subject of dispute, and had possession of them at the time of the bankruptcy proceedings, and it was held that the institution was not bound to return them, either to the bankrupt, the receiver, or the assignee in bankruptcy, prior to the time of the payment of the debt for which the certificate was held. So the state court held in this case, where the defendant took possession under the circumstances detailed, by virtue of his mortgage, *and where he had [527] the legal title to the property mortgaged, after condition broken, that the possession thus taken related back to the date of the giving of the mortgage, and in thus enforcing his lien there was not a violation of any of the provisions of the bankruptcy act.

In *Wilson Bros. v. Nelson*, 183 U. S. 191, 46 L. ed. 147, 22 Sup. Ct. Rep. 74, it was held that the bankrupt had committed an act of bankruptcy, within the meaning of the bankrupt law, by failing, for at least five days before a sale on the execution issued upon the judgment recovered, to vacate or discharge the judgment, or to file a voluntary petition in bankruptcy. The judgment and execution were held to have been such a preference, "suffered or permitted" by the bankrupt, as to amount to a violation of the bankrupt act. Although the judgment was entered upon the power of attorney given years before the passage of the bankrupt act, it was nevertheless regarded as "suffering or permitting" a preference, within that act. This is not such a case. As we have said, there is no finding that the defendant had reasonable cause to believe

that by the change of possession it was intended to give a preference. As the state court has said, it was rather a recognition of what was regarded as a right under the previous agreement contained in the mortgage.

Nor does the existence of the Ryan attachment, or the chattel mortgage of March 5, 1900, executed by the bankrupt, and delivered to the defendant, and by him assigned, on the 23d of March, 1900, to the bank, create any greater right or title in the trustee than he otherwise would have. The trustee moved under § 67f, [30 Stat. at L. 565, chap. 541, U. S. Comp. Stat. 1901, p. 3450], on notice to the defendant, for an order that the right or lien under the Ryan attachment should be preserved, so that the same might pass to the trustee for the benefit of the estate, as provided for in that section. This was denied. And unless such permission had been granted, the lien of the attachment was not preserved by the act, but, on the contrary, it was dissolved under § 67c.

[528] The mortgage assigned to the bank, and the attachment *obtained by Ryan, having been dissolved by the bankrupt proceedings, the defendant's rights under his mortgage of April 15, 1891, stood the same as though there had been no subsequent mortgage given, or attachment levied. This is the view taken by the state court of the effect of the dissolution of the mortgage and attachment liens under the bankrupt act, and we think it is the correct one. It is stated in the opinion of the state court as follows:

"It is urged that with the annulment of the attachment, the property affected by it passed to the trustee as a part of the estate of the bankrupt under the express provisions of § 67j. There would be more force in this contention were it not for the provision that, by order of the court, an attachment lien may be preserved for the benefit of the estate. If there is no other lien on the property, there can be no occasion for such order; for, on the dissolution of the attachment, the property, unless exempt, would pass to the trustee anyway. It is only when the property for some reason may not otherwise pass to the trustee as a part of the estate that such order is necessary. We think such is the purpose of that provision, and that unless the lien is preserved, the property, as in the case at bar, may be held upon some other lien, and not pass to the trustee. *Re Sentenne & G. Co.* 120 Fed. 436."

We think the judgment of the Supreme Court of Vermont was right, and it is affirmed.

196 U. S.

*CITY OF OKLAHOMA CITY, *Plff. in Err.*, [529]

v.

FRANK McMASTER.

(See S. C. Reporter's ed. 529-538.)

Appeal—distinction between appeal and writs of error—res judicata—evidence of former judgment—public lands—rights of occupant of projected town site.

1. The fact that an action of ejectment was tried by the court, upon waiver of a jury, does not make appeal the proper method of obtaining a review in the Federal Supreme Court of the final judgment of the Oklahoma supreme court, under the act of May 2, 1890 (26 Stat. at L. 81, 85, chap. 182), § 9, authorizing such review in the same manner and under the same regulations as though the judgment were that of a Federal circuit court.
2. Findings of fact by the judge trying the cause, and an order directing a conveyance "as decreed by this court," filed in different county clerks' offices, do not amount to a judgment, and are not admissible in evidence in support of a plea of *res judicata*.
3. The selection of a lot in a projected town site in Oklahoma, in accordance with a plat agreed upon by a portion of the occupants at or near the date of the opening to settlement, did not vest such an unconditional title in the selector as will prevail against the rights of Oklahoma City to the use and occupation of the lot as a public street under a subsequent survey, made or approved pursuant to the act of May 14, 1890 (26 Stat. at L. 109, chap. 207, U. S. Comp. Stat. 1901, p. 1463), by trustees appointed under that act to make town-site entries for the several use and benefit of the occupants, the selector not being an occupant thereof when the trustees made entry of the land, nor when the conveyance to them was made by the government.

[No. 137.]

Argued January 18, 19, 1905. Decided February 20, 1905.

IN ERROR to the Supreme Court of the Territory of Oklahoma to review a judgment which affirmed a judgment of the District Court of the Third Judicial District of that Territory, in favor of plaintiff, in an action of ejectment to recover land situated in a public street in Oklahoma City. *Reversed* and remanded for a new trial.

See same case below, 12 Okla. 570, 73 Pac. 1012.

The facts are stated in the opinion.

Mr. Frank Dale argued the cause, and, with Messrs. S. A. McGinnis, C. Porter Johnson, and A. G. C. Bierer, filed a brief for plaintiff in error:

The findings of a court as to the facts of a case upon which no judgment has been ren-

NOTE.—On distinction between appeal and writ of error—see note to *Miners' Bank v. Iowa*, 13 L. ed. U. S. 867.

dered do not constitute evidence in another action of the facts so found.

Child v. Morgan, 51 Minn. 116, 52 N. W. 1127; *Auld v. Smith*, 23 Kan. 65; *Massing v. Ames*, 36 Wis. 409; *Taylor v. Runyan*, 3 Iowa, 474; *Whitwell v. Emory*, 3 Mich. 84, 59 Am. Dec. 220; *Lincoln v. Cross*, 11 Wis. 94.

McMaster did not acquire a vested right in this ground in the street of Oklahoma City.

Guthrie v. Beamer, 3 Okla. 652, 41 Pac. 647.

Mr. **Chester Howe** argued the cause, and, with Mr. *Francis J. Kearful*, filed a brief for defendant in error:

The writ of error was improper, and should be dismissed, and the case considered as depending upon the appeal alone.

Stringfellow v. Cain, 99 U. S. 610, 612, 25 L. ed. 421, 422; *Hecht v. Boughton*, 105 U. S. 235, 236, 26 L. ed. 1018; *Story v. Black*, 119 U. S. 235-237, 30 L. ed. 341, 342, 7 Sup. Ct. Rep. 176; *Idaho & O. Land Improv. Co. v. Bradbury*, 132 U. S. 509, 514, 515, 33 L. ed. 433, 436, 437, 10 Sup. Ct. Rep. 177.

Mr. *Francis J. Kearful* also filed a separate brief for defendant in error:

The so-called case-made cannot be permitted to serve as a bill of exceptions, or proper transcript of the record.

Shumaker v. O'Brien, 19 Kan. 476; *Herron v. Merrilees*, 7 Okla. 261, 54 Pac. 467.

This is fatal to every claim of error.

Metropolitan R. Co. v. District of Columbia, 195 U. S. 322, 329, ante, 219, 222, 25 Sup. Ct. Rep. 28. See also *Armijo v. Armijo*, 181 U. S. 558, 45 L. ed. 1000, 21 Sup. Ct. Rep. 707; *Cohn v. Daley*, 174 U. S. 539, 544, 43 L. ed. 1077, 1079, 19 Sup. Ct. Rep. 802; *Hecht v. Boughton*, 105 U. S. 235, 236, 26 L. ed. 1018; *Comstock v. Eagleton*, 196 U. S. 99, ante, 402, 25 Sup. Ct. Rep. 210.

Mr. Justice **Peckham** delivered the opinion of the court:

On the 22d day of September, 1899, this action of ejectment was commenced by defendant in error in the district court of the third judicial district of Oklahoma territory, in Oklahoma county. It was brought to recover lands situated in a public street in the city of Oklahoma City. Judgment was entered for the defendant in error for the recovery of the land, and that judgment was affirmed by the supreme court of the territory, and the plaintiff in error has brought the case here, both by writ of error and appeal, taking both courses as a precaution, in order to bring the case before us. It was tried by the court, a jury having been waived by the parties, and the defendant in error contends that where a case is thus tried in a territorial court, an appeal

to this court is the only proper proceeding to obtain a review. Act of Congress, 1874, 18 Stat. at L. 27, 28, chap. 80. The contention of defendant is not correct in this case. The manner of reviewing judgments, in civil cases, of the supreme court of the territory of Oklahoma, is specially provided for by the 9th section of the act of May 2, 1890 (26 Stat. at L. 81, 85, chap. 182), providing a territorial government for Oklahoma, and is not governed by the act of Congress of 1874. *Comstock v. Eagleton*, 196 U. S. 99, ante, 402, 25 Sup. Ct. Rep. 210. The 9th section of the act of 1890 provides that writs of error and appeal from the final decision of the supreme court of the territory will be allowed and may be taken to the Supreme *Court of the United[532] States "in the same manner, and under the same regulations, as from the circuit courts of the United States," and it was held in the above case that final judgment in an action at law in the circuit court of the United States can only be reviewed by writ of error. The assumption that because this case was tried before the court, a jury having been waived by consent, that therefore it ought to go up by appeal, is a mistaken one. In *Deland v. Platte County*, 155 U. S. 221, 39 L. ed. 128, 15 Sup. Ct. Rep. 82, the case was an action at law where a jury had been waived and trial had before the court. Nevertheless, it was held that, as it was an action at law, and the case came from a circuit court of the United States, it could only be reviewed by this court on writ of error. This case must, therefore, be reviewed by writ of error because it is an action at law, although tried by the court upon a waiver of a jury. The record shows a sufficient bill of exceptions, however, and the case is to be reviewed upon the record as thus presented.

Upon the trial, for the purpose of proving the issue upon his part, by means of evidence of a former adjudication, the plaintiff introduced in evidence what he contended was a judgment in his favor for the recovery of the same land in an action in which he was plaintiff and Edgar N. Sweet *et al.*, town-site trustees, defendants, and which was entered in the district court of the second judicial district, county of Canadian, territory of Oklahoma, on or before May 11, 1892, and recorded on the 14th day of May, 1892, in the county of Oklahoma. The plaintiff argued that the defendant (plaintiff in error) in the case at bar was bound as a privy by the adjudication in the former action. The paper was received in evidence by the court, and it is set forth at length in the record. It is evidently nothing but a finding of facts by the judge trying the cause. There was also a paper of-

ferred and received in evidence, signed by the trial judge in the same case, and dated the 13th day of October, 1893. This was an order made in the case by him at Kingfisher, in Kingfisher county, and was entered in that county on the 13th day of October, [533] 1893,—*the day of its date. The order directs the defendant to make, execute, and deliver to Frank McMaster, the plaintiff, a trustee's deed, "as decreed by this court on the 14th day of November, 1892, of the following described premises and real estate." It is attempted to piece these two documents together, the finding of facts filed in Canadian county and thereafter recorded in the county of Oklahoma, and the order made in Kingfisher county, and filed therein October 13, 1893, and to regard the whole as a judgment. It is plain that there has been no formal judgment entered in the case, and that these two separate documents, filed in different clerks' offices, cannot be pieced together and made a formal and complete judgment. Without a judgment the plea of *res judicata* has no foundation; and neither the verdict of a jury nor the findings of a court, even though in a prior action, upon the precise point involved in a subsequent action and between the same parties, constitute a bar. In other words, the thing adjudged must be by a judgment. A verdict or finding of the court alone is not sufficient. The reason stated is that the judgment is the bar, and not the preliminary determination of the court or jury. It may be that the verdict was set aside, or the finding of facts amended, reconsidered, or themselves set aside, or a new trial granted. The judgment alone is the foundation for the bar. *Springer v. Bien*, 128 N. Y. 99, 27 N. E. 1076.

Without resort to this (asserted) judgment in the action against the town-site trustees, it is not urged that the defendant in error made out his case upon the trial. There was no judgment, and the "finding of facts" should not have been held to be such. For the error in the admission of the so-called judgment the case must be reversed.

We do not decide, even if there had been a technical and formal judgment entered, that such a judgment would be conclusive in favor of the plaintiff upon the trial of this action against the city of Oklahoma City. Whether the plaintiff in error would be regarded as a privy to such judgment, and therefore bound by it, it is not now necessary to decide.

[534] *The court is, however, indisposed to let the case rest upon the error pointed out. The question will arise upon another trial, as to the right of the plaintiff to recover upon the facts stated in the finding of facts in the action against the town-site trustees. 196 U. S.

We think it proper to now look into those findings simply for the purpose of determining whether, assuming them to be facts, the plaintiff below made out a case which would entitle him to recover the land in suit. The supreme court of the territory is of opinion that he did. Among the facts found on the trial of the case against the trustees are the following:

The trustees, appointed under the act of 1890, May 14 (26 Stat. at L. 109, chap. 207, U. S. Comp. Stat. 1901, p. 1463), entered the land in the local land office at Oklahoma City, September 3, 1890, covering, among other lots, the premises in question, "in trust, for the use and benefit of the occupants thereof." A patent from the United States was, on the 1st of October, 1890, issued to the trustees for the land (covering over 160 acres), which patent was, by its terms, in trust for the occupants of the town site, according to their respective interests. At neither date was the plaintiff below an occupant of the land in suit.

Prior to this time, and on the 22d day of April, 1889, the land had been opened for settlement under the proclamation of the President, pursuant to the act of Congress approved March 2, 1889. 25 Stat. at L. 980, chap. 412, page 1005, § 13. The land in question, together with other lots, was settled upon and occupied as a town site shortly after noon of April 22, 1889, and has continued to be and is still so held and occupied.

A portion of the occupants of the tract, on the 22d day of April, 1889, tacitly agreed to a plat of the land into lots, blocks, streets, and alleys, and the plaintiff on that day legally entered upon and occupied the piece or parcel of land particularly described in the plat as his lots, and being the land recovered by him in this action. Subsequently to such occupancy, and prior to the entry of the land by the trustees, and to the conveyance by the government to the trustees, a different plat, making a different arrangement of *streets, etc., was adopted and enforced by the parties occupying the town site. By the latter plat the parcel of land claimed by the plaintiff was thrown into the street called Grand avenue. The plaintiff did not consent, but objected to the second plat, and has never consented thereto or acquiesced therein. He was, by the city authorities, forcibly removed from the parcel of ground selected by him, and has since that time been forcibly kept from the occupancy thereof. [535]

On the 21st day of April, 1891, he applied to the trustees of the city for a deed to the lot, but they declined to award it. The city of Oklahoma City has appropriated the land as a street, and did so appropriate the same

long prior to the conveyance of the land by the United States to the trustees. The plaintiff was not an occupant of the tract at the time the United States conveyed the same to the trustees, but it was at the time used and occupied as a street by the city.

On these facts the plaintiff below did not make out his case. There was no unconditional vesting of title to the particular lot chosen by him on the 22d of April, by tacit agreement of some of the settlers, even though a map were made of the land showing the plaintiff in possession of a lot not in any public street of the city. Subsequently to the agreement upon a plat by some of the settlers, and prior to the conveyance to the trustees by the patent from the United States (October 1, 1890), the plat was altered and another plat adopted, by which the lot selected by the defendant in error became a part of a public street in the city. The defendant in error, in common with all others, chose lots upon a site which was intended as a town site, and took his lot subject to the conditions which might thereafter obtain. There was no portion of the territory of Oklahoma open to settlement prior to the date fixed by the proclamation of the President under the act of March 2, 1889. That date was April 22, 1889. 26 Stat. at L. 1544. It was provided by the act that after the proclamation, and not before, the Secretary of the Interior might permit the entry of land for town sites under Rev. [536] Stat. §§ 2387, *2388 (U. S. Comp. Stat. 1901, pp. 1457, 1458). The Secretary of the Interior gave no permit for entry of lands for town sites under the act of 1889. Again, the sections of the Revised Statutes plainly refer to an organized state or territory, and Oklahoma was neither on the 22d day of April, 1889. It was organized as a territory May 2, 1890 (26 Stat. at L. 81, chap. 182), and the special act to provide for town-site entries in Oklahoma was not passed until May 14, 1890. 26 Stat. at L. 109, chap. 207, U. S. Comp. Stat. 1901, p. 1463. Regulations for carrying out that act were promulgated by the Secretary of the Interior June 18 and July 10, 1890. 10 Land Dec. 666; 11 Land Dec. 24. It may be assumed that on April 22, 1889, it was supposed that the land now embraced in the city of Oklahoma City would be a town site, as it was stated on the argument at bar, and not disputed, that there was at that date a railroad station there, and there was every probability that a town would exist at that site. But there was no law for a present selection of land or lots for town sites on the 22d day of April, 1889. There was but a supposition that land actually selected on that day for a town site would eventually be approved. On May 14, 1890, more than a year after the

lands were open to entry, and just twelve days after the act was passed providing for the temporary government of the territory, an act providing for town-site entries was passed. 26 Stat. at L. 109, chap. 207, U. S. Comp. Stat. 1901, p. 1463. That act provided for trustees, to be appointed by the Secretary of the Interior, who were authorized to make entry for town sites on so much of the public lands situate in the territory of Oklahoma, and then open to settlement, as might be necessary to embrace all the legal subdivisions covered by actual occupancy, for the purpose of trade and business, not exceeding 1280 acres in each case, for the several use and benefit of the occupants thereof, and the entry was to be made under the provisions of § 2387 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 1457), as near as might be, and when such entry was made the Secretary of the Interior was to provide regulations for the proper execution of the trust by such trustees, including the survey of the land into streets, alleys, squares, blocks, and lots when necessary,* or [537] the approval of such survey as may already have been made by the inhabitants thereof, the assessment upon the lots of such sum as may be necessary to pay for the land embraced in such town site, the costs of the survey, the conveyances of lots, and other necessary expenses, including the compensation of the trustees. The maps and plats of streets, etc., to be surveyed were to be approved by the trustees, or they might approve the survey already made by the inhabitants thereof.

It seems, therefore, plain that a mere agreement among a portion of the people selecting lots for or in a projected town site, on April 22, 1889, did not and could not vest an absolute and unconditional title in the persons who thus selected such lots. The persons going on the land on that date, and under the circumstances then existing, did not have any law for the vesting of title to a lot as within a town site, by the mere selection of land at that time. There was general confusion, and there were thousands of people entering the territory embraced within the proclamation, on that date. In *Guthrie v. Territory*, 1 Okla. 188-194, 21 L. R. A. 841, 31 Pac. 190, the supreme court of the territory, in speaking of these crowds, said:

"They were aggregations of people, associated together for purposes of mutual benefit and protection. Without any statute law, they became a law unto themselves, and adopted the forms of law and government common among civilized people, and enforced their authority by the power of public sentiment. They had no legal existence; they

were nonentities; they could not bind themselves by contracts, or bind any one else."

The whole thing was experimental and conditional.

[538] The selection of the lots in a proposed town site, made on the 22d day of April, 1889, not being final, neither was the plat or map of the proposed town site, as then, or soon after, agreed upon by some of the people, final or conclusive. The agreement upon the plat or map was liable to alteration; there was no absolute right to any particular lot, as it was *subject to future survey. It was all in the air. When, thereafter, the trustees, under the statute, made a survey of the land into the streets, etc., or approved a survey already made, by which the plaintiff's lot was placed in the public street of the city, it was his misfortune, where all had taken their chances, that he should draw a blank. The approval of a survey by the trustees, which placed this lot in a public street of the city, gives to the city the right to the possession of it, and to keep it open as such public street. The plaintiff, not being an occupant of the lot at the time that the trustees made entry of the land, nor when the conveyance was made to the trustees by the government, was not one of the parties included in the statute, which directed the entry for the town sites to be made by the trustees "for the several use and benefit of the occupants thereof."

The supreme court in *Guthrie v. Beamer*, 3 Okla. 652, 41 Pac. 647, has held substantially the same views which we now state in the case at bar. We are unable to see any real difference in the principle governing the two cases, and we think the *Beamer Case* was rightly decided.

The judgment of the Supreme Court of Oklahoma must be reversed, and the case remanded with directions for a new trial.

Reversed.

[539]*CITY OF WORCESTER, *Plff. in Err.*,
v.

WORCESTER CONSOLIDATED STREET
RAILWAY COMPANY. (Nos. 144, 145.)

CITY OF WORCESTER and the Board of
Aldermen of the City of Worcester, *Plffs.*
in Err.,

v.

WORCESTER CONSOLIDATED STREET
RAILWAY COMPANY. (Nos. 146, 148.)

NOTE.—As to what laws are void as impairing obligation of contracts—see notes to *Franklin County Grammar School v. Bailey*, 10 L. R. A. 405; *Fletcher v. Peck*, 3 L. ed. U. S. 162; *McCanna & F. Co. v. Citizens' Trust & S. Co.* 24 C. C. A. 20; and *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co.* 35 C. C. A. 12.

196 U. S.

CITY OF WORCESTER, *Plff. in Err.*,
v.

WORCESTER CONSOLIDATED STREET
RAILWAY COMPANY. (No. 147.)

(See S. C. Reporter's ed. 539-553.)

Contracts—impairment of obligation—legislative power over municipal contracts.

A municipal corporation cannot invoke the protection of the contract clause of the Federal Constitution against the abrogation by Mass. Laws 1898, chap. 578, with the consent of the street railway company, of the provisions of a contract between that company and the municipality with reference to paving the streets through which the company was thereby granted the right to extend its tracks, and the substitution which that statute makes of another and different method for paving and repairing such streets.

[Nos. 144, 145, 146, 147, 148.]

Argued January 23, 24, 1905. Decided February 20, 1905.

TWO WRITS OF ERROR to the Supreme Judicial Court of the Commonwealth of Massachusetts to review judgments sustaining demurrers to petitions for writs of mandamus to compel a street railway company to repair and maintain the surface of the streets through which its tracks extend. *Affirmed.* Also

TWO WRITS OF ERROR to the Superior Court of the Commonwealth of Massachusetts for the County of Worcester to review judgments sustaining demurrers to bills in equity to compel a street railway company to repair and maintain the surface of the streets through which its tracks extend, which judgments were affirmed on appeal by the Supreme Judicial Court of that State. *Affirmed.* Also

IN ERROR to the Superior Court of the Commonwealth of Massachusetts for the County of Worcester to review a judgment affirmed by the Supreme Judicial Court of that State in favor of defendant in an action on a contract under which a street railway company agreed to pave and repair the streets through which its tracks extended. *Affirmed.*

See same cases below, 182 Mass. 49, 64 N. E. 581.

Statement by Mr. Justice **Peckham**:

These five cases were brought here by writs of error, sued out by the city of Worcester, for the purpose of reviewing the several judgments of the supreme and superior courts of the commonwealth of Massachusetts, respectively, affirming the judgments of the trial courts in favor of the railroad company, the defendant in error. The five cases

involve the same questions, and were brought for the purpose of answering any possible objection to the particular mode adopted in any one case for the purpose of obtaining the relief sought by the plaintiff in error. 182 Mass. 49, 64 N. E. 581. The first two cases were petitions for writs of [540] mandamus against the railroad *company, which petitions were demurred to, and the demurrers sustained. Of the three other cases, two were suits in equity, and were brought by the city against the railroad company, and were heard upon the bills and demurrers thereto, the court sustaining the demurrers; the fifth case was an action on contract originally brought by the city against the railroad company, in the superior court, and heard upon demurrer to the complaint, which was sustained and judgment ordered for defendant, from which judgment plaintiff appealed to the supreme judicial court of the commonwealth.

The defendant in error is a street railroad corporation, organized and doing business under the laws of the state of Massachusetts, and it owned and operated in the city of Worcester and in numerous outlying cities and towns a street railway system parts of which had previously belonged to other similar corporations, and had been acquired by the consolidated company in 1901, by the purchase of the franchises and properties of such other companies under the general provisions of the street railway laws of the commonwealth. Under the general laws of the commonwealth, as they existed from 1891 to 1893, it was provided that a street railway company might apply to the board of aldermen of a city, or the selectmen of a town, for the location of the tracks of the railway company in the streets of the city or town, and, after hearing, it was provided that the board might grant the petition "under such restrictions as they deem the interests of the public may require; and the location thus granted shall be deemed and taken to be the true location of the tracks of the railway, if an acceptance thereof by said directors in writing is filed with said mayor and aldermen or selectmen within thirty days after receiving notice thereof." Mass. Pub. Stat. chap. 113, § 7.

The law also provided (§ 21 of above act) that the board of aldermen or the selectmen might, from time to time, "under such restrictions as they deem the interests of the public may require, upon petition, authorize [541] a street railway *company whose charter has been duly accepted, and whose tracks have been located and constructed, or its lessees and assigns, to extend the location of its tracks within their city or town without entering upon or using the tracks of another street railway company; and such extended

location shall be deemed to be the true location of the tracks of the company, if its acceptance thereof in writing is filed in the office of the clerk of the city or town within thirty days after receiving notice thereof."

Section 32 of the act made it the duty of every street railway company to keep in repair, to the satisfaction of the superintendent of streets, "the paving, upper planking, or other surface material of the portions of streets, roads, and bridges occupied by its tracks, and if such tracks occupy unpaved streets or roads (the company) shall, in addition, so keep in repair 18 inches on each side of the portion occupied by its tracks," etc.

As the law then stood, the railroad company, on several different occasions, between 1891 and 1893, made applications for and was granted the privilege of extending the location of its tracks. On the 11th day of May, 1891, the defendant in error, upon application, was duly granted an extension of its location for its tracks in certain streets in the city of Worcester, which extension of location was stated in the order or decree of the board of aldermen to be granted "upon the following conditions;" eight different conditions then follow, among which is—

"Second. That block paving shall be laid and 'maintained between the rails of its track, and for a distance of 18 inches outside of said rails, for the entire distance covered by this location.'"

This order or decree was duly accepted in writing by the defendant in error, and its acceptance filed with the clerk of the city of Worcester. Other extensions of locations were applied for and granted during this time, some of which were upon the condition or restriction that the paving should be *be- [542] tween the rails and outside thereof to the street curb, and these conditions were accepted and the acceptance duly filed in the city clerk's office.

Subsequently, and in 1898 (chap. 578 of the Massachusetts Laws of that year), provision was made for a somewhat different system of taxation than that which prevailed at the time these several extensions of locations were granted and accepted by the railroad company. It was provided by § 11 of that act as follows:

"Sec. 11. Street railway companies shall not be required to keep any portion of the surface material of streets, roads, and bridges in repair, but they shall remain subject to all legal obligations imposed in original grants of locations, and may, as an incident to their corporate franchise, and without being subject to the payment of any fee or other condition precedent, open any street, road, or bridge, in which any part of their railway is located, for the purpose of

making repairs or renewals of the railway, or any part thereof, the superintendent of streets or other officer exercising like authority, or the board of aldermen or selectmen, in any city or town where such are required, issuing the necessary permits therefor."

After the passage of this act of 1898 the railroad company consented and conformed to its requirements, and thereafter omitted to make the repairs in the streets which had been required of it at the time when its extended locations were granted, during the period from 1891 to 1893. The city thereafter sought by these various actions or proceedings to compel the street railway company to repair and maintain the surface of the streets as provided for by the law in force when the extended locations were given and accepted. During the time that the railroad company had, since the passage of the act of 1898, omitted to make the repairs provided for as a condition for the granting of its application for extended locations, the city had incurred expenses in renewing and repairing various portions of the pavements, [543] because of the omission and refusal *of the railroad company to do so, and one of these actions was brought to recover the expenses thus incurred by the city in making such repairs and renewing such pavement.

Mr. Arthur P. Rugg argued the cause, and, with **Mr. John R. Thayer**, filed a brief for plaintiff in error:

A municipal corporation can make contracts with reference to the laying out and widening of streets, which are recognized as legal and enforceable.

Arlington v. Cutter, 114 Mass. 344; *Atkinson v. Newton*, 169 Mass. 242, 47 N. E. 1029; *Townsend v. Hoyle*, 20 Conn. 1.

It can make contracts with reference to the perpetual repair of streets and highways.

Brookfield v. Reed, 152 Mass. 568, 26 N. E. 138.

It can also so contract with reference to the repair of highways as to become personally responsible, and thereby relieve itself of the immunity which otherwise would attach to public work.

Butman v. Newton, 179 Mass. 1, 88 Am. St. Rep. 349, 60 N. E. 401.

It could also unquestionably receive legacies and gifts for the purpose of repairing its highways.

2 Dill. Mun. Corp. 4th ed. § 596.

These rights which it has acquired with reference to its duty, the city holds, not in its public capacity as a branch of the sovereign power and subject to the unrestricted control of the legislative power, but as a corporate individual, having rights of its own respecting the duties which it is re-

quired to perform, and which it is at liberty to enjoy, undisturbed by any agency of the state itself, and in the enjoyment of which it is entitled to the protection of the Federal Constitution.

Thompson v. Moran, 44 Mich. 602, 7 N. W. 180.

There may be, in such corporations, rights under contracts and grants which are beyond destruction by the legislature.

1 Dill. Mun. Corp. 4th ed. § 68; *Richland County v. Lawrence County*, 12 Ill. 1; *Montpelier v. East Montpelier*, 29 Vt. 12, 67 Am. Dec. 748, 27 Vt. 704; *Pawlet v. Clark*, 9 Cranch, 292, 336, 3 L. ed. 735, 750; *Terrett v. Taylor*, 9 Cranch, 43, 52, 3 L. ed. 650, 653; *Dartmouth College v. Woodward*, 4 Wheat. 518, 663, 4 L. ed. 629, 665; *Grogan v. San Francisco*, 18 Cal. 590; *People v. O'Brien*, 111 N. Y. 1, 18 N. E. 692; *Cooley, Const. Lim.* 7th ed. p. 344; *People ex rel. Dunkirk, W. & P. R. Co. v. Batchellor*, 53 N. Y. 128, 13 Am. Rep. 480; *People ex rel. McCagg v. Chicago*, 51 Ill. 17, 2 Am. Rep. 278; *State ex rel. McCurdy v. Tappan*, 29 Wis. 664, 9 Am. Rep. 622; *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103; *Hewison v. New Haven*, 37 Conn. 475, 9 Am. Rep. 342; *New Orleans, M. & C. R. Co. v. New Orleans*, 26 La. Ann. 517.

Contract rights stand at least upon as strong ground as would money raised by general taxation. Even in the exercise of the taxing power, the legislature has no right to issue its mandate to a municipality that it shall contribute its moneys raised from taxation toward the construction of a railroad or other public-service corporation.

People ex rel. Dunkirk, W. & P. R. Co. v. Batchellor, 53 N. Y. 128, 13 Am. Rep. 480.

As it is one of the principles of every free government that it is not in the power of the legislature to create a debt from one person to another, or from one corporation to another, without the consent, expressed or implied, of the party charged, so, also, it is beyond the legislative power to wipe out a valid debt subsisting from one person or corporation to another person or corporation without the assent of the creditor.

Hampshire County v. Franklin County, 16 Mass. 76; *People ex rel. Park Comrs. v. Detroit*, 28 Mich. 228, 13 Am. Rep. 202.

Restrictions constitute valuable property rights.

Soulard v. United States, 4 Pet. 511, 512, 8 L. ed. 938; *Metropolitan City R. Co. v. Chicago West Div. R. Co.* 87 Ill. 317.

The city of Worcester, under the Massachusetts law, had a pecuniary private interest in the repairs of its streets, provided it undertook to act respecting its statutory liabilities through strictly municipal agencies, or through any other instrumentality than

those provided by general law, acting solely under the authority conferred by general law.

Butman v. Newton, 179 Mass. 1, 88 Am. St. Rep. 349, 60 N. E. 401; *Perry v. Worcester*, 6 Gray, 544, 66 Am. Dec. 431; *Deane v. Randolph*, 132 Mass. 475; *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332; *Pratt v. Weymouth*, 147 Mass. 245, 9 Am. St. Rep. 691, 17 N. E. 538; *Brookfield v. Reed*, 152 Mass. 568, 26 N. E. 138; *Collins v. Greenfield*, 172 Mass. 78, 51 N. E. 454; *Tindley v. Salem*, 137 Mass. 171, 50 Am. Rep. 289.

Legislative power over municipalities is not universal and absolute, and does not extend to property or property rights acquired by a city for special purposes, nor to rights of immunity, in respect to both of which the municipality is recognized as having a right of private ownership, of which it cannot be deprived in any other way than can other private owners of property be deprived.

Mt. Hope Cemetery v. Boston, 158 Mass. 509, 35 Am. St. Rep. 515, 33 N. E. 695; *Tippecanoe County v. Lucas*, 93 U. S. 108, 114, 23 L. ed. 822, 824; *Mt. Pleasant v. Beckwith*, 100 U. S. 514, 533, 25 L. ed. 699, 704; *Broughton v. Pensacola*, 93 U. S. 266, 269, 23 L. ed. 896, 897; *New Orleans, M. & T. R. Co. v. Ellerman*, 105 U. S. 166, 172, 26 L. ed. 1015, 1017; *Richmond v. Southern Bell Teleph. & Teleg. Co.* 174 U. S. 761, 777, 43 L. ed. 1162, 1168, 19 Sup. Ct. Rep. 778.

The cases before cited, showing the property interest and pecuniary rights of a municipality as to a public way, when taken in conjunction with the contract power of the municipality with reference to the repair of streets, established in *Brookfield v. Reed*, 152 Mass. 568, 26 N. E. 138, place the property rights of the city in respect of highways upon the same basis as its property rights in sewer systems and waterworks.

Property rights of municipalities in sewers are recognized in a multitude of cases.

Johnston v. District of Columbia, 118 U. S. 19, 30 L. ed. 75, 6 Sup. Ct. Rep. 923; *Maximilian v. New York*, 62 N. Y. 164, 20 Am. Rep. 468; *Coan v. Marlborough*, 164 Mass. 206, 41 N. E. 238; *Child v. Boston*, 4 Allen, 41, 81 Am. Dec. 680.

Waterworks owned by a city are also treated, with reference to liability, as private property, and the municipality is held to the same degree of liability as it would be if it were a private corporation.

Hand v. Brookline, 126 Mass. 324; *Johnson v. Worcester*, 172 Mass. 122, 51 N. E. 519; *Lynch v. Springfield*, 174 Mass. 430, 54 N. E. 871; *Esberg Cigar Co. v. Portland*, 34 Or. 282, 43 L. R. A. 435, 75 Am. St. Rep. 651, 55 Pac. 961; *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77.

Wharves owned by a municipality which receives and charges wharfage for their use are the property of the municipality, which has, with reference to it, the ordinary incidents of private ownership.

Mersey Docks v. Gibbs, 11 H. L. Cas. 686; *Petersburg v. Applegarth*, 28 Gratt. 321, 26 Am. Rep. 357; *Pittsburgh v. Grier*, 22 Pa. 54, 60 Am. Dec. 65.

So, also, gasworks owned by the city are maintained as much for the private emolument and advantage of the city as for the public good; and the whole investment is the private property of the city, which cannot be confiscated or taken from the city by eminent domain.

Western Sav. Fund Soc. v. Philadelphia, 31 Pa. 183, 72 Am. Dec. 730; *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453.

In *Middleborough v. New York, N. H. & H. R. Co.* 179 Mass. 520, 61 N. E. 107, the supreme judicial court of Massachusetts strongly intimates that an electric-light plant of a municipality cannot be taken without compensation.

To deprive the city of Worcester of the right to have the defendant in error furnish its paving blocks year by year as required is as much confiscation of private property as for the legislature to convert the city hall into a station for the street railway company, or to compel the city to turn over its electric-light plant, if it owns one, to furnish power for the company.

Mr. Bentley W. Warren argued the cause, and, with **Mr. Clement R. Lamson**, filed a brief for defendant in error:

If the city became the obligee in any contract to which the street railway company was obligor, the rights of the city under the contract were held, not as its private property, but in trust as a governmental agency for the public in general, and were, therefore, subject at all times to the control of the legislature.

South Dakota v. North Carolina, 192 U. S. 286, 318, 48 L. ed. 448, 460, 24 Sup. Ct. Rep. 269; 2 Dill. Mun. Corp. 4th ed. §§ 656, 683; *Brimmer v. Boston*, 102 Mass. 19; *Agawam v. Hampden County*, 130 Mass. 528; *Freeland v. Hastings*, 10 Allen, 570; *Rawson v. Spenceer*, 113 Mass. 40; *Stone v. Charlestown*, 114 Mass. 214; *Coolidge v. Brookline*, 114 Mass. 592; *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332; *Laramie County v. Albany County*, 92 U. S. 307, 23 L. ed. 552; *Tippecanoe County v. Lucas*, 93 U. S. 108, 114, 23 L. ed. 822, 824; *New Orleans v. Clark*, 95 U. S. 644, 654, 24 L. ed. 521, 522; *Meriwether v. Garrett*, 102 U. S. 472, 26 L. ed. 197; *Prince v. Crocker*, 166 Mass. 347, 32 L. R. A. 610, 44 N. E. 446; *Browne v. Turner*, 176 Mass. 9, 56 N. E. 969; *Mt. Hope Cemetery v. Boston*, 158

Mass. 509, 35 Am. St. Rep. 515, 33 N. E. 695; *East Hartford v. Hartford Bridge Co.* 10 How. 511, 13 L. ed. 518; *People v. Kerr*, 27 N. Y. 188; *Clinton v. Cedar Rapids & M. River R. Co.* 24 Iowa, 455.

Mr. Justice **Peckham**, after making the foregoing statement of facts, delivered the opinion of the court:

The defendant in error makes no objection [548] to the form in *which the question to be decided comes before us. Whether one or the other action or proceeding is proper and appropriate need not, therefore, be considered.

The contention on the part of the plaintiff in error is that, by virtue of the restrictions or conditions placed by it upon granting the various extensions of locations of the tracks of the railroad company, and by the acceptance of the same by the company, a contract was entered into between the city and the railroad company, which could not be altered without the consent of both parties; and that as the city had never consented to any alteration of the obligation of the railroad company to make the repairs in the streets, as provided for in those restrictions or conditions, the subsequent legislation contained in the act of 1898 impaired the obligation of that contract, and was therefore void, as a violation of the Constitution of the United States.

In the view we take of this subject it may be assumed, for the purpose of argument, that the city of Worcester had power, under the legislation of the state, to grant the right to extend the location of the railroad company's tracks upon the restrictions or conditions already mentioned. It may also be assumed, but only for the purpose of the argument, that the restrictions or conditions contained in the orders or decrees of the board of aldermen, upon their acceptance by the company, became contracts between the city and the company.

The question then arising is whether the legislature, in the exercise of its general legislative power, could abrogate the provisions of the contract between the city and the railroad company with the assent of the latter, and provide another and a different method for the paving and repairing of the streets through which the tracks of the railroad company were laid under the permit of their extended location. We have no doubt that the legislature of the commonwealth had that power. A municipal corporation is simply a political subdivision of the state, and exists by virtue of the exercise of the power of the state through its legislative department. [549] The *legislature could at any time terminate the existence of the corporation itself, and provide other and different means for the government of the district
196 U. S.

comprised within the limits of the former city. The city is the creature of the state. *East Hartford v. Hartford Bridge Co.* 10 How. 511, 533, 534, 13 L. ed. 518, 528.

As is stated in *United States v. Baltimore & O. R. Co.* 17 Wall. 322, 329, 21 L. ed. 597, 600, a municipal corporation is not only a part of the state, but is a portion of its governmental power. "It is one of its creatures, made for a specific purpose, to exercise within a limited sphere the powers of the state. The state may withdraw these local powers of government at pleasure, and may, through its legislature or other appointed channels, govern the local territory, as it governs the state at large. It may enlarge or contract its powers, or destroy its existence. As a portion of the state, in the exercise of a limited portion of the powers of the state, its revenues, like those of the state, are not subject to taxation."

In *New Orleans v. Clark*, 95 U. S. 644, 654, 24 L. ed. 521, 522, it was stated by Mr. Justice Field, in delivering the opinion of the court, that—

"A city is only a political subdivision of the state, made for the convenient administration of the government. It is an instrumentality, with powers more or less enlarged, according to the requirements of the public, and which may be increased or repealed at the will of the legislature. In directing, therefore, a particular tax by such corporation, and the appropriation of the proceeds to some special municipal purpose, the legislature only exercises a power through its subordinate agent, which it could exercise directly; and it does this, only in another way, when it directs such corporation to assume and pay a particular claim not legally binding for want of some formality in its creation, but for which the corporation has received an equivalent."

In *Laramie County v. Albany County*, 92 U. S. 307, 23 L. ed. 552, it was held that public or municipal corporations were but parts of the machinery employed in carrying on the affairs of the state, and that the *charters under which such corporations are [550] created may be changed, modified, or repealed as the exigencies of the public service or the public welfare may demand; that such corporations were composed of all the inhabitants of the territory included in the political organization; and the attribute of individuality is conferred on the entire mass of such residents, and it may be modified or taken away at the mere will of the legislature, according to its own views of public convenience, and without any necessity for the consent of those composing the body politic.

It was said in that case that "public duties are required of counties as well as of

towns, as a part of the machinery of the state; and, in order that they may be able to perform those duties, they are vested with certain corporate powers; but their functions are wholly of a public nature, and they are at all times as much subject to the will of the legislature as incorporated towns, as appears by the best text writers upon the subject, and the great weight of judicial authority."

In *Tippecanoe County v. Lucas*, 93 U. S. 108-114, 23 L. ed. 822-824, the question of the validity of an act of the legislature was presented, and Mr. Justice Field, in delivering the opinion of the court, said:

"Were the transaction one between the state and a private individual, the invalidity of the act would not be a matter of serious doubt. Private property cannot be taken from individuals by the state except for public purposes, and then only upon compensation or by way of taxation; and any enactments to that end would be regarded as an illegitimate and unwarranted exercise of legislative power. . . . But between the state and municipal corporations, such as cities, counties, and towns, the relation is different from that between the state and the individual. Municipal corporations are mere instrumentalities of the state, for the convenient administration of government; and their powers may be qualified, enlarged, or withdrawn at the pleasure of the legislature."

[551] In *Mt. Pleasant v. Beekwith*, 100 U. S. 514, 25 L. ed. 699, it was held *that, where no constitutional restriction is imposed, the corporate existence and powers of counties, cities, and towns are subject to the legislative control of the state creating them.

In *New Orleans v. New Orleans Waterworks Co.* 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142, it was also held that a municipal corporation was the mere agent of the state in its governmental character, and was in no contract relations with its sovereign, at whose pleasure its charter may be amended, changed, or revoked without the impairment of any constitutional obligation. It was also therein held that such a corporation, in respect of its private or proprietary rights and interests, might be entitled to constitutional protection. The Massachusetts courts take the same view of such a corporation. *Browne v. Turner*, 176 Mass. 9, 56 N. E. 969.

Enough cases have been cited to show the nature of a municipal corporation as stated by this court. In general it may be conceded that it can own private property, not of a public or governmental nature, and that such property may be entitled, as is said, "to constitutional protection." Prop-

erty which is held by these corporations upon conditions or terms contained in a grant, and for a special use, may not be diverted by the legislature. This is asserted in *Tippecanoe County v. Lucas*, 93 U. S. 115, 23 L. ed. 824, and in *Mt. Hope Cemetery v. Boston*, 158 Mass. 509, 35 Am. St. Rep. 515, 33 N. E. 695, the supreme court of Massachusetts held that cities might have a private ownership of property which could not be wholly controlled by the state government.

It seems, however, plain to us that the asserted right to demand the continuance of the obligation to pave and repair the streets, as contained in the orders or decrees of the board of aldermen granting to the defendant the right to extend the locations of its tracks on the conditions named, does not amount to property held by the corporation, which the legislature is unable to touch, either by way of limitation or extinguishment. If these restrictions or conditions are to be regarded as a contract, we think the legislature would have the same right to *terminate it, with the consent of the rail-[552] road company, that the city itself would have. These restrictions and conditions were of a public nature, imposed as a means of collecting from the railroad company part, or possibly the whole, of the expenses of paving or repaving the streets in which the tracks were laid, and that method of collection did not become an absolute property right in favor of the city, as against the right of the legislature to alter or abolish it, or substitute some other method with the consent of the company, even though as to the company itself there might be a contract not alterable except with its consent. If this contention of the city were held valid, it would very largely diminish the right of the legislature to deal with its creature in public matters, in a manner which the legislature might regard as for the public welfare. In *Springfield v. Springfield Street R. Co.* 182 Mass. 41, 64 N. E. 577, this question was before the supreme judicial court of Massachusetts, and the contention of the city, to the same effect as the plaintiff in error contends in this case, was overruled. It was therein held that the city acted in behalf of the public in regard to these extensions of locations, and that the legislature had the right to modify or abrogate the conditions on which the locations in the streets and public ways had been granted, after such conditions had been originally imposed by it. The case at bar was decided at the same time as the *Springfield Case* (182 Mass. 49, 64 N. E. 581), and the proposition that the legislature had the power to free the company from obligations imposed upon it by the conditions in the grant of the extended locations was adhered to, and the

Springfield Case cited as authority for the same. We concur in that view.

There is no force in the contention that the city of Worcester has a proprietary right in the property of the defendant in error, reserved to it under the original statute incorporating the Worcester Horse Railroad Company. Mass. Laws, 1861, chap. 148. These sections simply give the city of Worcester the right, during the continuance of the charter of the corporation, and after the expiration of ten years from the opening of *any part of said road for use, to purchase all its franchises, property, rights, etc. That right is not affected by the legislation in question, even assuming (which we do not for a moment intimate) that the act of 1898 affected the right of the city to make the purchase under the sections above cited.

We see no reason to doubt the validity of the act of 1898, and *the judgments of the Supreme Judicial Court and the Superior Court of Massachusetts are, respectively, affirmed.*

P. J. FLANIGAN, *Petitioner,*
v.

COUNTY OF SIERRA.

(See S. C. Reporter's ed. 553-562.)

Courts—when Federal courts will follow decisions of state courts.

1. The validity, under the state laws, of an ordinance adopted by a board of county supervisors, is settled, so far as the Federal courts are concerned, by a decision of the highest court of that state upholding a similar ordinance.
2. The decisions of the California supreme court that the repeal by Cal. act March 23, 1901, of the authority conferred on county and municipal legislative bodies to license for revenue abates a suit previously brought to recover a license fee imposed under an ordinance which, under the decisions of that court, must be deemed a revenue measure, will be followed by the Federal courts.

[No. 121.]

Argued January 12, 1905. Decided February 20, 1905.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Northern District of California, enforcing a license fee imposed by the board

of supervisors of Sierra County, in that State, on the business of raising, grazing, herding, and pasturing sheep. *Reversed* and remanded for further proceedings.

See same case below, 58 C. C. A. 340, 122 Fed. 24.

The facts are stated in the opinion.

Mr. C. C. Cole argued the cause, and Messrs. Joseph C. Campbell and Thomas H. Breeze filed a brief for petitioner.

Mr. Frank R. Wehe argued the cause, and, with Messrs. C. N. Post and W. J. Redding, filed a brief for respondent.

Mr. Justice McKenna delivered the opinion of the court:

This action was brought by respondent against petitioner in the superior court of the county of Sierra, state of California, and removed on his motion to the United States circuit court.

The action was brought to recover the amount of license ordained under an ordinance passed May 31, 1900, by the supervisors of the respondent county, under what is known as "the county government act." Cal. Stat. 1897, chap. 277. The act gave power to the boards of supervisors of counties as follows:

"To license for regulation and revenue, all and every kind of business not prohibited by law, and transacted and carried on in such county, and all shows, exhibitions, and lawful games carried on therein, to fix the rates of license tax upon the same, and to provide for the collection of the same, by suit or otherwise." § 25, subd. 25.

In pursuance of the power conferred the ordinance in controversy was enacted, § 1 of which is as follows:

"Each and every person, copartnership, firm, or corporation engaged in the business of raising, grazing, herding, or pasturing sheep in the county of Sierra, state of California, must annually procure a license therefor from the license collector, and must pay therefor the sum of ten (10) cents for each sheep or lamb owned by, in the possession of, or under the control of such person, copartnership, firm, or corporation, and used in such business in said county."

*Application for a license is required to be made by affidavit, stating the number of sheep owned by and in possession of the applicant. "The license tax," it is provided, "shall be deemed a debt due to the county," which the district attorney of the county is directed to sue for; and a judgment is authorized. In case of recovery by the coun-

NOTE.—As to state decisions and laws as rules of decision in Federal courts—see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553; *Griffin v. Overman Wheel Co.* 9 C. C. A. 548; *Elmendorf v. Taylor*, 6 L. ed. 196 U. S. U. S., Book 49.

U. S. 290; *Jackson ex dem. St. John v. Chew*, 6 L. ed. U. S. 583; *United States ex rel. Butz v. Muscatine*, 19 L. ed. U. S. 490; *Clark v. Graham*, 5 L. ed. U. S. 334, and *Forepaugh v. Delaware*, L. & W. R. Co. 5 L. R. A. 508.

ty, \$50 damages and costs must be added to the judgment. All money collected for license, less a fee of 10 per cent for collection, "shall be paid over to the county treasurer, as other moneys are, and be placed to the credit of the general funds of the county." Years, within the meaning of the ordinance, shall commence on the 1st day of January and end on the 31st day of December.

The petitioner, between the 1st of May and the 25th of June, 1900, engaged in the business described in the ordinance, and had in his possession and under his control 25,000 sheep. He failed to apply for a license, and became, it is alleged, indebted to the county for the sum of \$2,500, and became further indebted to the sum of \$50 by way of damages for his neglect. Payment of both sums was demanded.

Petitioner demurred to the complaint, which, being overruled, and he having declined to answer, judgment was taken against him. It was affirmed by the circuit court of appeals. 58 C. C. A. 340, 122 Fed. 24.

The ordinance was passed on the 31st day of May, 1900, and suit was brought on the 25th day of June of that year. On March 23, 1901, by an amendment to the Political Code of the state of California (Cal. Stat. 1900, 1901, p. 635, § 3366), the authority of the board of supervisors to license for revenue was repealed. The repealing provision is as follows:

"Boards of supervisors of the counties of the state, and the legislative bodies of the incorporated cities and towns therein, shall, in the exercise of their police powers, and for the purpose of regulation, as herein provided, and not otherwise, have power to license all and every kind of business not prohibited by law, and transacted and carried on within the limits of their respective jurisdictions, and all shows, exhibitions, and lawful games carried on therein, to fix the rates of license tax upon the same, and to provide for the collection of the same by suit or otherwise."

It is contended that the ordinance imposing the license was a revenue measure, not a police regulation, and that the law under which it was enacted, having been repealed, the suit abated. And it is also contended that there was no power to pass the ordinance. The latter contention is certainly untenable. *Ex parte Mirande*, 73 Cal. 365, 14 Pac. 888. The former requires some discussion. There are two parts to it,—the character of the ordinance, as being for revenue or regulation, and the effect of the repeal of the ordinance. Under the authority of the California cases, it must be regarded as a revenue measure. 72 Cal. 387, 14

Pac. 100; 73 Cal. 365, 14 Pac. 888; 119 Cal. 119, 51 Pac. 32; *Santa Monica v. Guidinger*, 137 Cal. 658, 70 Pac. 732; *Sonora v. Curtin*, 137 Cal. 583, 70 Pac. 674.

In *Merced County v. Helm*, 102 Cal. 159, 36 Pac. 399, the court said, distinguishing between the taxing power and the police power, that the latter "is exercised in the enforcement of a penalty prescribed for the noncompliance with the law, or for the doing of some prohibited act." It was provided by the ordinance passed on that the license should be a "debt," payable in advance, and to be collected, in case of nonpayment, by suit. The absence of regulatory provisions has also been held to be an element in determining the character of an ordinance. *Santa Monica v. Guidinger*, 137 Cal. 658, 70 Pac. 732. The ordinance in controversy in the case at bar was, at least, assumed by the circuit court of appeals to be a revenue measure. This being its character, what was the effect of its repeal? It withdraws the power of collecting the tax, petitioner contends. The court of appeals did not take this view. The court regarded the right of the county as vesting at the date of the imposition of the license, and that the liability of petitioner was so far contractual as to be unaffected by the repeal of the statute giving power to the county to enact the ordinance. We are unable to assent to this view. It is disputable under the authorities, and it is opposed to the decisions of the supreme court of the state of California.

The general rule is that powers derived wholly from a statute are extinguished by its repeal. *Sutherland*, Stat. Const. § 165. And it follows that no proceedings can be pursued under the repealed statute, though begun before the repeal, unless such proceedings be authorized under a special clause in the repealing act. 9 Bacon, Abr. 226. This doctrine is oftenest illustrated in the repeal of penal provisions of statutes. It has, however, been applied by the supreme court of the state of California to the repeal of the power of counties to enact ordinances for revenue.

Santa Monica v. Guidinger, 137 Cal. 658, 70 Pac. 732, was an action for the recovery of \$50 for license imposed under an ordinance of the town "for the license of business carried on in the town . . . for the purpose of regulation and revenue." The defendant was charged with two license taxes for \$25 each for the year following the date of the ordinance, that being the annual date established by the ordinance, "for each person acting as agent or solicitor for any laundry without the corporate limits of the town." It was held that the license tax was repealed, and the right of

action therefore extinguished, by § 3366 of the Political Code, added thereto by the act of March 23, 1901. This is the same section relied upon in the case at bar. The court said it was clear that the license tax in question was imposed for the purpose of raising revenue, and that the case was therefore substantially similar to that of *Sonora v. Curtin*, 137 Cal. 583, 70 Pac. 674. The ordinance involved in the latter case contained penal provisions, but they manifestly did not determine the decision. The court observed:

"The right is given by the ordinance to bring a civil suit to recover the amount so made a license tax. The civil remedy was created by the ordinance, and the remedy is repealed by the repeal of the ordinance as [561] to revenue. *In speaking of the rule as to enforcements of rights under repealed statutes, Endlich on the Interpretation of Statutes, § 480, says: 'The same rule applies to rights and remedies founded solely upon statute, and to suits pending to enforce such remedies. If, at the time the statute is repealed, the remedy has not been perfected or the right has not become vested, but still remains executory, they are gone.'"

It is clear that the decision was not based alone on the penal character of the ordinance, but on the broader principle that, the power to enact it having been taken away, the power to enforce it was also taken away. The cases cited by the court illustrate this. Among others, *Napa State Hospital v. Flaherty*, 134 Cal. 315, 66 Pac. 322, was cited. In that case the right given by a statute of the state to maintain an action against the father of an insane adult son was held to be taken away by the repeal of the statute conferring the right.

But if the ordinance passed on in *Sonora v. Curtin* was penal, the ordinance involved in the case at bar may be so characterized within the limits of the principle we are now discussing, as applied by the supreme court of the state of California. What it might be under broader considerations, see *Huntington v. Attrill*, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224.

That there is a conflict between the supreme court of the state and the circuit court of appeals respondent does not deny. Counsel, however, say the conflict "does not arise out of a construction of a statute of the state," but (we quote the language of counsel) "as to the effect of the new statute, construed by each court to be a repeal of a prior statute, upon the rights of the litigant granted under the prior statute, the circuit court of appeals first assuming, but not deciding, that the ordinance *may* have been a revenue measure, and the supreme court of California deciding that, in its cases, 196 U. S.

the ordinance *was* a revenue measure. This question did not involve the construction of the statute; it was merely the determination of a question that depended upon the principle of general law, and not upon a positive statute of the state." The counsel further *say: "In such cases the courts of the United States are not required to follow the decision of state courts." The distinction made by counsel we cannot adopt. Whether a statute of a state is or is not a revenue measure certainly depends upon the construction of that statute. Besides, if in any case we should lean to an agreement with the state court, this is such a case. There is no Federal right involved. The question is one strictly of the state law, and the power of one of the municipalities of the state under that law. If we should yield to the contention of counsel, we should give greater power to one of the municipalities of the state than the law of the state, as construed by the supreme court of the state, would give it. We should enforce against petitioner a tax which the supreme court of the state, construing a state law, would not enforce. The result of the contention indicates its error.

Judgment reversed and cause remanded for further proceedings in conformity with this opinion.

D. E. WHEELER and D. W. Ridenour,
Partners, Doing Business under the Firm
Name and Style of Wheeler & Ridenour,
Petitioners,

v.

COUNTY OF PLUMAS.

(See S. C. Reporter's ed. 562, 563.)

*Courts—when Federal courts will follow
decisions of state courts.*

This case is governed by the decision in *Flanagan v. Sierra County*, ante, 597.

[No. 122.]

Submitted January 12, 1905. Decided February 20, 1905.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Northern District of California, enforcing a license fee imposed by the board of supervisors of Plumas County, in that State, on the business of raising, grazing, herding, and pasturing sheep. *Reversed* and remanded for further proceedings.

See same case below, 58 C. C. A. 683, 122 Fed. 1022.

The facts are stated in the opinion.

Messrs. **J. C. Campbell** and **C. C. Cole** submitted the cause for petitioners. *Mr. Thomas H. Breeze* was on the brief.

Messrs. **U. S. Webb** and **C. N. Post** submitted the cause for respondent. *Mr. L. N. Peter* was on their brief.

[563] *Mr. Justice **McKenna** delivered the opinion of the court:

This case was submitted with *Flanigan v. Sierra County*, 196 U. S. 553, ante, 597, 25 Sup. Ct. Rep. 314. It is also an action for the recovery of a sum of \$2,100, alleged to be due for license tax, and \$50 damages. The taxes were imposed under an ordinance of the county of Plumas, substantially similar to the ordinance passed on in *Flanigan v. Sierra County*. The action was brought in the superior court of Plumas county, and removed, upon the petition of the petitioners herein, to the circuit court for the northern district of California. In that court petitioners demurred to the complaint, which, being overruled, and they declining to answer, judgment was taken against them by default. It was affirmed by the circuit court of appeals.

The questions are identical with those passed on in *Flanigan v. Sierra County*, and on the authority of that case the judgment is reversed, and cause remanded for further proceedings.

WILLIAM H. McCaffrey, Edward Quigley, et al., Appts.,
v.

LIZZIE C. MANOGUE, George W. Manogue, and Frank Foley.

(See S. C. Reporter's ed. 563-573.)

Wills—construction—intention of testator governs—indefinite devise of lands.

The evident intention of a testator to dispose of his whole estate by a will making all his heirs at law devisees, with a special aim at equality among them, particularly evidenced by charging the funeral expenses and the testator's debts upon that devisee who was given a greater quantity of realty than the others, prevents the application of the rule that devises of land without words of limitation or description pass nothing but a life estate.

[No. 131.]

Argued January 17, 18, 1905. Decided February 20, 1905.

A PPEAL from the Court of Appeals of the District of Columbia to review a decree

which affirmed a decree of the Supreme Court of that District, construing a will as devising life estates only. *Reversed* and remanded with directions to reverse the decree of the Supreme Court, and to remand the cause to that court for the entry of a decree in accordance with this opinion.

See same case below, 22 App. D. C. 385.

Statement by Mr. Justice **McKenna**:

*The question involved in this case is the [564] construction of the will of Hugh McCaffrey, deceased. It was duly admitted to probate, and recorded in the supreme court of the District. It is as follows:

Washington, District of Columbia,
April Thirtieth, 1896.

In the name of God, being now in good health and sound in mind and body I hereby certify and declare this to be my last will and testament, hereby annulling and revoking any and all wills previously made.

I give and bequeath to my daughter Mary A. Quigley house number 301 at southwest corner of 11th and C streets southeast, being in lot number 5 in square 970, with the store and dwelling, stock and fixtures, and lot on which it stands, also houses numbers 13 and 15 6th street southeast with lots on which they stand, being parts of lots 19 and 20 in square 841, also any money in bank to my account at the time of my death, also any money due to me, also any building association stock. She is to pay funeral expencies and any other legal debts I may owe, also to care for my lot in Mount Olivet cemetery.

I give and bequeath to my son, James B. McCaffrey, house number six hundred and two (602) East Capitol street and lot on which it stands, being in lot number ten (10) in square number eight hundred and sixty-eight (868).

To my son, William H. McCaffrey, I give and bequeath house 604 East Capitol street, being in lot number ten (10), in square number eight hundred and sixty-eight (868) and lot on which it stands.

To my daughter, Lizzie Manogue, I give and bequeath house number fourteen hundred and twenty-three (1423) Corcoran street, N. W., and lot on which it stands, being lot number fifty-four (54) in square number two hundred and eight (208).

2. To my son, Francis T. McCaffrey, I give and bequeath house five hundred and nineteen (519) East Capitol street, and *lot on [565] which it stands, being part of lot number

NOTE.—On the effect of an indefinite devise of lands—see note to *King v. Ackerman*, 17 L. ed. U. S. 292.

As to how far the intention of a testator is to govern in the construction of a will—see 600

notes to *Pray v. Belt*, 7 L. ed. U. S. 309; *Dougherty v. Rogers*, 3 L. R. A. 847; *Boston Safe Deposit & T. Co. v. Coffin*, 8 L. R. A. 740; *Davidson v. Coon*, 9 L. R. A. 587; and *Masterson v. Townshend*, 10 L. R. A. 816.

(20) in square eight hundred and forty-one (841), also my horse and buggy.

And to my grandson, Frank Foley, I give and bequeath house number one hundred and twenty-one (121) Eleventh street, S. E., being in lot number fourteen (14), square number nine hundred and sixty-eight (968), and lot on which it stands.

To my grandson Joseph Quigley, I give and bequeath my watch and chain.

I hereby name and appoint as executors of this my last will and testament, John E. Herrell and Patrick Maloney.

All the real estate herein described is located in the city of Washington, District of Columbia.

Hugh McCaffrey. [Seal.]

The devisees in the will were the only heirs of the testator.

On the 10th of July, 1897, Mary A. Quigley died, leaving surviving four children, the appellants Catherine L., Margaret, Mary, and Joseph Quigley. Edward Quigley, her husband, also an appellant, survived her. She left a will, which was duly admitted to record, by which she devised all her estate to Catherine L. and Edward Quigley, in trust for her children. Francis T. McCaffrey, son of Hugh, and one of the devisees in the latter's will, died October 20, 1898, leaving as heirs at law his brothers and sisters, the children of his deceased sister, Mary A. Quigley, and his nephew, Frank Foley. He left a will, by which he devised and bequeathed all of the property to his sister, Lizzie C. Manogue, and his brothers William A. and James B. McCaffrey, "absolutely and in fee simple, according to the nature of the property, as tenants in common, but not as joint tenants." At the time of his death he was seised and possessed of the real estate devised to him by his father.

James B. McCaffrey has sold and conveyed the lot devised to him to the respondent George W. Manogue. Upon an attempt to sell the property devised by Francis T. McCaffrey, a doubt was raised as to the extent [566] of the interest devised to him *and the other devisees by the will of H. McCaffrey,—whether an estate for life or in fee simple. This suit was brought "to have it determined what estate each of the said devisees took thereby, and to have their title quieted as against any person or persons who may claim adversely to the same as heirs of said Hugh McCaffrey, or under such heirs."

It was decreed by the trial court that only life estates were devised by the will, and the decree was affirmed by the court of appeals. 22 App. D. C. 385.

Messrs. Arthur A. Birney and O. B. Hallam argued the cause, and, with Mr. 196 U. S.

Henry F. Woodard, filed a brief for appellants:

A devisee who takes a piece of land subject to any payment, however small, gets a fee simple notwithstanding the omission of words of inheritance.

Collier's Case, 6 Coke, 16; *King v. Ackerman*, 2 Black, 408, 17 L. ed. 292; *Doe ex dem. Willey v. Holmes*, 8 T. R. 1; *Goodtitle v. Maddern*, 4 East, 500; *Doe v. Clarke*, 8 New Rep. 349; *Roe v. Daw*, 3 Maule & S. 522; *Baddeley v. Leppingwell*, Wilmot's Notes, 235; *Barber v. Pittsburgh, Ft. W. & C. R. Co.* 166 U. S. 109, 41 L. ed. 936, 17 Sup. Ct. Rep. 488; *Wilkins v. Allen*, 18 How. 385, 15 L. ed. 396; *West v. Fitz*, 109 Ill. 438; 3 Powell, Devises, 379; 3 Jarman, Wills, 23.

Every testator in the making of his will is supposed to intend to dispose of his entire estate, and the presumption is against his intention to die intestate as to any part of it, unless such intention is plainly expressed or necessarily implied.

Kennedy v. Alexander, 21 App. D. C. 424; *Hardenbergh v. Ray*, 151 U. S. 112, 38 L. ed. 93, 14 Sup. Ct. Rep. 305.

In case of a mixed devise and bequest in the same clause, the condition or charge shall be held to relate to the realty as well as to the personalty, regardless of the order in which they are enumerated, and regardless of the value of the personalty.

Doe ex dem. Willey v. Holmes, 8 T. R. 1; *Abbott v. Essex Co.* 18 How. 202, 15 L. ed. 352.

Where, from the fact of such condition in one of several devises, it is manifest that the testator intended to pass a fee in such devise, the fact that in the others he has used similar terms (although without attaching conditions) will, in the absence of words of contrary import, establish a like intent in those other devises, and the beneficiaries will take in fee.

Cook v. Holmes, 11 Mass. 529; *Butler v. Butler*, 2 Mackey, 96; *White v. Crenshaw*, 5 Mackey, 113, 60 Am. Rep. 370; *King v. Ackerman*, 2 Black, 408, 17 L. ed. 292.

Messrs. Edwin Forrest and A. A. Hoehling, Jr., argued the cause and filed a brief for appellees:

A devise without words of limitation or inheritance passes only a life estate. And this is so notwithstanding the testator, in the will, may have declared an intention to dispose of his whole estate.

2 Jarman, Wills, p. 267; *Wright v. Denn*, 10 Wheat. 204, 236, 237; 6 L. ed. 303, 311.

The devise to Mary A. Quigley cannot be enlarged, by legal implication, to a fee.

Wright v. Denn, 10 Wheat. 204, 236, 237, 6 L. ed. 303, 311; *Jackson ex dem. Harris v. Harris*, 8 Johns. 142; *Burlingham v. Beld-*

ing, 21 Wend. 463; *Den ex dem. Moor v. Mellor*, 5 T. R. 284.

Even if the Quigley devise is so enlarged, the other devises in the will are not aided thereby.

Mr. Justice **McKenna**, after stating the case, delivered the opinion of the court:

It will be observed that the devises are expressed in exactly the same way. To Mary A. Quigley, however, there are given several pieces of real estate, the money of the testator in bank, and his building association stock. She is charged with the payment of the testator's funeral expenses and debts; also with the care of his cemetery lot. Nevertheless, neither of the lower courts distinguished between the devisees,—to all was applied the rule of law that a devise of land, without words of limitation or description, gives a life estate only. The court of appeals held that the charge or burden upon Mary A. Quigley to pay the funeral expenses and debts of the testator was offset by the gift to her of personal property. It is insisted that the ruling is contrary to the decision in *King v. Ackerman*, 2 Black, 408, 17 L. ed. 292. It is there said: "The rule of law which gives a fee where the devisee is charged with a sum of money is a technical dominant rule, and intended to defeat the effect" of the artificial rule established in favor of the heir at law, that an indefinite devise of land passes nothing but a life estate. It was, however, apparent to the court of appeals that to follow *King v. Ackerman* would not execute the intention of the testator by opposing one technical rule by another, but would discriminate between his heirs, and destroy the equality between them which it was the purpose of the will to create. To effect this equality the court selected not the "dominant rule," whose virtue this court pointed out, but the other, regarding it the most commanding. It is altogether a strange tangle of technicalities. Apply either of them or

[569] both *of them, and we defeat the intention of the testator. Are we reduced to this dilemma? We think not; nor need we dispute the full strength of the rule in favor of the heir at law. It is not an unyielding declaration of law. It cannot be applied when the intention of the testator is made plain. It cannot be applied when the purpose of the testator, as seen in the will, cannot be carried out by a devise of a less estate than the fee. *Bell County v. Alexander*, 22 Tex. 350, 73 Am. Dec. 268. The policy of the law in favor of the heir yields, we repeat, to the intention of a testator if clearly expressed or manifested. That policy, the reason for it and the elements of it, is expressed strongly by

602

Mr. Justice Story in *Wright v. Denn*, 10 Wheat. 204, 227, 228, 6 L. ed. 303, 309:

"Where there are no words of limitation to a devise, the general rule of law is that the devisee takes an estate for life only, unless, from the language there used or from other parts of the will, there is a plain intention; because if it be doubtful or conjectural upon the terms of the will, or if full legal effect can be given to the language without such an estate, the general rule prevails. It is not sufficient that the court may entertain a private belief that the testator intended a fee; it must see that he has expressed that intention with reasonable certainty on the face of his will. For the law will not suffer the heir to be disinherited upon conjecture. He is favored by its policy; and though the testator may disinherit him, yet the law will execute that intention only when it is put in a clear and unambiguous shape." (Italics ours.)

We think the intention of McCaffrey is "put in a clear and unambiguous shape." He intended to dispose of his whole estate. It is true there is no introductory clause expressing such intention, but there is no residuary clause indicating that he intended to pass less than all of his estate. And all of his heirs at law were his devisees. In other words, the very heirs for whom the rule is invoked are those among whom he distributed his property, and surely he intended a *com-[570] plete distribution,—to vest in each the largest interest he could give, not assigning life estates with residuary fees to the very persons to whom such life estates were devised. In other words, making each heir the successor of the other and of himself. It was evident to the court of appeals—it is evident to us—that he intended to make his heirs equal. Of this purpose the charge upon his daughter, Mary A. Quigley, is dominantly significant, not only in effect, but in its expression. She is given a greater quantity of real estate than the other devisees. She is given personal property besides; "But," declared the testator, "she is to pay funeral expenses and other legal debts I may owe, also to care for my lot in Mount Olivet Cemetery." That charge was not intended to enlarge the quantity of interest in the real estate devised in the sense contended for, but to make an equality between her and the other heirs and devisees, and, we repeat, that was his especial purpose. In other words, he gave her more property, not a larger interest in it. The devise to his grandson, Frank Foley, shows how carefully the testator regarded his heirs. Surely, as he regarded that grandchild as inheriting the rights which his mother might have inherited, he did not intend a disposition of his property which precluded his other grandchildren of inheriting

through their parents. And this will be the result if the appellees are right. No devisee possesses an estate which can be devised to or inherited by his or her children.

Against the effect of the heirs at law of the testator being also his devisees, it may be said that it has been held that, though a testator has given a nominal legacy to his heir, or declared an intention to wholly disinherit him, the inflexibility of the rule in favor of the heir has been enforced. *Frogmorton ex dem. Wright v. Wright*, 2 W. Bl. 889; *Roe ex dem. Callow v. Bolton*, 2 W. Bl. 1045; *Right v. Sidebotham*, 2 Dougl. K. B. 59; *Roe ex dem. Peter v. Daw*, 3 Maule & S. 518.

In *Right v. Sidebotham*, Lord Mansfield felt himself constrained to enforce the rule, [571] but he observed in protest: "I *verily believe that, in almost every case where by law a general devise of lands is reduced to an estate for life, the intent of the testator is thwarted; for ordinary people do not distinguish between real and personal property. The rule of law, however, is established and certain, that express words of limitation or words tantamount are necessary to pass an estate of inheritance." And he hence concluded that words tending to disinherit the heir at law, unless the estate is given to someone else, were not sufficient to prevent the heir from taking.

Lord Ellenborough, in *Roe ex dem. Peter v. Daw*, followed the rule, and declared also that he thereby probably defeated the intention of the testator. It is a strange conclusion from the facts, and needs the sanction of those great names to rescue it from even stronger characterization. Lord Mansfield spoke in 1781, Lord Ellenborough in 1815. We cannot believe, if called upon to interpret a will made in 1896, when the rights of heirs are not so insistent, and the rule in their favor lingers, where it lingers at all, almost an anachronism,—when ownership of real property is usually in fee, and when men's thoughts and speech and dealings are with the fee,—they would hold that the purpose of a testator to disinherit his heirs could be translated into a remainder in fee after a devise of a life estate to another.

But, perhaps, even the severe technicality of those cases need not be questioned. In the construction of wills we are not required to adhere rigidly to precedents. We said in *Abbott v. Essex Co.* 18 How. 202, 213, 15 L. ed. 352, 355:

"If wills were always drawn by counsel learned in the law, it would be highly proper that courts should rigidly adhere to precedents, because every such instrument might justly be presumed to have been drawn with reference to them. But in a country where, from necessity or choice, every man acts as

his own scrivener, his will is subject to be perverted by the application of rules of construction of which he was wholly ignorant."

To like effect is *Cook v. Holmes*, 11 Mass. 528, where the will passed on contained the following devise: *"*Item. To his grandson* [572] *Gregory C., only child of his son Daniel C., deceased, a certain piece of land in Watertown, containing about 6 acres.*" The will contained devises to other sons of pieces of real estate, charging them with payment of certain legacies. The will concluded as follows: "The above-described legacies, together with what I have heretofore done for my children and grandchildren, make them nearly equal, and are their full portions of my estate."

The will, therefore, is similar to the will in the case at bar. Equality between the devisees is as much the purpose of one as the other, though it is expressed in one and deduced as an implication in the other. Chief Justice Parker, in delivering the opinion of the court said: "The quality of the estate which Gregory C. took by the devise must be determined by the words of the will, taken together, and receiving a liberal construction, to effectuate the intention of the testator as manifested in the will."

Further: "The words of the particular devise to Gregory, considered by themselves, certainly give no inheritance." And stating the rule of law to be, as contrasted with the popular understanding, "that such a devise, standing alone, without any aid in the construction from other parts of the will, would amount only to an estate for life in the devisee," added:

"But it is too well established and known to require argument or authorities now to support the position that devises and legacies in a will may receive a character, by construction and comparison with other legacies and devises in the same will, different from the literal and direct effect of the words made use of in such devise; [cases were cited in note] and this because the sole duty of the court in giving a construction is to ascertain the real intent and meaning of the testator, which can better be gathered by adverting to the whole scope of the provisions made by him for the objects of his bounty than by confining their attention to one isolated paragraph, probably drawn up without a knowledge of technical words, or without recollecting the advantage of using them."

*The devise to Gregory C. was held to be [573] of the fee.

From these views it follows that *the decree of the Court of Appeals must be, and it is, reversed*, and the case is remanded to that court with directions to reverse the decree of the Supreme Court, and remand

the case to that court, with directions to enter a decree in accordance with this opinion.

Mr. Justice **Peckham** dissents.

UNITED STATES OF AMERICA

v.

MONTANA LUMBER & MANUFACTURING COMPANY, The Northern Pacific Railway Company, *et al.*

(See S. C. Reporter's ed. 573-578.)

Public lands—railroad land grants—removal of timber from unsurveyed land—evidence—private survey inadmissible to identify odd-numbered sections.

1. Until identification by government survey of the even and odd-numbered sections of the land within the limits of the grant of the odd-numbered sections on each side of the line of the Northern Pacific Railroad, made by the act of July 2, 1864 (13 Stat. at L. 367, chap. 217), the United States has such a property in the timber growing thereon as enables it to recover the value of the timber cut and removed by the railroad company or its grantees.
2. A private survey is inadmissible in evidence in an action by the United States to recover the value of timber cut from unsurveyed lands, to show that, when surveyed, the land will be an odd-numbered section, and therefore included in the grant to the Northern Pacific Railroad Company, by the act of July 2, 1864 (13 Stat. at L. 367, chap. 217), of the odd-numbered sections on each side of the line of the railroad.

[No. 125.]

Argued January 12, 13, 1905. Decided February 20, 1905.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Ninth Circuit, presenting questions respecting the right of the United States to recover the value of timber cut from unsurveyed land which appeared, by a private survey, to be an odd-numbered section within the limits of the Northern Pacific Railroad Company's land grant. Answered by holding that, until identification by government survey, the United States has a sufficient property right to support the action, and that a private survey was inadmissible in evidence to identify the land as an odd-numbered section.

Statement by Mr. Justice **McKenna**:
Action by the United States against the

NOTE.—As to land grants to railroads—see note to *Kansas P. R. Co. v. Atchison, T. & S. F. R. Co.* 28 L. ed. U. S. 794.

Montana Lumber Company and the other defendants for the recovery of \$15,000, for the value of 2,000,000 feet of lumber which had been cut by the lumber company on unsurveyed lands within the district of Montana, and converted by the defendants to their own use. It is alleged that the land from which the lumber was cut when surveyed will be in township 26 N., of range 34 W., of the Montana meridian. The railway company answered separately, denying the allegations of the complaint. The other defendants also denied the allegations of the complaint. Further answering, they admitted the cutting of the lumber, but alleged it was cut from land which, when surveyed, would be section 5 of said township, and that said section was within the limits of the grant made by Congress to the Northern Pacific Railroad Company, and that the lumber company was, at the time of the cutting, the owner of the lands by conveyances from the railway company.

The case was tried to a jury. A nonsuit was granted as to the railway company. Under instructions of the court a verdict was returned for the other defendants.

On the trial of the case the lumber company was permitted to introduce in evidence, over the objection of the plaintiff, a private survey of a portion of the township, made by one John J. Ashley, a civil engineer and surveyor, in the year 1886, for the Northern Pacific Railroad Company, for the purpose of ascertaining the location of the railroad sections contained in said township, in connection with other evidence that the timber sued for was taken from what Ashley had designated as section 5.

In rebuttal of this evidence the plaintiff offered to prove by George F. Rigby, a surveyor and engineer, that he had made a survey of the same lands, and that the Ashley survey was incorrect, and that section 5, as located by Ashley, had been placed three fourths of a mile too far east. The court ruled out the testimony. From the judgment entered upon the verdict for the defendants the case was taken by writ of error to the circuit court of appeals. Whereupon the latter court stated the facts substantially as above, and recited that there were two other cases pending involving the same questions, and that the court was divided in opinion, and certified to this court the following questions:

*"First. Did the district court for the district of Montana err in admitting in evidence the proof of the survey made by Ashley and the proof tending to show that the timber cut by the Montana Lumber & Manufacturing Company had been cut on what will be, when surveyed by the United States,

section 5 of township 26 north, of range 34 west, Montana meridian?

"Second. Did the court err in excluding the evidence offered on behalf of the plaintiff in error, tending to show that the Ashley survey was erroneous?

"Third. Did the court err in instructing the jury to return a verdict for the defendants in error on the ground that the United States had failed to prove its ownership of the land from which the timber was cut?"

Mr. Marsden C. Burch argued the cause, and, with *Solicitor General Hoyt*, filed a brief for the United States.

No counsel opposed.

Mr. Justice McKenna delivered the opinion of the court:

In the view we take of the case the answer to the second question becomes unnecessary. The answer to the first and third depends upon the effect of the grant to the Northern Pacific Railroad Company by the act of July 2, 1864 [13 Stat. at L. 367, chap. 217].

[577] *The 3d section of that act contains the usual granting words: "That there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns," every alternate section of public land, not mineral, designated by odd numbers, on each side of the line of the railroad when definitely fixed.

It has been decided many times that such grants are *in præsentia*, and take effect upon the sections of the land when the road is definitely located, by relation as to the date of the grant. But the survey of the land is reserved to the government (§ 6); in other words, the identification of the sections—whether odd or even—is reserved to the government; and by the act of July 15, 1870 [16 Stat. at L. 291, chap. 292], making appropriations for the sundry civil expenses of the government for the year ending June 30, 1871, it was provided, in regard to the grant to the Northern Pacific Railroad Company, that the cost of surveying must be paid by the company, and no conveyance should be made of the lands until such cost be paid. On account of that provision it was held in *Northern P. R. Co. v. Traill County* (*Northern P. R. Co. v. Rockne*), 115 U. S. 600, 29 L. ed. 477, 6 Sup. Ct. Rep. 201, that the land of a railroad company was not subject to taxation. It was said, "to secure the payment of those expenses, it (the government) decided to retain the legal title in its own hands until they were paid." See also *New Orleans P. R. Co. v. United States*, 124 U. S. 124, 31 L. ed. 383, 8 Sup. Ct. Rep. 417. The equitable title becomes a legal title only upon the identification of the granted sections. *Deseret Salt Co. v. Tar-*

pey, 142 U. S. 241, 35 L. ed. 999, 12 Sup. Ct. Rep. 158. As expressed in *Leavenworth, L. & G. R. Co. v. United States*, 92 U. S. 733-741, 23 L. ed. 634-637, "they" (the words "there be and is hereby granted") "vest a present title, . . . though a survey of the lands and a location of the road are necessary to give precision to it, and attach it to any particular tract." The right of survey is in the United States. It was error, therefore, in the trial court to admit the survey made by Ashley. It was also error to instruct the jury to return a verdict for the defendants. Until the identification of the even and odd-numbered sections the *United States retained a special [578] property, at least, in the timber growing in the township; and this was sufficient to enable it to recover the value of the timber cut and removed by the defendants. A contrary conclusion would impair the government's right of survey, and force it into controversies over surveys made by the railroad or its grantees. It would enable the railroad company or its grantees to despoil the lands of their timber, and leave them denuded, and, maybe, worthless, to the government. Indeed, it would reverse the statutory grant of powers, and transfer the location of the sections from the government to the railroad company. The extent and the effect of the power of the government to make its own surveys is expressed and illustrated in the following cases. *Maguire v. Tyler*, 8 Wall. 650, 19 L. ed. 320; *Cragin v. Powell*, 128 U. S. 691, 32 L. ed. 566, 9 Sup. Ct. Rep. 203; *United States v. McLaughlin*, 127 U. S. 428, 32 L. ed. 213, 8 Sup. Ct. Rep. 1177; *Blake v. Doherty*, 5 Wheat. 359, 5 L. ed. 109; *Central P. R. Co. v. Nevada*, 162 U. S. 525, 40 L. ed. 1061, 16 Sup. Ct. Rep. 885; *United States v. Hanson*, 16 Pct. Rep. 196, 10 L. ed. 935; *Les Bois v. Bramell*, 4 How. 449, 11 L. ed. 1051; *Mackay v. Dillon*, 4 How. 448, 11 L. ed. 1050; *Glenn v. United States*, 13 How. 256, 14 L. ed. 135; *Smith v. United States*, 10 Pet. 326, 9 L. ed. 442.

There is nothing in *Northern P. R. Co. v. Hussey*, 9 C. C. A. 463, 15 U. S. App. 391, 61 Fed. 231, which militates with these views. In that case relief was granted by injunction against a trespasser upon unsurveyed land at the suit of the railway company, its contingent interest being held sufficient for that purpose. The paramount control and property in the United States was not in question.

We, therefore, answer the first and the third question certified by the Circuit Court of Appeals in the affirmative.

Mr. Justice Brewer concurs in the result.

[579] *BERTHA DOCTOR and Katherine Sayles,
Appts.,
v.

JOHN J. HARRINGTON, Dennis A. Harrington, Sol Sayles Company, and Sayles, Zahn Company.

(See S. C. Reporter's ed. 579-589.)

Courts — jurisdiction of Federal circuit court—diversity of citizenship.

1. The presumption that the stockholders of a corporation are citizens of the state which created it does not preclude them from asserting their actual citizenship to sustain the jurisdiction of a Federal circuit court of a suit brought by them as such stockholders.
2. The fact that the ultimate interest of a corporate defendant may be the same as that of the complaining stockholders does not require, in arranging the parties to a cause, for the purpose of determining the jurisdiction of a Federal circuit court, invoked on the ground of diversity of citizenship, that such corporation be grouped on the side of complainants, where the bill alleges that the corporation is under a control antagonistic to complainants, and is made to act in a way detrimental to their rights.

[No. 477.]

Submitted January 25, 1905. Decided February 20, 1905.

A PPEAL from the Circuit Court of the United States for the Southern District of New York to review the dismissal, for lack of the requisite diversity of citizenship, of a suit brought by some of the stockholders of a corporation, in which the corporation is made a party defendant. *Reversed.*

Statement by Mr. Justice **McKenna**:

The bill in this case was dismissed by the circuit court on the ground that it had no jurisdiction upon the fact alleged, and certified to this court the question of jurisdiction. The following is the question certified.

"Whether or not the complainants' bill of complaint showed that there was such diversity of citizenship between the parties complainant and parties defendant in this cause as would be sufficient, under the provisions of the United States Revised Statutes, to confer jurisdiction upon the United States circuit court for the southern district of New York, of this cause."

The court further certified that it entered a decree dismissing the bill, "holding that it appeared from the said bill of complaint that there was no such diversity of citizenship between the parties complainant and defendant as would confer *jurisdiction up-[580] on the United States circuit court for the southern district of New York in the cause within the meaning of the United States Revised Statutes, and that, in arranging the parties to this cause relatively to the controversy, the Sol Sayles Company must be grouped on the side of the complainants, with the result that citizens of the same state would thus be parties on both sides of the litigation, and thus deprive this court of jurisdiction."

The bill is very voluminous, and, as it is agreed by appellees that the statement of appellants substantially states its allegation, we quote from appellants' brief as follows:

"This action was brought by the appellants, as stockholders of the Sol Sayles Company, a corporation organized under the laws of the state of New York, for the purpose of vacating and setting aside a judgment obtained by the appellees Harrington against the Sol Sayles Company in the supreme court of the state of New York, on October 28, 1902, and the levy and sale under an execution issued thereunder, and of requiring the appellees Harrington to deliver to the Sol Sayles Company certain shares of stock in the Sayles, Zahn Company, and certain bonds, belonging to the Sol Sayles Company, which had been sold under such execution, and for other equitable relief.

"In substance, the complainants allege in their bill of complaint that they are citizens of Morris county, New Jersey; that the defendants Harrington are citizens of the state of New York, and that the defendants Sol Sayles Company and Sayles, Zahn Company are likewise citizens of said state, both being incorporated under the laws of that state; that the Sol Sayles Company was organized with a capital stock of \$100,000, divided into 1,000 shares of the par value of \$100 per share, of which the complainants owned 500 shares and the defendants Harrington 500 shares; that, by an arrangement made between the owners of the stock, the voting power on a majority thereof was given to the defendant John J. Harrington, who directed the management of the affairs of the corporation, dictated its *policy, and[581]

NOTE.—As to the residence or citizenship of corporations for the purpose of Federal jurisdiction in a state other than that of incorporation—see note to *Stephens v. St. Louis & S. F. R. Co.* 14 L. R. A. 184.

As to diverse citizenship as ground of Federal jurisdiction—see *Shipp v. Williams*, 10 C. C. A.

247, and note; *Mason v. Duliagh*, 27 C. C. A. 296, and note; *Seddon v. Virginia T. & C. Steel & I. Co.* 1 L. R. A. 108, and note; and *Myers v. Murray, N. & Co.* 11 L. R. A. 216, and note. And see note to *Roberts v. Lewis*, 36 L. ed. U. S. 579.

selected its directors; that on January 26, 1898, the defendant John J. Harrington caused the defendant Sayles, Zahn Company to be organized, for the purpose of taking over the business of the defendant Sol Sayles Company and of one Henry Zahn, and thereupon the property of the Sol Sayles Company and of Zahn were transferred to the Sayles, Zahn Company, which likewise was controlled by the defendant John J. Harrington; that the Sol Sayles Company received, in consideration of the transfer of its property, \$50,000 of the capital stock of the Sayles, Zahn Company, and subsequently subscribed for \$50,000 additional stock.

"It is further alleged that about February 1, 1899, the defendants Harrington, for the purpose of cheating and defrauding the Sol Sayles Company and the complainants of their interest in the assets of the Sayles, Zahn Company, fraudulently caused the Sol Sayles Company to execute and deliver to them, without any consideration whatsoever, its promissory notes, aggregating \$23,700, which were utterly fictitious, and thereafter, and on October 3, 1902, the defendants Harrington, in furtherance of their fraudulent scheme, caused an action to be instituted, and a judgment to be recovered against the Sol Sayles Company, for the amount of the said promissory notes and interest which was alleged to have accrued thereon, the Sol Sayles Company being in utter ignorance of the nature of the action, and omitting to interpose any defense thereto.

"This scheme resulted in the recovery of a judgment against the defendant Sol Sayles Company on October 28, 1902, for \$27,357 28, in favor of the defendants Harrington, who thereupon caused an execution to be issued to the sheriff of the county of New York, against the property and assets of the Sol Sayles Company, under which execution the said sheriff levied on the shares of stock in the Sayles, Zahn Company, and also two bonds of the New Jersey Steamboat Company, which belonged to the Sol Sayles Company, and sold all of the right, title, and interest of the Sol Sayles Company in the said certificates of stock and in the said [582] bonds, the said defendants *Harrington causing them to be purchased for their own benefit; said shares of stock being then, as the defendants Harrington well knew, and have ever since continued to be, worth upwards of \$200,000.

"It further alleged that the complainants caused a demand to be made upon the defendants Harrington, that they transfer the said shares of stock and the said bonds to the Sol Sayles Company, but that they have refused to do so, and have insisted that these

shares of stock and bonds are their personal and individual property, and that neither the Sol Sayles Company nor their complainants have any right, title, or interest in either the said shares of stock or the said bonds, or any part thereof.

"The twentieth paragraph of the bill of complaint is as follows:

"The complainants were and each of them was a shareholder of the defendant Sol Sayles Company at the time of the transactions herein complained of. This suit is not a collusive one to confer upon a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. The complainants are unable to secure any corporate action on the part of the defendant Sol Sayles Company to redress the wrongs hereinbefore set forth, nor are they able to obtain any redress at the hands of the stockholders of the said defendant Sol Sayles Company. The board of directors of said corporation is under the absolute control and domination of the defendant John J. Harrington, and the said Harrington, by reason of having possession of a majority of the capital stock of the said corporation likewise controls the action of the stockholders. Although requested for information with regard to the facts hereinbefore set forth, he has refused to give any information with regard thereto, and has declined to redress the wrongs of which complaint is herein made, or to give to the complainants any opportunity to lay before the board of directors or the stockholders of the defendant Sol Sayles Company the facts herein set forth."

Mr. Charles A. Hess submitted the cause for appellants:

This court has entertained jurisdiction in numerous instances where precisely the same state of facts existed as in the present case.

Dodge v. Woolsey, 18 How. 331, 15 L. ed. 401; *Hawes v. Oakland* (*Hawes v. Contra Costa Water Co.*) 104 U. S. 450, 26 L. ed. 827; *Quincy v. Steel*, 120 U. S. 241, 30 L. ed. 624, 7 Sup. Ct. Rep. 520; *Pollock v. Farmers' Loan & T. Co.* 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673; *Cotting v. Kansas City Stock Yards Co.* (*Cotting v. Godard*) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30. See also *Utah-Nevada Co. v. De Lamar*, 133 Fed. 113.

Even though the complainants are seeking to maintain this action in the right of the Sol Sayles Company, in view of the trend of authority that fact is not entitled to weight as against the circumstance that the Sol Sayles Company is in fact a defendant.

De Neufville v. New York & N. R. Co. 26 C. C. A. 306, 51 U. S. App. 374, 81 Fed. 10.

Mr. Philip J. Britt submitted the cause for appellees. **Mr. John J. Adams** was on his brief:

The action is brought in the right of the corporation.

Davenport v. Dows, 18 Wall. 626, 21 L. ed. 938; *Dewing v. Perdicaries*, 96 U. S. 197, 34 L. ed. 656; *Porter v. Sabin*, 149 U. S. 473, 37 L. ed. 815, 13 Sup. Ct. Rep. 1008; *Dickerman v. Northern Trust Co.* 176 U. S. 188, 44 L. ed. 423, 20 Sup. Ct. Rep. 311; *Alexander v. Donohoe*, 143 N. Y. 203, 38 N. E. 263; *Flynn v. Brooklyn City R. Co.* 158 N. Y. 493, 53 N. E. 520.

There are two classes of stockholders' actions. In the one class we find those actions in which the injury has been done to the stockholder directly, and he sues in his own right for the damages sustained by him; in the other class of cases the injury is done to the corporation, and the stockholder, if he can sue at all, must sue, not in his own behalf, but in behalf of the corporation.

Niles v. New York, C. & H. R. R. Co. 176 N. Y. 119, 68 N. E. 142; *Smith v. Hurd*, 12 Met. 371, 46 Am. Dec. 690; *Allen v. Curtis*, 26 Conn. 456.

Jurisdiction in the Federal courts over a corporation depends upon its status, which in turn is dependent upon the state of its original incorporation, and upon the conclusive, irrebuttable presumption of law that all of the members of the corporation—that is, all of its stockholders—are citizens of the state in which the corporation was organized.

Bank of United States v. Deveaux, 5 Cranch, 61, 3 L. ed. 38; *Hopc Ins. Co. v. Boardman*, 5 Cranch, 57, 3 L. ed. 36; *Sullivan v. Fulton S. B. Co.* 6 Wheat. 450, 5 L. ed. 302; *Breithaupt v. Bank of Georgia*, 1 Pet. 238, 7 L. ed. 127; *Commercial & R. Bank v. Slocomb*, 14 Pet. 60, 10 L. ed. 354; *Marshall v. Baltimore & O. R. Co.* 16 How. 314, 14 L. ed. 953; *Covington Drawbridge Co. v. Shepherd*, 20 How. 227, 233, 15 L. ed. 896, 898; *Ohio & M. R. Co. v. Wheeler*, 1 Black, 286, 296, 17 L. ed. 130, 133; *Muller v. Dows*, 94 U. S. 444, 24 L. ed. 207; *National S. S. Co. v. Tugman*, 106 U. S. 118, 121, 27 L. ed. 87, 88, 1 Sup. Ct. Rep. 58; *Memphis & C. R. Co. v. Alabama*, 107 U. S. 581, 27 L. ed. 518, 2 Sup. Ct. Rep. 432; *Shaw v. Quincy Min. Co.* 145 U. S. 444, 451, 36 L. ed. 768, 772, 12 Sup. Ct. Rep. 935; *St. Louis & S. F. R. Co. v. James*, 161 U. S. 545, 562, 40 L. ed. 802, 808, 16 Sup. Ct. Rep. 621; *Barrow S. S. Co. v. Kane*, 170 U. S. 100, 42 L. ed. 964, 18 Sup. Ct. Rep. 526; *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S. 456, 44 L. ed. 845, 20 Sup. Ct. Rep. 690; *Taylor v. Illinois C. R. Co.* 89 Fed. 119; *Thomas v. Ohio State University*, 195 U. S. 207, ante, 160, 25 Sup. Ct. Rep. 24;

Louisville, C. & C. R. Co. v. Letson, 2 How. 497, 558, 11 L. ed. 353, 378.

This suit being a derivative one in which the complainants are suing solely for the benefit of the Sol Sayles Company, a New York corporation, that corporation, although in form a defendant, is, in legal effect, on the same side of the controversy as the complainants; and, since it is a citizen of the same state as the remaining defendants, the Federal courts have no jurisdiction, as the suit does not involve a controversy between citizens of different states.

Arapahoe County v. Kansas P. R. Co. 4 Dill. 277, Fed. Cas. No. 502; *Walden v. Skinner*, 101 U. S. 589, 25 L. ed. 967; *Removal Cases (Meyer v. Delaware R. Constr. Co.)* 100 U. S. 457, 25 L. ed. 593; *Pacific R. Co. v. Ketchum*, 101 U. S. 289, 25 L. ed. 932; *Harter Twp. v. Kernochan*, 103 U. S. 562, 26 L. ed. 411; *Evers v. Watson*, 156 U. S. 532, 39 L. ed. 522, 15 Sup. Ct. Rep. 430; *Brown v. Trousdale*, 138 U. S. 389, 395, 34 L. ed. 987, 990, 11 Sup. Ct. Rep. 308; *Merchants' Cotton Press & Storage Co. v. Insurance Co. of N. A.* 151 U. S. 385, 38 L. ed. 204, 4 Inters. Com. Rep. 499, 14 Sup. Ct. Rep. 367; *Wilson v. Oswego Twp.* 151 U. S. 63, 38 L. ed. 74, 14 Sup. Ct. Rep. 259; *Covert v. Waldron*, 33 Fed. 311; *Cilley v. Patten*, 62 Fed. 498; *Oberlin College v. Blair*, 70 Fed. 414; *Consolidated Water Co. v. Babcock*, 76 Fed. 246; *Shipp v. Williams*, 10 C. C. A. 247, 22 U. S. App. 380, 62 Fed. 4; *Gardner v. Brown*, 21 Wall. 36, 22 L. ed. 527; *Pittsburgh, C. & St. L. R. Co. v. Baltimore & O. R. Co.* 10 C. C. A. 20, 22 U. S. App. 359, 61 Fed. 705; *Boston Safe Deposit & T. Co. v. Racine*, 97 Fed. 817; *Old Colony Trust Co. v. Atlanta R. Co.* 100 Fed. 798; 1 Foster, Fed. Pr. p. 64.

Mr. George H. Yeaman filed a brief as *amicus curiæ*:

Stockholders, members of a corporation, are conclusively presumed to be citizens of the state which created the corporation, called it into life, gave to it its being as an artificial, legal entity.

Thomas v. Ohio State University, 195 U. S. 207, ante, 160, 25 Sup. Ct. Rep. 24; *Louisville, C. & C. R. Co. v. Letson*, 2 How. 497, 558, 11 L. ed. 353, 377; *St. Louis & S. F. R. Co. v. James*, 161 U. S. 545, 40 L. ed. 802, 16 Sup. Ct. Rep. 621; *Barrow S. S. Co. v. Kane*, 170 U. S. 100, 42 L. ed. 964, 18 Sup. Ct. Rep. 526; *Southern R. Co. v. Allison*, 190 U. S. 326, 47 L. ed. 1078, 23 Sup. Ct. Rep. 713; *Carter, Jurisdiction of Federal Courts*, p. 197; *Covington Drawbridge Co. v. Shepherd*, 20 How. 232, 15 L. ed. 898; *Muller v. Dows*, 94 U. S. 444, 24 L. ed. 207; 1 Foster, Fed. Pr. § 19.

The act of March 3, 1887, as corrected by act of March 13, 1888, was intended to con-

tract the jurisdiction of the national courts, and all doubts as to jurisdiction must be resolved against it.

St. Louis, I. M. & S. R. Co. v. Davis, 132 Fed. 629.

The United States courts have firmly established the policy of looking at the facts to see how the parties are interested, and will align them as plaintiffs or defendants according to that interest, or according to the substance of the controversy.

Groel v. United Electric Co. 132 Fed. 252; *Elkins v. Chicago*, 119 Fed. 957; *Hawes v. Oakland* (*Hawes v. Contra Costa Water Co.*) 104 U. S. 450, 26 L. ed. 827; *Quincy v. Steel*, 120 U. S. 241, 30 L. ed. 624, 7 Sup. Ct. Rep. 520; *Central R. Co. v. Mills*, 113 U. S. 249, 28 L. ed. 949, 5 Sup. Ct. Rep. 456; *East Tennessee, V. & G. R. Co. v. Grayson*, 119 U. S. 240, 30 L. ed. 382, 7 Sup. Ct. Rep. 190; *Arapahoe County v. Kansas P. R. Co.* 4 Dill. 277, Fed. Cas. No. 502.

A court of equity will not take cognizance of a bill brought to settle a question in which a corporation is the essential party in interest, unless it is made a party to the litigation.

Davenport v. Dows, 18 Wall. 626, 21 L. ed. 938.

Mr. Justice **McKenna**, after stating the case, delivered the opinion of the court:

To sustain the action of the circuit court in dismissing the bill the argument is as follows: (1) By a conclusive presumption of law the stockholders of a corporation are deemed to be citizens of the state of the corporation's domicile. (2) Granting that the complainants are citizens of New Jersey, yet, as they are suing for the Sol Sayles Company, a New York corporation, that corporation, although in form a defendant, is, in legal effect, on the same side of the controversy as the complainants, and since it is a citizen of the same state as the other defendants, the circuit court had no jurisdiction, as the suit *does not involve a controversy between citizens of different states.

1. This is based on the assumption adopted by this court, that stockholders of a corporation are citizens of the state which created the corporation,—an assumption physically possible, but hardly true in a single instance; and appellants here contend that it should be classed with the fictions of the law, and subject to one of their fundamental maxims, and cannot be carried beyond the reasons which caused its adoption necessarily require. It is, however, more of a presumption than a fiction, but whether we regard it as either, it cannot be pushed to the end contended for by appellees.

The reason of the presumption (we will so denominate it) was to establish the citi-

zenship of the legal entity for the purpose of jurisdiction in the Federal courts. Before its adoption difficulties had been encountered on account of the conditions under which jurisdiction was given to those courts. A corporation is constituted, it is true, of all its stockholders; but it has a legal existence separate from them,—rights and obligations separate from them; and may have obligations to them. It can sue and be sued. At first this could be done in the circuit court of the United States only when the corporation was composed of citizens of the state which created it. *Bank of United States v. Deveaux*, 5 Cranch, 61, 3 L. ed. 38; *Hope Ins. Co. v. Boardman*, 5 Cranch, 57, 3 L. ed. 36. But the limitation came to be seen as almost a denial of jurisdiction to or against corporations in the Federal courts, and in *Louisville, C. & O. R. Co. v. Letson*, 2 How. 497, 11 L. ed. 353, prior cases were reviewed, and this doctrine laid down:

"That a corporation created by and doing business in a particular state is to be deemed, to all intents and purposes, as a person, although an artificial person, . . . capable of being treated as a citizen of that state, as much as a natural person." And "when the corporation exercises its powers in the state which chartered it, that is its residence, and such an averment is sufficient to give the circuit courts jurisdiction."

*The presumption that the citizenship of [587] the incorporators should be that of the domicile of the corporation was not then formulated. That came afterwards, and overcame the difficulty and objection that the legal creation, the corporation, could not be a citizen within the meaning of the Constitution. *Marshall v. Baltimore & O. R. Co.* 16 How. 314, 14 L. ed. 953. This, then, was its purpose, and to stretch beyond this is to stretch it to wrong. It is one thing to give to a corporation a status, and another thing to take from a citizen the right given him by the Constitution of the United States. Disregarding the purpose of the presumption, it is easy to represent it, as counsel does, as illogical if not extended to every stockholder; but as easy it would be to show its falseness if so applied. But such charges and countercharges are aside from the question. To the fact and place of incorporation the law attaches its presumption for a special purpose. Perhaps, as intimated in *St. Louis & S. F. R. Co. v. James*, 161 U. S. 545, 563, 40 L. ed. 802, 808, 16 Sup. Ct. Rep. 621, this "went to the verge of judicial power." Against the further step urged by appellees we encounter the Constitution of the United States.

2. The ninety-fourth rule in equity contemplates that there may be, and provides

for, a suit brought by a stockholder in a corporation, founded on rights which may properly be asserted by the corporation. And the decisions of this court establish that such a suit, when between citizens of different states, involves a controversy cognizable in a circuit court of the United States. The ultimate interest of the corporation made defendant may be the same as that of the stockholder made plaintiff; but the corporation may be under a control antagonistic to him, and made to act in a way detrimental to his rights. In other words, his interests and the interests of the corporation may be made subservient to some illegal purpose. If a controversy hence arise, and the other conditions of jurisdiction exist, it can be litigated in a Federal court.

In *Detroit v. Dean*, 106 U. S. 537, 27 L. ed. 300, 1 Sup. Ct. Rep. 500, Dean, who was [588] a citizen *of New York and a stockholder in the Mutual Gaslight Company, a Michigan corporation, in order to protect its right and property against the threatened action of a third party, brought suit against the latter and the corporation in the circuit court of the United States for the eastern district of Michigan. This court ordered the bill dismissed, not because Dean and the corporation had identical interests, but because the refusal of the directors of the corporation to sue was collusive. The right of a stockholder to sue a corporation for the protection of his rights was recognized, the condition only being the refusal of the directors to act, which refusal, it is said, must be real, not feigned. *Hawes v. Oakland* (*Hawes v. Contra Costa Water Co.*) 104 U. S. 450, 26 L. ed. 827, was cited, where a like right was decided to exist. See also *Dodge v. Woolsey*, 18 How. 331, 15 L. ed. 401; *Davenport v. Dows*, 18 Wall. 626, 21 L. ed. 938; *Memphis v. Dean*, 8 Wall. 73, 19 L. ed. 328; *Greenwood v. Union Freight R. Co.* 105 U. S. 16, 26 L. ed. 963; *Quincy v. Steel*, 120 U. S. 241, 30 L. ed. 624, 7 Sup. Ct. Rep. 520. It was said that in *Dodge v. Woolsey*, that the refusal of the directors to sue caused them and Woolsey, who was a stockholder in a corporation of which they were directors, "to occupy antagonistic grounds in respect to the controversy, which their refusal to sue forced him to take in defense of his rights." *Dodge v. Woolsey* was modified by *Hawes v. Oakland*, as to what circumstances would justify a suit by a stockholder if the directors refuse to sue. See also *Quincy v. Steel*, 120 U. S. 241, 30 L. ed. 624, 7 Sup. Ct. Rep. 520.

The case at bar is brought within the doctrine of those cases by the allegations of the bill. The defendant corporations are alleged to be under the control of John J. and Dennis A. Harrington, and that com-

plainants are unable to secure any corporate action on the part of the defendant, the Sol Sayles Company, to redress the wrongs complained of. It is also alleged that the Harringtons control the action of the stockholders, and have declined to redress the wrongs complained of or give complainants any opportunity to lay before the board of directors or the stockholders of the Sol Sayles Company the facts alleged. It is also alleged the suit is not collusive. It is manifest that if the matter alleged be true, complainants *will suffer irremediable loss [589] if not permitted to sue, and as they had a cause of action they rightly brought it in the circuit court of the United States.

Decree reversed.

OCEANIC STEAM NAVIGATION COMPANY (Limited), Claimant of the Steamship "Germanic," etc., *Petitioner*,

v.

JOHN W. AITKEN *et al.* and The Insurance Company of North America *et al.*†

(See S. C. Reporter's ed. 589-599.)

Certiorari—adoption of concurrent findings of lower courts—negligence—standard of conduct of expert—carriers—damage to cargo while unloading—Harter act.

1. The concurrent findings of the two lower courts that water damage to cargo was caused by hurried and imprudent unloading will be accepted by the Federal Supreme Court, on certiorari, unless clearly incorrect.
2. Even an expert may be guilty of negligence in doing what, at the time, his judgment approves.
3. Damage to cargo from the sinking of a ship after arriving in port, due to hurried and imprudent unloading, which brought the center of gravity of the ship too high for safety, does not result from "faults or errors in navigation or in the management of said vessel," within the meaning of the Harter act of February 13, 1893 (27 Stat. at L. 445, chap. 105, U. S. Comp. Stat. 1901, p. 2946), § 3, exempting the owner of the vessel from liability, but arises from "negligence, fault, or failure in proper loading, storage, custody, care, or proper delivery" of merchandise, under § 1 of that act, so as to preclude any stipulation of exemption.

[No. 128.]

Argued January 13, 16, 1905. Decided February 20, 1905.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the

†This case is reported by the Official Reporter under the title of "The Germanic."

NOTE.—On statutory exemptions of ship owners from liability—see note to *Nord-Deutscher Lloyd v. Insurance Co. of N. A.* 49 C. C. A. 11.

Second Circuit to review two decrees affirming decrees of the District Court for the Southern District of New York in favor of libellants upon libels filed by cargo owners and underwriters to recover for water damage done to goods on board a vessel while unloading in port. *Affirmed*.

See same case below, 59 C. C. A. 521, 124 Fed. 1.

The facts are stated in the opinion.

Mr. **Everett P. Wheeler** argued the cause and filed a brief for petitioner:

The handling of the ship in the port of discharge in any respect which will affect her safety to carry cargo is an error in management.

The Glenochil [1896] P. 10; *The Silvia*, 171 U. S. 462, 466, 43 L. ed. 241, 243, 19 Sup. Ct. Rep. 7; *Knott v. Botany Worsted Mills*, 179 U. S. 69, 45 L. ed. 90, 21 Sup. Ct. Rep. 30; *The Wilderoft*, 130 Fed. 521; *The Rotherfield*, 8 Revue Internationale du Droit Maritime, 103.

The object of the Harter act is to regulate the relation between the carrier and the shipper.

The Delaware, 161 U. S. 459, 40 L. ed. 771, 16 Sup. Ct. Rep. 516; *The Viola*, 59 Fed. 632; *The Berkshire*, 59 Fed. 1007.

When the management affects the fitness of the ship to carry her cargo there is no liability for faults or errors therein. In other words, that is the management of the vessel. But, if the conduct of the captain or other employees of the shipowner does not affect the fitness of the ship to carry the cargo, the question is whether or not there was negligence in the proper loading or stowage of the cargo with reference to the relation of its different parts to each other.

The Silvia, 171 U. S. 462, 43 L. ed. 241, 19 Sup. Ct. Rep. 7.

If it be claimed that the fault was in stowing coal in the side pockets the answer is the same. Coal is not cargo. It is one of the appliances of the ship. Fault in handling it is fault in management of the ship.

The Rotherfield, 8 Revue Internationale du Droit Maritime, 103, 104.

Knott v. Botany Worsted Mills, 179 U. S. 69, 45 L. ed. 90, 21 Sup. Ct. Rep. 30, is one of many cases in which injury is done to one lot of cargo by leakage from another lot, and the carrier is held liable for bad stowage.

See also *The Mississippi*, 113 Fed. 985.

But when the injury is done to cargo by mismanagement of part of the ship the carrier is exempt.

The Carron Park, L. R. 15 Prob. Div. 203; *The Southgate* [1893] P. 329.

Management of the vessel includes management of any part of the vessel as a cargo
196 U. S.

carrier, although not connected with her navigation.

Rowson v. Atlantic Transp. Co. [1903] 1 K. B. 114, 9 Asp. Mar. Law Cas. 347, Affirmed in [1903] 2 K. B. 666, 19 Times L. R. 668; *The Rodney* [1900] P. 112.

Four recent decisions of the circuit court of appeals are opposed, on principle, to the doctrine of the prevailing opinions in the case at bar.

The Sandfield, 79 Fed. 371, Affirmed in 34 C. C. A. 612, 61 U. S. App. 385, 92 Fed. 663; *American Sugar Ref. Co. v. Rickinson Sons*, 59 C. C. A. 604, 124 Fed. 188; *The Mexican Prince*, 82 Fed. 484, Affirmed in 34 C. C. A. 168, 63 U. S. App. 782, 91 Fed. 1003; *The Wilderoft*, 130 Fed. 521.

The history of the Harter act shows that carriers have been endeavoring to limit their liability, not only for the faults of the captain, but for faults of stevedores and other persons employed by the carrier.

The Delaware, 161 U. S. 459, 471, 472, 40 L. ed. 771, 776, 16 Sup. Ct. Rep. 516.

If there had been any intention to limit the general language of the 3d section certainly this limitation would have been expressed.

Demarest v. Wynkoop, 3 Johns. Ch. 142, 8 Am. Dec. 467; *United States v. Coombs*, 12 Pet. 72, 9 L. ed. 1004; *Chamberlain v. Western Transp. Co.* 44 N. Y. 305, 4 Am. Rep. 681; *Southern L. Ins. & T. Co. v. Packer*, 17 N. Y. 51.

The decisions that the Harter act applies to foreign vessels are really an application of this rule of construction. There is nothing in the act itself that states that it is applicable to foreign vessels. On the other hand, there is nothing in the act that excepts them. This court, therefore, has held that it applies to foreign, as well as to domestic, vessels.

The Chattahoochee, 173 U. S. 540, 43 L. ed. 801, 19 Sup. Ct. Rep. 491; *The Silvia*, 171 U. S. 462, 43 L. ed. 241, 19 Sup. Ct. Rep. 7.

To say that error of judgment is negligence when the error is that of a competent officer who is diligent to observe and to act upon the result of his observation is a contradiction in terms. Negligence is an omission to judge, or the neglect of some means reasonably adapted to guard against a danger which is reasonably to be expected.

The Adriatic, 17 Blatchf. 176, Fed. Cas. No. 91; *Farr & B. Mfg. Co. v. International Nav. Co.* 39 C. C. A. 197, 98 Fed. 636, Affirmed in 181 U. S. 218, 227, 45 L. ed. 830, 834, 21 Sup. Ct. Rep. 591; *Brown v. French*, 104 Pa. 604; *The Tom Lysle*, 48 Fed. 690; *Mason v. Irvine*, 27 Fed. 459; *Wilson v. Charleston Pilots' Asso.* 57 Fed. 227; *Williams v. Le Bar*, 141 Pa. 149, 21 Atl. 525;

The E. Luckenback, 109 Fed. 487; *Lawrence v. Minturn*, 17 How. 100, 110, 15 L. ed. 58, 62; *Boyd v. Moses*, 7 Wall. 316, 19 L. ed. 192.

Negligence is not measured by what is subsequently learned.

The Newfoundland, 176 U. S. 97, 44 L. ed. 386, 20 Sup. Ct. Rep. 274; *The Styria v. Morgan*, 186 U. S. 1, 9, 46 L. ed. 1027, 1033, 22 Sup. Ct. Rep. 731; *McClain v. Brooklyn City R. Co.* 116 N. Y. 459, 22 N. E. 1062; *The Maria Luigia*, 28 Fed. 244.

This is illustrated by the rule of evidence which forbids the introduction of proof of subsequent precautions as evidence of past negligence.

The Columbia & P. S. R. Co. v. Hawthorne, 144 U. S. 202, 36 L. ed. 405, 12 Sup. Ct. Rep. 591; *Hart v. Lancashire & Y. R. Co.* 21 L. T. N. S. 261.

The court below failed to give proper effect to the undisputed evidence, that the discharge and loading of the *Germanie* was carried on in the usual manner, that no inconvenience had ever resulted from it, and that it was the only practicable way consistent with despatch.

1 Shearm. & Redf. Neg. 4th ed. § 11; Wharton, Neg. § 46; *The Nitro-glycerine Case (Parrott v. Wells)* 15 Wall. 524, 537, 21 L. ed. 206, 211; *The Timor*, 14 C. C. A. 412, 35 U. S. App. 278, 67 Fed. 356; Carver, Carr. by Sea, 3d ed. § 181.

The sinking of the *Germanie* was unlike anything that had ever occurred before in the history of the port. It could not have been expected. Even if the claimant, with the experience derived from this accident, could now in a similar case prevent such a disaster, it is not necessarily liable here. The question is one of due care with the knowledge it then had. The captain did all that reasonable, prudent men would have done under the circumstances.

The Etona, 64 Fed. 880; *Hibernia Ins. Co. v. St. Louis & N. O. Transp. Co.* 120 U. S. 166, 30 L. ed. 621, 7 Sup. Ct. Rep. 550; *Sloror v. Erie R. Car Float No. 4*, 37 C. C. A. 154, 95 Fed. 495.

Mr. Wilhelmus Mynderse argued the cause, and, with *Messrs. Butler, Notman, & Mynderse*, filed a brief for respondents:

The facts have been established finally by the concurrent decisions of the district court and the United States circuit court of appeals.

Compania de Navigacion La Flecha v. Brauer, 168 U. S. 104, 42 L. ed. 398, 18 Sup. Ct. Rep. 12; *Morewood v. Enequist*, 23 How. 491, 16 L. ed. 516; *The Richmond (The Sabine v. The Richmond)* 103 U. S. 540, 26 L. ed. 313; *The Conqueror*, 166 U. S. 110, 135, 41 L. ed. 937, 948, 17 Sup. Ct. Rep. 510; *The Carib Prince (Wuppermann v. The*

Carib Prince) 170 U. S. 655, 42 L. ed. 1181, 18 Sup. Ct. Rep. 753; *The Iroquois*, 194 U. S. 240, 247, 48 L. ed. 955, 959, 24 Sup. Ct. Rep. 640.

So far as perils of the sea are concerned, the Harter act leaves the law just as it found it. The statute merely declares that the owners and master of a vessel shall not be held liable for losses resulting from dangers of the sea or other navigable waters, or from the acts of God. The statute goes no further.

The Carib Prince (Wuppermann v. The Carib Prince) 170 U. S. 655, 42 L. ed. 1181, 18 Sup. Ct. Rep. 753.

The damage to the cargo was "loss or damage arising from neglect, fault, or failure in proper loading, stowage, custody, care, or proper delivery" of the cargo. The responsibility of the shipowner for such damage is recognized in the 1st section of the Harter act.

Knott v. Botany Worsted Mills, 179 U. S. 69, 45 L. ed. 90, 21 Sup. Ct. Rep. 30.

The damages did not result "from faults or errors in navigation or in management" of the steamer within the 3d section of the Harter act.

Ibid.

The disaster at New York was due, not so much to a condition of unseaworthiness, in the usual acceptance of that term, as to negligence by the petitioner and its representatives in the care and custody of the cargo which had been committed to the steamer for transportation and delivery; and the 1st section of the Harter act forbids exemption in such case.

The Manitoba, 104 Fed. 145.

Mr. Walter F. Taylor also argued the cause, and, with *Mr. Edmund L. Baylies*, filed a brief for respondents:

The character of a fault, as a fault in the management of the ship, or as one for which the owner is responsible, is not to be determined by the fact that it affects the ship, or the nature or degree of the effect produced, but by reference to the nature of the operation which is negligently performed.

Knott v. Botany Worsted Mills, 179 U. S. 69, 45 L. ed. 90, 21 Sup. Ct. Rep. 30; *The Silvia*, 171 U. S. 462, 43 L. ed. 241, 19 Sup. Ct. Rep. 7; *The Glenochil* [1896] P. 10; *The Wildcroft*, 130 Fed. 521; *The Rodney* [1900] P. 112; *The Mexican Prince*, 82 Fed. 484; *The Sandfield*, 34 C. C. A. 612, 61 U. S. App. 385, 92 Fed. 663; *Rowson v. Atlantic Transp. Co.* [1903] 2 K. B. 666.

The tendency of the decisions construing the Harter act has been to limit, rather than to extend, the exemption given by the Harter act for faults and errors in the management and navigation of the ship.

The Delaware, 161 U. S. 459, 40 L. ed. 771,

16 Sup. Ct. Rep. 516; *The Irrawaddy* (*Flint v. Christall*) 171 U. S. 187, 43 L. ed. 130, 18 Sup. Ct. Rep. 831; *The Chattahoochee*, 173 U. S. 540, 43 L. ed. 801, 19 Sup. Ct. Rep. 491; *The Carib Prince* (*Wuppermann v. The Carib Prince*), 170 U. S. 655, 42 L. ed. 1181, 18 Sup. Ct. Rep. 753.

Mr. Justice **Holmes** delivered the opinion of the court:

This writ of certiorari brings up the record of two cases which were tried together upon libels filed by cargo owners and underwriters to recover for water damage done to goods on board the steamship *Germanic*. 107 Fed. 294, 59 C. C. A. 521, 124 Fed. 1. The steamer reached her pier in New York at about noon, Saturday, February 11, 1899. She was heavily coated with ice, estimated by the courts below at not less than 213 tons, and this weight was increased by a heavy fall of snow after her arrival. She was thirty-six hours late, and, in order to sail at her regular time on the following Wednesday, began to discharge cargo from all of her five hatches at once. At the same time she was taking in coal from coal barges on both sides, to that end being breasted off from the dock 25 or 30 feet on her port side. At about 4 p. m. on Monday, February 13, she had discharged about 1,370 out of her 1,650 tons of cargo, including all but about 155 tons in the lower hold, the other 125 tons being on the orlop and steerage decks. She then had a starboard list of about 8°. At that moment she suddenly rolled over from starboard to port and kept a port list of 9° or more. As she rolled over, the open cover of an aft coal port, about 33 inches by 22, was knocked off, leaving the bottom of the coal port about a foot above the water line.

[595] *Thereupon the master, who previously had given no attention to the discharge of cargo and loading of coal, ordered that coaling should be stopped on the port side, but continued on the starboard, that no more cargo should be taken from the lower hold, and that some sugar in bags should be shifted to the starboard side.

When 10 tons of sugar had been shifted, at 4.45 p. m., the steamer rolled back to starboard with a list of 8°, as before. Coal-ing was resumed on the port side, but at 6 was stopped on the starboard side. Between 6 and 9 p. m. all her side pockets were filled with coal up to the main deck, except one on the starboard, which lacked about 30 tons of being full. Some 20 or 25 tons were run into her cross bunkers in the lower part of the ship, which previously were about half full. About 50 tons of goods were discharged from the orlop and steerage decks, and about 60 tons of bacon were put on board and distributed evenly in the bottom

of the hold. From 4.45 to 9 the starboard list was increasing constantly. At a little after 9 the steamer suddenly rolled over again to port, carrying the lower part of the open coal port below the water line. The pumps could not control the inflowing water and the ship sank before relief could be got. The damage to the goods was caused in this way.

The petitioner argues that the danger could not have been foreseen, and that there was no negligence, attributing the loss to an unusual gale and special circumstances. But the district court and the circuit court of appeals agree that the loss was due to hurried and imprudent unloading, which brought the center of gravity of the ship 5 or 6 inches above the metacenter. As usual, we accept their finding. *The Iroquois*, 194 U. S. 240, 247, 48 L. ed. 955, 959, 24 Sup. Ct. Rep. 640; *The Carib Prince* (*Wuppermann v. The Carib Prince*) 170 U. S. 655, 658, 42 L. ed. 1181, 1182, 18 Sup. Ct. Rep. 753. We see no sufficient reason to doubt that it was correct. With reference to a part of the argument, we think it proper to say a word. It is quite true that negligence must be determined upon the facts as they appeared at the time, and not by a judgment from actual consequences which then were not *to be apprehended by a prudent [596] and competent man. This principle nowhere has been more fully recognized than by this court. *Lawrence v. Minturn*, 17 How. 190, 110, 15 L. ed. 58, 62; *The Star of Hope* (*The Star of Hope v. Annan*) 9 Wall. 203, 19 L. ed. 638. But it is a mistake to say, as the petitioner does, that if the man on the spot, even an expert, does what his judgment approves, he cannot be found negligent. The standard of conduct, whether left to the jury or laid down by the court, is an external standard, and takes no account of the personal equation of the man concerned. The notion that it "should be coextensive with the judgment of each individual," was exploded, if it needed exploding, by Chief Justice Tindal, in *Vaughan v. Menlove*, 3 Bing. N. C. 468, 475. And since then, at least, there should have been no doubt about the law. *Com. v. Pierce*, 138 Mass. 165, 176, 52 Am. Rep. 264; *Pollock, Torts*, 7th ed. 432.

The foregoing statement, abridged from that of the district court, which was accepted by the circuit court of appeals, is sufficient to present the question which we have to discuss, if we add the finding of the latter court, that, after the *Germanic* was made fast, she was given in charge of the shore agents of the owners, and that they alone assumed direction of the discharging and loading of cargo, and prepared her for the return voyage. The question is whether the

damage to the cargo was "damage or loss resulting from faults or errors in navigation or in the management of said vessel," as was set up in the answers, in which case the owner was exempted from liability by § 3 of the Harter act, or whether it was "loss or damage arising from negligence, fault, or failure in proper loading, storage, custody, care, or proper delivery" of merchandise under § 1 of the same, in which case he could not stipulate to be exempt. The second section also recognizes and affirms the "obligations" "to carefully handle and store her cargo, and to care for and properly deliver the same." Act of February 13, 1893 (27 Stat. at L. 445, chap. 105, U. S. Comp. Stat. 1901, p. 2946).

[597] The petitioner contends that any dealing with the ship or cargo which affects the fitness of the ship to carry her cargo is "management of the vessel," within the meaning of § 3. To support this contention the case of *The Glenochil* [1895] P. 10, is cited. There, after the arrival of the vessel in port, and while she was unloading, the engineer, in order to stiffen the ship, let water into a ballast tank, and did it so negligently that the water got to and injured the cargo. The damage was held to result from fault in the management of the vessel, within § 3, and the shipowner was held exempt. See *The Silvia*, 171 U. S. 462, 43 L. ed. 241, 19 Sup. Ct. Rep. 7. We see no reason to criticize this decision, and therefore lay on one side at once the fact that the vessel had come to the end of her voyage, and was in dock. We assume further that the captain retained authority over his ship, so that it was his power and perhaps his duty to intervene in any case that needed his control. On these assumptions the argument is that cargo has also a function as ballast; that if, for instance, the loss is caused by the improper shifting of pigs of lead, it does not matter whether they are called ballast or cargo, but in either case, so far as the change affects the fitness of the ship as a carrier, it is management of the vessel, within the act. The thing done is the same, and the name of the object cannot affect the result.

Nevertheless, in a practical sense, the ship was not under management at the time, but was the inert ground or floor of activities that looked not to her, but to getting the cargo ashore. And this consideration brings to light the limitation of the section, adopted by the court in *The Glenochil*, and sanctioned by this court in *Knott v. Botany Worsted Mills*, 179 U. S. 69, 73, 74, 45 L. ed. 90, 94, 21 Sup. Ct. Rep. 30, to faults "primarily connected with the navigation or the management of the vessel, and not with the cargo." [1895] P. 15, 19. In the case supposed the name given to the pigs of lead is

not important in itself, to be sure, but may indicate a difference in the purpose and character of the change of place. If the primary purpose is to affect the ballast of the ship, the change is management of the vessel; but if, as in view of the findings we must take to have been the case here, the primary purpose is to get the cargo ashore, *the fact that it also affects the trim of the [598] vessel does not make it the less a fault of the class which the first section removes from the operation of the third. We think it plain that a case may occur which, in different aspects, falls within both sections; and if this be true, the question which section is to govern must be determined by the primary nature and object of the acts which cause the loss.

A distinction was hinted at in argument, based on the fact that the damage was not to the cargo removed, but to that left behind in the ship. If the damage was attributable to negligence in unloading, it does not matter what part of the cargo is injured. The fact referred to does bring out, however, that the negligence in removing the cargo was negligence only because of its probable effect on the ship, and was negligence towards the remaining cargo only through its effect on the ship. But, although this may be conceded, the criterion which we have given is undisturbed. That "in" which, as the statute puts it, the fault was shown, was not management of the vessel, but unloading cargo; and, although it was fault only by reason of its secondary bearing, the primary object determines the class to which it belongs.

It is settled by repeated decisions that the Harter act will be applied to foreign vessels in suits brought in the United States. *The Scotland (National Steam Nav. Co. v. Dyer)* 105 U. S. 24, 26 L. ed. 1001; *The Chattahoochee*, 173 U. S. 540, 43 L. ed. 801, 19 Sup. Ct. Rep. 491. The claimant sets up the act and relies upon it. Under the cases it must take the burdens with the benefits, and no discussion of the terms of the bills of lading, if they might lead to a greater limitation of liability, is necessary. *Knott v. Botany Worsted Mills*, 179 U. S. 69, 45 L. ed. 90, 21 Sup. Ct. Rep. 30; *The Kensington*, 183 U. S. 263, 269, 46 L. ed. 190, 193, 22 Sup. Ct. Rep. 102. Some of the bills of lading in evidence contain a clause to the further effect that the shipowners, if liable for a loss capable of being covered by insurance, shall have the benefit of any insurance on the goods. But these bills of lading were for transport to Liverpool, and while they provided for forwarding the goods at ship's expense to New York, the forwarding was to be on bills of lading issued by *the steam- [599] er sailing to that port, and subject to the

stipulations, exceptions, and conditions in those bills. We see no occasion to consider the questions which might be raised if the same stipulations were contained in the bills of lading to New York. See *Liverpool & G. W. Steam Co. v. Phoenix Ins. Co.* 129 U. S. 397, 463, 33 L. ed. 788, 799, 9 Sup. Ct. Rep. 469; *Inman v. South Carolina R. Co.* 129 U. S. 128, 32 L. ed. 612, 9 Sup. Ct. Rep. 249; *Phoenix Ins. Co. v. Erie & W. Transp. Co.* 117 U. S. 312, 29 L. ed. 873, 6 Sup. Ct. Rep. 750, 1176.

Decree affirmed.

GUS G. COULTER, S. W. Hager, and C. B. Hill, *Appts.*,
v.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

(See S. C. Reporter's ed. 599-610.)

Courts—jurisdiction of Federal courts to enjoin collection of state tax—taxation of corporate franchise—inequality in valuation.

1. A Federal court cannot enjoin the collection of a franchise tax assessed under the authority of a state because of inequality in valuation as compared with other taxable property, nor can it order the state treasurer to issue a receipt in full to the complainant, which has paid so much of the tax as it thinks was justly due.
2. The Federal Constitution does not forbid state taxation of the franchise of a domestic corporation at a different rate than is assessed upon the tangible property in the state.
3. Inequality in valuation for taxation of a franchise, as compared with other taxable property, must be systematic and intentional in order to justify a Federal court in enjoining the apportionment and certification of the tax to the several counties, where the assessment does not appear to have been made on such a different scale of values from that adopted elsewhere as to deny the equal protection of the laws guaranteed by U. S. Const. 14th Amend., which was the only ground invoked to sustain the Federal jurisdiction.

[No. 244.]

Argued November 29, 30, 1904. Decided February 20, 1905.

APPEAL from the Circuit Court of the United States for the Eastern District of Kentucky to review a decree which re-

NOTE.—On taxation of corporate franchises in the United States—see note to *Louisville Tobacco Warehouse Co. v. Com.* 57 L. R. A. 33.

As to constitutional equality in the United States in relation to corporate taxation—see note to *Bacon v. State Tax Comrs.* 60 L. R. A. 321.

196 U. S.

strained, for inequality in valuation for taxation, the apportionment and certification to the several counties of a tax imposed on the franchise of a domestic corporation, and enjoined the collection of such tax, and required the state treasurer to execute a receipt in full to the complainant, which had paid the amount of the tax which it regarded as justly due. *Reversed.*

See same case below, 131 Fed. 282.

The facts are stated in the opinion.

Messrs. William O. Davis and **Henry L. Stone** argued the cause, and, with **Mr. Napoleon B. Hays**, filed a brief for appellants:

Appellee's suit was against the state without its consent, and in violation of the 11th Amendment to the Constitution of the United States, and the demurrer to the bill for want of jurisdiction should have been sustained and the bill dismissed without regard to the merits, so far as state taxes were concerned.

Louisiana v. Jumel, 107 U. S. 711, 27 L. ed. 448, 2 Sup. Ct. Rep. 128; *Re Ayers*, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164; *Hans v. Louisiana*, 134 U. S. 1, 33 L. ed. 842, 10 Sup. Ct. Rep. 504; *Coulter v. Weir*, 62 C. C. A. 429, 127 Fed. 897; *Fitts v. McGhee*, 172 U. S. 516, 43 L. ed. 535, 19 Sup. Ct. Rep. 269; *Arbuckle v. Blackburn*, 65 L. R. A. 864, 51 C. C. A. 122, 113 Fed. 616.

There being no diverse citizenship between the parties, the bill does not show jurisdiction in the circuit court on account of the alleged denial of the equal protection of the laws, within the meaning of the 14th Amendment to the Constitution of the United States.

Nashville, C. & St. L. R. Co. v. Taylor, 86 Fed. 168; *Railroad & Teleph. Cos. v. Board of Equalizers*, 85 Fed. 302; *Taylor v. Louisville & N. R. Co.* 31 C. C. A. 537, 60 U. S. App. 166, 88 Fed. 350; *Louisville Trust Co. v. Stone*, 46 C. C. A. 299, 107 Fed. 305; *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153, 25 L. ed. 903; *Albuquerque Nat. Bank v. Perea*, 147 U. S. 87, 37 L. ed. 91, 13 Sup. Ct. Rep. 194.

The allegation in the amended bill that the assessors "uniformly" assessed such property below its value for the year 1902 is not sufficient to bring this case within the rule announced in this class of cases by the Federal courts.

Cummings v. Merchants' Nat. Bank, 101 U. S. 153, 25 L. ed. 903; *Taylor v. Louisville & N. R. Co.* 31 C. C. A. 537, 60 U. S. App. 166, 88 Fed. 350; *German Nat. Bank v. Kimball*, 103 U. S. 732, 26 L. ed. 469; *Pelton v. Commercial Nat. Bank*, 101 U. S. 143, 25 L. ed. 901; *Albuquerque Nat. Bank v. Perea*, 147 U. S. 87, 37 L. ed. 91, 13 Sup. Ct.

Rep. 194; *New York v. Barker*, 179 U. S. 279, 45 L. ed. 190, 21 Sup. Ct. Rep. 121; *State ex rel. Gottlieb v. Western U. Teleg. Co.* 165 Mo. 504, 65 S. W. 775; *Western U. Teleg. Co. v. Missouri*, 190 U. S. 412-417, 47 L. ed. 1116, 1117, 23 Sup. Ct. Rep. 730; *Exchange Nat. Bank v. Miller*, 19 Fed. 372.

If the court shall conclude that the allegations of the bill are sufficient to give jurisdiction to the circuit court, and to constitute a cause of action, then the proof falls short of what is required by the decisions of the Federal courts in this class of cases before an injunction will be granted interfering with the collection of the public revenues of a state.

Cincinnati S. R. Co. v. Guenther, 19 Fed. 398; *Taylor v. Louisville & N. R. Co.* 31 C. C. A. 537, 60 U. S. 166, 88 Fed. 373; *New York v. Barker*, 179 U. S. 286, 45 L. ed. 194, 21 Sup. Ct. Rep. 121; *Louisville Trust Co. v. Stone*, 46 C. C. A. 299, 107 Fed. 305.

The court cannot take judicial notice of undervaluations of any species of property, if any there be, by assessing officers.

New York v. Barker, 179 U. S. 286, 45 L. ed. 194, 21 Sup. Ct. Rep. 121.

The complainant, by reason of the action of the county assessors and board of equalization, or the board of valuation and assessment, has not been discriminated against or denied the equal protection of the laws, within the meaning of the 14th Amendment to the Constitution of the United States.

King v. Mullins, 171 U. S. 436, 43 L. ed. 226, 18 Sup. Ct. Rep. 925; *Judson, Taxn.* § 437, p. 562; *Head Money Cases (Edye v. Robertson)* 112 U. S. 595, 28 L. ed. 798, 5 Sup. Ct. Rep. 247; *National Bank v. Baltimore*, 40 C. C. A. 254, 100 Fed. 27; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 233, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; *Merchants' & M. Nat. Bank v. Pennsylvania*, 167 U. S. 464, 42 L. ed. 237, 17 Sup. Ct. Rep. 829; *Columbus S. R. Co. v. Wright*, 151 U. S. 478, 38 L. ed. 242, 14 Sup. Ct. Rep. 396; *Florida, C. & P. R. Co. v. Reynolds*, 183 U. S. 476, 46 L. ed. 286, 22 Sup. Ct. Rep. 176; *Kentucky Railroad Cases (Cincinnati, N. O. & T. P. R. Co. v. Kentucky)* 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; *Charlotte, C. & A. R. Co. v. Gibbes*, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255; *Wagoner v. Loomis*, 37 Ohio St. 571; *Lowell v. Middlesex County*, 152 Mass. 375, 9 L. R. A. 356, 25 N. E. 469; *State, Central R. Co., Prosecutor, v. State Assessors*, 48 N. J. L. 7, 57 Am. Rep. 516, 2 Atl. 789; *Louisville R. Co. v. Com.* 105 Ky. 710, 49 S. W. 486.

Mr. James P. Helm argued the cause, and, with Mr. Helm Bruce, filed a brief for appellee:

Can a state, through its administrative

officers, intentionally, uniformly, and systematically make some of its citizens bear, proportionately to their wealth, one fifth more of the burdens of state government than it requires of all the rest of its citizens?

Taylor v. Louisville & N. R. Co. 31 C. C. A. 537, 60 U. S. App. 166, 88 Fed. 364.

As to the effect of practical construction by those whose duty it is to execute a statute, see—

Harrison v. Com. 83 Ky. 163; *Barbour v. Louisville*, 83 Ky. 95; *Clark's Run & S. River Turnp. Road Co. v. Com.* 96 Ky. 532, 29 S. W. 360; *Louisville v. Garr*, 97 Ky. 588, 31 S. W. 281, 32 S. W. 748.

Whenever a question of fact is submitted to the determination of a special tribunal, its decision creates something more than a mere presumption of fact; and, if such determination comes into inquiry before the courts it cannot be overthrown by evidence going only to show that the fact was otherwise than was found and determined.

Pittsburgh, C. C. & St. L. R. Co. v. Baekus, 154 U. S. 434, 38 L. ed. 1039, 14 Sup. Ct. Rep. 1114; *Western U. Teleg. Co. v. Taggart*, 163 U. S. 1, 41 L. ed. 49, 16 Sup. Ct. Rep. 1054; *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 229, 41 L. ed. 698, 17 Sup. Ct. Rep. 305.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill brought by the railroad company, appellee, a *Kentucky corporation, [605] against citizens of Kentucky, the members of the state board of valuation and assessment, and, respectively, auditor of public accounts, treasurer, and secretary of state. The only ground of jurisdiction alleged is that, under the tax laws of the state of Kentucky, as administered by its executive officers, the railroad company is deprived of the equal protection of the laws, contrary to the 14th Amendment. The Constitution of the state requires all property not exempted from taxation to be assessed at its fair cash value; but the bill alleges that the county assessors uniformly assess the property assessed by them, which is the great body of tangible property in the state, below its cash value. It alleges that, in like manner, the board of equalization equalizes the county assessments at a percentage not above 80 per cent of the fair cash value of the property taxed. On the other hand the defendants, who assess the franchise tax on the railroad company, are alleged to have assessed the company's property in Kentucky at its full value, viz., \$33,788,724.50, for the year 1902, and then, deducting the tangible property locally taxed, \$23,103,825, to have made the taxable franchise \$10,774,899.50.

Whereas, if 80 per cent of the value of the company's property had been taken, then, deducting as before, the taxable franchise would be only a little over \$4,000,000.

The railroad company contends that when there is a uniform and general undervaluation of other property, then the only way in which the company can be put on an equality with other taxpayers is by a similar undervaluation in its case. The railroad company contends further that although this contravenes the letter of the statute, the requirement of equality so far outweighs the requirement of a tax on the full value of property, that if, by misconduct elsewhere, both cannot be observed, the rule of equality must prevail. It should be mentioned that the franchise tax is both state and local, and that after the same has been laid and apportioned between the state and [606] county, etc., by the defendants, the *state auditor, who is one of them, certifies to the county clerks their proportion of the tax. The bill prays for an injunction against such an apportionment and certification, and also against collection by the officers of the state. There was a general demurrer to the bill, and an answer and replication. The demurrer was overruled. Much evidence was taken, and at the final hearing a decree was entered by the circuit court enjoining the defendants as prayed, and requiring the defendant Hager, treasurer of the state, to execute a receipt in full of the state taxes on the franchise for 1902, the plaintiff having paid the sum which was due on its view of the case. 131 Fed. 282. The defendants appealed to this court. It may be assumed from an affidavit filed, if not from the pleadings, that the amount in controversy is over \$2,000. See *United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 310, 41 L. ed. 1007, 1017, 17 Sup. Ct. Rep. 540.

From a consideration of different kinds of evidence the circuit court reached the conclusion that the county assessors had systematically and intentionally undervalued the property assessed by them. In the first place it found a settled habit of undervaluing, recognized by the legislature and the state court, before the adoption of the Constitution of 1891, which required the fair cash value to be assessed. It found that while the value of land had increased or, at least, had not diminished since 1891, the assessments had varied very little, while those of 1891 were not more than 70 per cent of the value at any time. It considered testimony that from 1893 to 1896 the assessments were equalized at 70 per cent, following earlier statutes, notwithstanding the Constitution of 1891. It then compared tabulated statements of sales in the different counties, which were required by statute to

be furnished to the board of equalization, with the local assessments and with the results reached by the last-named board. It thus found an additional and independent reason for believing that there was systematic undervaluation in the counties, and it inferred from comparisons and from testimony to that effect *that the board paid lit- [607] tle attention to the tabulated statements, even on a basis of 80 per cent, but really was governed by the assessment of the previous year. Finally, it confirmed its conclusions by direct testimony as to the practice in certain counties and the rules practically adopted by the board. The reasoning is careful and elaborate, and cannot be read without an impression that probably it is correct to the extent of establishing a general undervaluation of land.

On the other hand, there was testimony that the statements of sales did not afford satisfactory evidence of average values, or at least, for various reasons, were not regarded by the board of equalization as affording it. Most of the members of the board testified that they tried in good faith to reach fair cash values, and there were many affidavits to a like effect as to the past and present conduct of the county assessors. It was sworn that, so far as percentages of the reported sales were used, they were used on an estimate of what proportion actual values would bear to the sums named in the deeds. The circuit court, while regarding it as the condition of equitable relief that the property other than that of the plaintiff should have been undervalued systematically and intentionally, hardly dealt with this evidence in its bearing on the question of intent. Yet, of course, no court would venture to intervene merely on the ground of a mistake of judgment on the part of the officer to whom the duty of assessment was intrusted by the law.

The other half of the plaintiff's case is that its franchise was valued at its full cash value. It might even require consideration, if necessary, whether it ought not to be shown further that the appellants, in valuing the franchise, consciously adopted a different standard from that which they understood to be adopted in the counties. On the foregoing questions one of the three appellants testified that he had dissented from the majority on several occasions, believing that the assessments were higher than those for other kinds of property, and that he understood that the majority assessed *the franchise at its full value. One [608] testified that he thought at the time, and still thought, that the franchise was valued lower than it ought to be. The third was not explicit, but showed that the valuation

was reduced after hearing. Different well-known modes were used in approaching the valuation, but probably there was an element of arbitrary judgment at the end. This certainly was the case in regard to the proportion of mileage in the state, which, by the statutes, was to "be considered" in fixing the value of the franchise, and which the appellants contend was underestimated so much as to compensate for any other mistake, if there was any, which is denied.

We need not stop to show that so much of the bill as seeks an injunction against collecting the state tax, and the portion of the decree which orders a receipt to be executed on the part of the state, cannot be maintained. See *Coulter v. Weir*, 62 C. C. A. 429, 127 Fed. 897, 906, 912. On the other hand, in a proper case, a bill may be brought to restrain apportionment and certification to the counties. *Fargo v. Hart*, 193 U. S. 490, 495, 503, 48 L. ed. 761, 764, 767, 24 Sup. Ct. Rep. 498. The question is whether such a case has been made out, and we may assume, for purposes of decision, without deciding, that, if we otherwise agreed with the railroad company's contention, the injunction might be granted, although the franchise was valued as the law requires in every respect except in the proportion which the assessment bore to the other valuations. The decisions are not agreed upon this point.

We have stated as much as we deem necessary to the answering of the question just put. It must be obvious on even that short statement how uncertain are the elements of the evidence, and in what unusual paths it moves. On the face of their records the proceedings of the defendants, of the county assessors, and of the equalizing board all are regular. If it be a fact that the franchise of a Kentucky corporation is taxed at a different rate from the tangible property in the state, there can be no question that the state had power to tax it at a different rate, so far as the Constitution of the United States *is concerned. *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; *Merchants' & M. Nat. Bank v. Pennsylvania*, 167 U. S. 461, 464, 42 L. ed. 236, 237, 17 Sup. Ct. Rep. 829; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 295, 42 L. ed. 1037, 1043, 18 Sup. Ct. Rep. 594. It is doubtful, at least, if any further question should have been asked in this case. *Missouri v. Dockery*, 191 U. S. 165, 48 L. ed. 133, 63 L. R. A. 571, 24 Sup. Ct. Rep. 53. But as the claim of right under the United States Constitution was not merely colorable (*Penn Mut. L. Ins. Co. v. Austin*, 168 U. S. 685, 695, 42 L. ed. 626, 618

630, 18 Sup. Ct. Rep. 223), and as the evidence is here, we have considered the evidence also, and our conclusion from that, as well as from the law, is that the bill must be dismissed.

Looking first at the assessment of the franchise, there is no such certainty that it was made on a different scale of values from that adopted elsewhere as would warrant an attack upon it under the 14th Amendment, even if otherwise that attack could be maintained. But the supposed infringement of the 14th Amendment is the only ground on which the railroad company could come into the circuit court, and if that ground fails, and obviously fails, the court should be very cautious, at least, in interfering with the state's administration of its taxes upon other considerations which would not have given it jurisdiction.

The undervaluation in the counties, looked at from the point of view just indicated, also does not appear to have been such as to warrant the action of the court. It is not contended that a mere undervaluation would be enough. It is admitted that it must have been systematic and intentional. There is, no doubt, a natural inclination to think such an undervaluation probable when it is suggested. But what is the proof? The state Constitution, whatever the statutes may have said, seems popularly to have been understood to have made a great change in the law. Practice before its adoption, therefore, hardly can raise a presumption as to practice afterwards, even on the liberal assumption that it properly could be considered in evidence. It is obvious that the accidental sales in a given year may be a misleading guide to average values, *apart from [610] the testimony that some, at least, of the conveyances did not report true prices, yet they furnish the chief weapon of attack. The testimony as to the board of equalization taking 80 per cent of the reported sales was explained by the members of the board. It would be going very far to assume that they were committing perjury because, to another mind, the sales seemed more significant and the explanations not very good. Inequality, we repeat, is nothing, unless it was in pursuance of a scheme. To make out that scheme the anomalous course was followed of putting members of a tribunal established by law upon the witness stand to testify to the operations of their minds in doing the work intrusted to them. *Fayerweather v. Ritch*, 195 U. S. 276, 306, 307, ante, 193, 213, 25 Sup. Ct. Rep. 58. But the prevailing testimony was that no such scheme was entertained.

Whatever we may surmise or apprehend,
196 U. S.

making allowance for a certain vagueness of ideas to be expected in the lay mind, for the reasonable differences of opinion among the most instructed and competent men, and for the uncertainty of the elements from which a judgment was to be formed in the first instance, considering the still greater uncertainty of those from which the local judgment must be controlled, if at all, by persons having only the printed record before them, considering further that to maintain the bill imputes perjury to many witnesses whose character is not impeached, and, finally, recalling once more that we are dealing with a case that properly was not cognizable in the circuit court, we are of opinion that the bill must be dismissed.

Decree reversed.

[611]*SCOTTISH UNION & NATIONAL INSURANCE COMPANY, *Appt.*,

v.

WILLIS G. BOWLAND, as Treasurer, and L. Ewing Jones, as Auditor of Franklin County, Ohio; Arthur I. Vorys, as Superintendent of Insurance, and William S. McKinnon, as Treasurer of the State of Ohio. (No. 360.)

WILLIS G. BOWLAND, as Treasurer, and L. Ewing Jones, as Auditor of Franklin County, Ohio, *et al.*, *Appts.*,

v.

SCOTTISH UNION & NATIONAL INSURANCE COMPANY. (No. 361.)

(See S. C. Reporter's ed. 611-633.)

State taxation of foreign corporation—bonds deposited with state official—exemptions—due process of law in collection of taxes — distraint — equity — adequate remedy at law.

1. Bonds in which a foreign insurance company is required by Ohio Rev. Stat. § 3660, as a condition of doing business in Ohio, to invest a portion of its capital stock, to be deposited with the superintendent of insurance, for the protection of the local policy holders, are "personal property" within the meaning of § 2744, requiring insurance companies to list for taxation all their personal property, which, by the terms of that section, is to include moneys and credits within the state, and is also defined in § 2730 as including the capital stock, although the taxation of "investments in bonds" provided for in §§ 2730, 2731, extends only to such securities as are in the hands of individual residents, owned by themselves or held by them for others, since

these last sections were not intended to limit other sections of the tax law, but were enacted to carry out a general purpose to tax all personal property within the state.

2. The imposition of a privilege tax on foreign insurance companies by Ohio Rev. Stat. § 2745, does not bring such companies within the exception from the operation of § 2744 which that section makes in favor of corporations whose taxation elsewhere is specifically provided for, and hence does not relieve them from the duty, under that section, to return for taxation bonds deposited by them with the superintendent of insurance for the protection of the local policy holders, as a condition of doing business in Ohio.
3. Due process of law is not denied a foreign insurance company by distraining its personal property under the authority of Ohio Rev. Stat. § 1095, to satisfy personal taxes lawfully levied.
4. The exemption of United States bonds from state taxation does not prevent their distraint, under Ohio Rev. Stat. § 1095, to satisfy taxes lawfully levied on unexempt personal property of the owner of such bonds.
5. The lawful substitution by a foreign insurance company of United States bonds in place of municipal bonds deposited by it with the superintendent of insurance for the protection of local policy holders, as a condition of doing business in the state, when made before the day on which the company is required to list its property for taxation for a certain year, prevents the levy of any tax thereon for that year.
6. Equity will not interfere by injunction with the prosecution of civil suits against a foreign corporation to recover taxes levied on its personal property within the state, on the ground that the corporation is not personally liable therefor, since this objection may be set up as a defense by answer in the actions at law.

[Nos. 360, 361.]

Argued January 4, 5, 1905. Decided February 20, 1905.

CROSS APPEALS from the United States Circuit Court for the Southern District of Ohio to review a decree holding liable to taxation municipal bonds deposited by a foreign insurance company with the superintendent of insurance as a condition of doing business in Ohio, except so far as such taxes were levied when United States bonds had been substituted before the time for returning property for taxation, and refusing to restrain the execution of a distress warrant, though enjoining the collection of the taxes by civil actions. *Reversed* for error in enjoining the prosecution of the civil actions to collect the taxes, and remanded for further proceedings.

Statement by Mr. Justice Day:

These cases are cross appeals from a decree rendered in the circuit court upon bill and demurrer. The Scottish Union & Na-[612]

NOTE.—On taxation of capital stock of corporations in the United States—see note to State Board v. People, 58 L. R. A. 513.

tional Insurance Company, a corporation of Great Britain, filed its bill to enjoin the defendants, Willis G. Bowland, treasurer, and L. Ewing Jones, auditor, of Franklin county, Ohio; Arthur I. Vorys, superintendent of insurance, and William S. McKinnon, treasurer, of the state of Ohio, from the collection of taxes levied on certain bonds deposited by the complainant under the laws of Ohio regulating the right of foreign insurance companies to do business in that state. It appears from the averments of the bill that the bonds were deposited under § 3660 of the Revised Statutes of Ohio, as amended in 1894. 91 Ohio Laws, 40. They were municipal bonds of the county of Lucas and state of Ohio. Fifty thousand dollars thereof was deposited on September 14, 1894, and \$50,000 on November 7, 1894. The bonds were registered in the name of the superintendent of insurance, in trust, for the benefit and security of the policy holders of the insurance company, residing in Ohio, and were delivered by him to the state treasurer for safe keeping, and remained in the office of the treasurer of the state at Columbus, Franklin county, Ohio, until withdrawn on April 2, 1903, when United States bonds were substituted therefor.

The insurance company is transacting the business of insurance in Ohio, but it avers that its home office is in the city of Edinburgh, Scotland, and its chief office and managing agency for this country is at Hartford, Connecticut, from which office it conducts its business in Ohio.

Acting under the Ohio statute, § 2781a (94 Ohio Laws, 62), the auditor of Franklin county, by notice served on one of the local agents of the Scottish Union & National Insurance Company, notified it to appear and show cause why the said bonds should not be taxed against it on the duplicate of Franklin county, Ohio, and taxes collected thereon for the years 1895 to 1900, inclusive. The auditor entered upon the tax duplicate taxes against the insurance company for \$2,700 each for the years 1895 to 1897, inclusive, and \$2,750 each for the years [613] 1898 to 1900, inclusive; and 5 per cent *penalty thereon. On November 15, 1900, the treasurer of Franklin county brought a civil action against the company for taxes so assessed. This action, at the time of the filing of the bill, was still pending in the court of common pleas of Franklin county, Ohio.

On December 4, 1903, another notice was served upon the company, through its local agent, and the auditor entered taxes against such company for the years 1901, 1902, and 1903, in all, the sum of \$8,935.50. On April 2, 1904, the treasurer of Franklin county procured a warrant of distraint, and upon

such warrant demanded of the superintendent of insurance and the state treasurer the United States bonds so substituted on April 2, 1903, for such municipal bonds, for the purpose of seizing and selling the same to satisfy the taxes which had been assessed against the company with respect to the municipal bonds for the years 1895 to 1900, inclusive. It is averred that to permit the collection of these taxes by suit for personal judgment or distraint will be violative of complainant's treaty rights as a subject of Great Britain, and will be taking complainant's property without due process of law, in violation of the 14th Amendment to the Constitution of the United States.

The prayer of the bill is that the defendant the treasurer of Franklin county be restrained from collecting or attempting to collect any of the taxes against the complainant personally; that the said treasurer be restrained from collecting or attempting to collect said taxes or any portion of them by distraint against either such bonds of the United States so deposited or any personal property of complainant which may now or hereafter be situated in the county of Franklin or in the state of Ohio; that the defendants the superintendent of insurance and treasurer of the state of Ohio be enjoined from delivering or attempting to deliver said United States bonds or any part thereof to the said county treasurer, and for such other relief as equity and good conscience may require.

The respondents having interposed demurrers to the bill, *the court held that the [614] municipal bonds on deposit in Ohio were subject to taxation under the laws of the state; that there was no personal liability of the complainant on account of said taxes, and therefore a civil action to recover the taxes should be enjoined; that for the year 1903 the collection of taxes could not be enforced, as the United States bonds were substituted before the time for returning property for that year; that the bonds might be seized by distraint to satisfy the taxes levied upon the municipal securities for the years they were on deposit, and the court therefore refused to enjoin the execution of the distress warrant except for the taxes and penalty for the year 1903, and rendered a decree enjoining the collection of the taxes by civil action.

Both parties appealed; the company from so much of the decree as permitted distraint of the United States securities for the collection of taxes levied with respect to the municipal bonds, the treasurer and auditor of Franklin county from so much of the decree as denies the right of the state to prosecute a civil action against the company to recover the taxes aforesaid, and from so

much thereof as restrained the officials from attempting to collect the taxes assessed against the municipal bonds for the year 1903.

Messrs. Judson Harmon and Hartwell Cabell argued the cause, and, with *Mr. W. O. Henderson*, filed a brief for the Scottish Union & National Insurance Company:

The constitutional provision bearing upon the question of taxation is not self-executing.

Lamb v. Lane, 4 Ohio St. 167; *Chisholm v. Shields*, 67 Ohio St. 374, 66 N. E. 93.

Classes of personal property enumerated in the Constitution and statutes are mutually exclusive.

Exchange Bank v. Hines, 3 Ohio St. 1; *Worthington v. Sebastian*, 25 Ohio St. 1; *Myers v. Seaberger*, 45 Ohio St. 232, 12 N. E. 396.

Investments in bonds for the purposes of taxation are incapable of a situs apart from their owner or holder.

Brown v. Noble, 42 Ohio St. 405; *Somers v. Boyd*, 48 Ohio St. 648, 29 N. E. 497; *Payne v. Watterson*, 37 Ohio St. 121; *Sims v. Best*, 25 Ohio C. C. 149.

Even granting that the words "personal property" in Ohio Rev. Stat., § 2744, taken alone, are broad enough to include investments in bonds, and to require their return by officers of corporations if the instruments themselves are in the state, we have still, under the authority of *Lander v. Burke*, 65 Ohio St. 532, 63 N. E. 69, to look to §§ 2730 and 2731 to find when they are in the state for the purposes of taxation, viz., whether they are owned or held by persons residing in this state.

These bonds are not held by some person in the state in some such capacity as would bring him within the law requiring from him their return for taxation.

Myers v. Seaberger, 45 Ohio St. 232, 12 N. E. 396; *Jaek v. Walker*, 79 Fed. 138; *Sims v. Best*, 25 Ohio C. C. 149; *McNeill v. Hagerty*, 51 Ohio St. 255, 23 L. R. A. 628, 37 N. E. 526; *French v. Bobe*, 64 Ohio St. 323, 60 N. E. 292.

Taxes are not a lien, in Ohio, upon the personal property of the person against whom they are assessed until actually seized and distrained by the treasurer.

Spence v. Frye, 3 Ohio Dec. Reprint, 11; *Citizens' Bank Assignment*, 2 Ohio Dec. Reprint, 230; *Chisholm v. Shields*, 67 Ohio St. 374, 66 N. E. 93.

Since the municipal bonds were not taxed, or charged with the payment of taxes, by any step or proceeding, they left the state free of all liability for taxes, and there was no lien or encumbrance thereon to be trans-

ferred to the United States bonds substituted for them.

New Orleans v. Stempel, 175 U. S. 309, 312, 44 L. ed. 174, 177, 20 Sup. Ct. Rep. 110.

Mr. Augustus T. Seymour argued the cause, and, with *Messrs. Edward L. Taylor, Jr., Karl T. Webber, Thomas N. Ross, and Wade H. Ellis*, filed a brief for *Bowland et al.*:

Under the Constitution and statute law of Ohio, investments in bonds held in that state and owned by nonresidents of the state are taxable within the state.

Lee v. Sturges, 46 Ohio St. 153, 2 L. R. A. 556, 19 N. E. 560; *Hubbard v. Brush*, 61 Ohio St. 252, 55 N. E. 829; *Western Assur. Co. v. Halliday*, 61 C. C. A. 271, 126 Fed. 257; *Sims v. Best*, 25 Ohio C. C. 149.

The nature of the deposit is not such as to exempt bonds so deposited from taxation within the state.

British Commercial L. Ins. Co. v. Tax Comrs. 18 Abb. Pr. 118; *International L. Assur. Soc. v. Tax Comrs.* 28 Barb. 318; *People v. Home Ins. Co.* 29 Cal. 533; *Sims v. Best*, 25 Ohio C. C. 149, Affirmed in *Heintz v. Cameron*, 70 Ohio St. 491, 72 N. E. 1159.

The requirement in the Constitution, that laws shall be passed taxing by uniform rule all property, made it impossible for the legislature to substitute the provisions of Ohio Rev. Stat., § 2745, for those of § 2744. It is a well-settled rule of construction that statutes which strip a government of any portion of its prerogative, or give exemption from the general burden, should receive a strict interpretation.

Western Assur. Co. v. Halliday, 61 C. C. A. 271, 126 Fed. 266; 1 *Desty*, Taxn. 180; *Yazoo & M. Valley R. Co. v. Thomas*, 132 U. S. 174, 33 L. ed. 302, 10 Sup. Ct. Rep. 68; *New Orleans City & Lake R. Co. v. New Orleans*, 143 U. S. 192, 36 L. ed. 121, 12 Sup. Ct. Rep. 406; *Chicago, B. & K. C. R. Co. v. Guffey* (*Chicago, B. & K. C. R. Co. v. Missouri*), 120 U. S. 569, 30 L. ed. 732, 7 Sup. Ct. Rep. 693; *Phoenix F. & M. Ins. Co. v. Tennessee*, 161 U. S. 174-177, 40 L. ed. 660, 661, 16 Sup. Ct. Rep. 471; *Erie R. Co. v. Pennsylvania*, 21 Wall. 492, 22 L. ed. 595; *Delaware Railroad Tax* (*Minot v. Philadelphia, W. & B. R. Co.*) 18 Wall. 206, 21 L. ed. 888.

The power of the state to impose conditions upon a nonresident seeking to engage in business within its borders is beyond question.

Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 44 L. ed. 657, 20 Sup. Ct. Rep. 518; *Hooper v. California*, 155 U. S. 648, 652, 39 L. ed. 297, 298, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; *Judson*, Taxn. § 158.

The right of a sovereign government to

proceed summarily in the method of collecting dues owing to itself is as old as the common law, and statutes authorizing the distraint of property to satisfy tax charges which are past due and unpaid are a part of the taxing machinery of every state in the Union and of every civilized government.

2 Desty, Taxn. pp. 750, 776; Judson, Taxn. § 331; *Palmer v. McMahon*, 133 U. S. 660, 33 L. ed. 772, 10 Sup. Ct. Rep. 324; *Den ex dem. Murray v. Hoboken Land & Improv. Co.* 18 How. 272, 15 L. ed. 372; *Springer v. United States*, 102 U. S. 586, 26 L. ed. 253; Cooley, Taxn. p. 302.

The theory of the laws of Ohio taxing personal property is that such taxes are obligations created by legislative authority, and assessed against the owner of property as the measure of his duty to contribute to the support of public burdens in exchange for the protection afforded his property by the government. Although the property is resorted to for the purpose of ascertaining the amount of the tax, the individual, and not the property, must pay the tax.

Desty, Taxn. p. 7.

The power of a state to tax property of a nonresident is by virtue of jurisdiction over such property. But the meaning of the word "property" indicates the right of a person to own and control things external to such person.

Black, Law Dict. *Property*, 253; 1 Bl. Com. p. 138; 2 Bl. Com. pp. 2-15.

Under the scheme of taxation adopted in every state in the Union, taxes on account of the ownership of personal property are assessed in the name of and against the owner thereof.

27 Am. & Eng. Enc. Law, pp. 648, 672, 673.

The right to subject property to the payment of a state tax can only be carried to the extent of such property, owned by such nonresident, as is within its limits; but, so long as no other property than that located within its jurisdiction is authorized by statute to be taken, such statute can be said to have no extraterritorial effect.

Desty, Taxn. pp. 7, 11, § 6; *Green v. Craft*, 28 Miss. 70; *Rundell v. Lakey*, 40 N. Y. 517.

The obligation to pay a tax is a much higher obligation than the duty of one citizen to discharge an obligation arising out of a contract with another citizen.

Florida, C. & P. R. Co. v. Reynolds, 183 U. S. 475, 46 L. ed. 285, 22 Sup. Ct. Rep. 176; *Allen v. Armstrong*, 10 Iowa, 512; *Buck v. Miller*, 147 Ind. 586, 37 L. R. A. 384, 62 Am. St. Rep. 436, 45 N. E. 647, 47 N. E. 8; *Geren v. Gruber*, 26 La. Ann. 694; *Catlin v. Hull*, 21 Vt. 152.

The legislature has just as much power to

provide for the enforcement and collection of taxes which may be due from a nonresident as it has to provide for the collection of debts which may be due to a resident of the state from debtors residing beyond its jurisdiction. A taxpayer is just as essential to a valid tax levy as an obligor is to the creation of a valid debt.

Reno, Non-Residents, §§ 25, 136; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Picquet v. Swan*, 5 Mason, 35, Fed. Cas. No. 11,134; *McGoon v. Seales*, 9 Wall. 23, 19 L. ed. 545; *Drake, Attachm.* § 57; *Waples, Attachm.* § 32.

There is no constitutional objection to the right of the state to subject the property of a nonresident, when found within its limits, to the discharge of a valid tax which has been levied, which could not be urged with the same force against an attempt on the part of the state to attach the property of a nonresident to pay the claim of one of its citizens.

State v. Meyer, 41 La. Ann. 439, 6 So. 590; 27 Am. & Eng. Enc. Law, p. 791; *Hall v. American Refrigerator Transit Co.* 24 Colo. 291, 56 L. R. A. 89, 65 Am. St. Rep. 223, 51 Pac. 421.

Taxes levied on account of personal property belonging to a resident of New York, having a situs for taxation in the state of Minnesota, were held, by virtue of a statute of Minnesota, to be a debt which might be proved against the estate of a nonresident owner, and collectible out of other property within the state than the very property taxed.

Bristol v. Washington County, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585.

The right to collect taxes assessed on account of property belonging to a nonresident having a taxing situs within a state, by any means, including that of distraint, is not objectionable so far as the means used do not extend the operation of a state statute beyond the territorial limits of the state.

Bristol v. Washington County, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585.

The right of appellant, as treasurer of Franklin county, to proceed against either the bonds of the United States deposited by the Scottish Union & National Insurance Company, with the superintendent of insurance of the state of Ohio, or any other personal property belonging to the company found within his county, to pay taxes charged on the tax duplicate of the county in the name of such company, is consistent with the decisions of this court in *Bristol v. Washington County*, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585, and *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876.

Marye v. Baltimore & O. R. Co. 127 U. S. 117, 32 L. ed. 94, 8 Sup. Ct. Rep. 1037.

The bonds of the United States owned by a nonresident are subject to distraint or attachment to satisfy a charge against the owner thereof.

Plummer v. Coler, 178 U. S. 115, 44 L. ed. 998, 20 Sup. Ct. Rep. 829; 27 Am. & Eng. Enc. Law, p. 791.

It was not material whether the property omitted, or not returned for taxation, was or was not in the county at the time the county auditor was making his inquiries and corrections.

Sturges v. Carter, 114 U. S. 511-518, 29 L. ed. 240-242, 5 Sup. Ct. Rep. 1014; *Winnona & St. P. Land Co. v. Minnesota*, 159 U. S. 526, 40 L. ed. 247, 16 Sup. Ct. Rep. 83; *Weyerhaeuser v. Minnesota*, 176 U. S. 550, 44 L. ed. 583, 20 Sup. Ct. Rep. 485; *Gager v. Prout*, 48 Ohio St. 89, 26 N. E. 1013.

Messrs. Augustus T. Seymour, Edward L. Taylor, Jr., and Karl T. Webber also filed a supplemental brief for Bowland *et al.*:

The taxation provided for foreign insurance companies by Ohio Rev. Stat., § 2745, is not a tax upon property, but a tax upon the privilege of doing business within the state.

State ex rel. New England Mut. L. Ins. Co. v. Reinmund, 45 Ohio St. 214, 13 N. E. 30; *Western U. Teleg. Co. v. Mayer*, 28 Ohio St. 522.

A state can impose an obligation upon a nonresident to pay a tax on account of property belonging to such nonresident having a situs for taxation, and being taxed, within such state.

Bristol v. Washington County, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585; *Marye v. Baltimore & O. R. Co.* 127 U. S. 117, 32 L. ed. 94, 8 Sup. Ct. Rep. 1037; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70, 43 L. ed. 899, 19 Sup. Ct. Rep. 599; *Union Refrigerator Transit Co. v. Lynch*, 177 U. S. 149, 44 L. ed. 708, 20 Sup. Ct. Rep. 631; *Florida, C. & P. R. Co. v. Reynolds*, 183 U. S. 475, 46 L. ed. 285, 22 Sup. Ct. Rep. 176.

The definition of taxes, that they are obligations created by legislative authority, is based upon the theory that the owner of property is charged by law with the duty of contributing to the support of that government which affords protection to his property.

Desty, Taxn. § 6; *Florida, C. & P. R. Co. v. Reynolds*, 183 U. S. 475, 46 L. ed. 285, 22 Sup. Ct. Rep. 176; *Bristol v. Washington County*, 177 U. S. 133, 145, 44 L. ed. 701, 707, 20 Sup. Ct. Rep. 585.

196 U. S.

Mr. Justice **Day**, after making the foregoing statement, delivered the opinion of the court:

These cases may be considered together, as they are appeals from a single decree, and involve the right to assess and collect taxes upon the municipal bonds deposited by the insurance company under the laws of Ohio.

A considerable part of the opinion of the court below and the discussion in the briefs of counsel goes to the question of the *pow- [620] er of the state to tax bonds, held as these were, within its jurisdiction. At the oral argument, however, the learned counsel representing the insurance company conceded that there was legislative power to impose the taxes in question. A reference to the decisions of this court makes it perfectly plain that such taxation is within the power of the state. *New Orleans v. Stemple*, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110; *Bristol v. Washington County*, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585; *Blackstone v. Miller*, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277; *State Assessors v. Comptoir National D'Escompte*, 191 U. S. 388, 403, 48 L. ed. 232, 238, 24 Sup. Ct. Rep. 109; *Carstairs v. Cochran*, 193 U. S. 10, 48 L. ed. 596, 24 Sup. Ct. Rep. 318.

The contention for the company is, that conceding the power of the state, it has never been exercised in the only way to make it effectual, which is by statutory enactment, and that the policy and statutes of Ohio have never authorized taxation of bonds deposited under the conditions shown in this case.

The question therefore, is, Have the statutes of Ohio, read in the light of the construction placed upon them by the supreme court of the state, conferred the right to tax these municipal bonds?

Before entering upon a consideration of the statutes we may say, in general terms, that we agree with the learned counsel for the insurance company, that the scheme of taxation of personal property in Ohio involves the requirement that it shall be returned or listed by some person or corporation whose duty it is by law to return or list such property. Provision is not made for assessing or taxing personal property by proceedings *in rem*, but before a recovery for taxes can be justified, either by action or distraint, it must appear that it was required to be returned for the purpose of taxation under some law of the state.

The proceedings under which the taxes for the years included in this case were charged against the insurance company by the auditor of Franklin county are under a statute (Ohio Rev. Stat. § 2781a) having for its purpose the correction of returns by those whose duty it was to return *property for [621]

623

taxation, and making correction of returns so as to include property which should have been returned, but had been omitted, by some person charged by law with that duty.

Was it the duty of the insurance company or any one acting for it to return these municipal bonds for taxation? They were required to be deposited under § 3660, Ohio Rev. Stat. as amended, which reads as follows:

"Sec. 3660. [*Certain companies must make deposit.*].—A company incorporated by, or organized under, the laws of a foreign government, shall deposit with the superintendent of insurance, for the benefit and security of its policy holders residing in this state, a sum not less than one hundred thousand dollars in stocks or bonds of the United States, or the state of Ohio, or any municipality or county thereof, which shall not be received by the superintendent at a rate above their par value; the stocks and securities so deposited may be exchanged from time to time for other like securities; so long as the company so depositing continues solvent and complies with the laws of this state, it shall be permitted by the superintendent to collect the interest or dividends on such deposits; and for the purpose of this chapter the capital of any foreign company doing fire insurance business in this state shall be deemed to be the aggregate value of its deposits with the insurance or other departments of this state and of the other states of the United States, for the benefit of policy holders in this state, or in the United States, and its assets and investments in the United States, certified according to the provisions of this chapter; but such assets and investments must be held within the United States and invested in and held by trustees, who must be citizens of the United States, appointed by the board of directors of the company, and approved by the insurance commissioner of the state where invested, for the benefit of the policy holders and creditors in the United States; and the trustees so chosen may take, hold, and convey real and personal property for the purpose of the trust, [622] subject *to the same restrictions as companies of this state." [91 v. 40; 70 v. 147, § 21; (S. & S. 212).]

This section is part of the chapter of the Ohio statutes regulating insurance companies other than life. In the same chapter may be found other sections regulating the manner of doing business in Ohio by insurance companies, and in § 3637 we find a provision as to how the capital of domestic insurance companies shall be invested, and such companies are required to invest their capital in certain United States, state, county, and municipal bonds, etc. These domes-

624

tic companies are in like manner required to deposit such securities with the commissioner for the benefit of their policy holders (Ohio Rev. Stat. §§ 3593, 3595), and without such deposit are not authorized to do business within the state. As a condition of doing business in Ohio, companies organized under the laws of foreign governments are, by § 3660, required to invest a portion of their capital in the stock or bonds of the United States or of the state of Ohio, or some municipality or county thereof, and make deposit of such bonds with the superintendent of insurance for the benefit of local policy holders. Subsequent provisions of the section further show that this deposit is to be regarded as a part of the capital of such foreign insurance company, which may be considered in determining the aggregate capital of the company required by law. The companies are permitted to collect the interest or dividends on the securities. These deposits constitute a fund primarily for the benefit of such policy holders, and after their claims are satisfied may be turned over to an assignee or devoted to other purposes. *Falkenbach v. Patterson*, 43 Ohio St. 359, 1 N. E. 757; *State v. Matthews*, 64 Ohio St. 419, 60 N. E. 605.

This statute, therefore, provides for the manner of investment of a portion of the capital stock of a foreign insurance company within the state of Ohio for the protection of the policy holders within the state. It is more than a mere "investment in bonds." It is also a part of the capital stock required to be deposited as a condition of doing business *within the state, and de-[623] voted to the benefit of local stockholders.

The authority to enact laws for the imposition of taxes is found in the Constitution of the state, article 12, § 2, which provides: "Laws shall be passed, taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also all real and personal property, according to its true value in money."

Section 2731 provides, in language similar to that used in the Constitution, for the taxation of all property, real and personal, in the state, and all moneys, credits, investments in bonds, stock, or otherwise, of persons residing in the state. This section is found in the first chapter of Title 13, "*Taxation*," of the Ohio Statutes, and is in part in the following language:

"Sec. 2731. All property, whether real or personal, in this state, and whether belonging to individuals or corporations; and all moneys, credits, investments in bonds, stocks, or otherwise, of persons residing in this state, shall be subject to taxation, except only such as may be expressly exempted

therefrom; and such property, moneys, credits, and investments shall be entered on the list of taxable property as prescribed in this title."

The argument for the insurance company is, that this preliminary section, read with the other sections of the Ohio law upon the subject, excludes "investment in bonds" from being embraced in a general description of personal property, and limits their taxation to persons residing in the state, or (under § 2730) where they are held within the state for others by persons residing therein.

Section 2730 of the same chapter is a section giving definitions of terms used in the title. So far as it is pertinent in this connection, that section is as follows:

"Sec. 2730. The terms 'investments in bonds' shall be held to mean and include all moneys in bonds or certificates of indebtedness, or other evidences of indebtedness, *of whatever kind, whether issued by incorporated or unincorporated companies, towns, cities, villages, townships, counties, states, or other incorporations, or by the United States, held by persons residing in this state, whether for themselves or others."

If these sections embraced all the statutory law of the state, together, they tax investments in bonds held by residents, because of jurisdiction over the person of the owner, and those held by residents for other owners, and if such reside out of the state, because of jurisdiction over the property held within the state.

Section 2744 undertakes to make provision for the taxation of corporations generally, and is as follows:

"Sec. 2744. [*Corporations generally; their returns.*].—The president, secretary, and principal accounting officer of every canal or slackwater navigation company, turnpike company, plank-road company, bridge company, insurance company, telegraph company, or other joint stock company, except banking or other corporations whose taxation is specifically provided for, for whatever purpose they may have been created, whether incorporated by any law of this state or not, shall list for taxation, verified by the oath of the person so listing, all the personal property, which shall be held to include all such real estate as is necessary to the daily operations of the company, moneys and credits of such company or corporation within the state, at the actual value in money, in manner following: In all cases return shall be made to the several auditors of the respective counties where such property may be situated, together with a statement of the amount of said property which is situated in each township, village, city, or ward there-

in. The value of all movable property shall be added to the stationary and fixed property and real estate, and apportioned to such wards, cities, villages, or townships, *pro rata*, in proportion to the value of the real estate and fixed property in said ward, city, village, or township, and all property so listed shall be subject to and pay the same taxes as other property *listed in such ward, city, village, or township. It shall be the duty of the accounting officer aforesaid to make return to the auditor of state during the month of May of each year of the aggregate amount of all property by him returned to the several auditors of the respective counties in which the same may be located. It shall be the duty of the auditor of each county, on or before the first Monday of May, annually, to furnish the aforesaid president, secretary, principal accounting officer, or agent the necessary blanks for the purpose of making aforesaid returns; but no neglect or failure on the part of the county auditor to furnish such blanks shall excuse any such president, secretary, principal accountant, or agent from making the returns within the time specified herein. If the county auditor to whom returns are made is of the opinion that false or incorrect valuations have been made, or that the property of the corporation or association has not been listed at its full value, or that it has not been listed in the location where it properly belongs, or in cases where no return has been made to the county auditor, he is hereby required to proceed to have the same valued and assessed: *Provided*, That nothing in this section shall be so construed as to tax any stock or interest in any joint stock company held by the state." [73 v. 139, § 16; (S. & C. 1446).]

This section is broad in its terms, and requires the return of the property, among others, of insurance companies, whether incorporated by the laws of Ohio or not, and such companies are required to list for taxation "all the personal property, which shall be held to include all such real estate as is necessary to the daily operations of the company, moneys and credits of such company or corporation within the state, at its actual value in money."

The supreme court of Ohio has expressly held that this section applies to foreign as well as domestic corporations. *Hubbard v. Brush*, 61 Ohio St. 252, 55 N. E. 829; *Lander v. Burke*, 65 Ohio St. 532-542, 63 N. E. 69.

This section, therefore, requires of both foreign and domestic *insurance companies that they return the personal property mentioned which is within the state. What is meant by "personal property," in this connection? Referring to § 2730 we find it

provided that the terms "personal property," when used in the title, shall be held to mean and include, among other things, the capital stock, undivided profits, and all other means not forming a part of the capital stock of every company.

In the case of domestic corporations, and assuming that this statute applies, as has been held by the supreme court of Ohio, with equal force to foreign corporations, this definition of personal property must be held to include not only the paid-in capital stock of the company, but as well the bonds or securities in which it may be invested.

This question was before the supreme court of Ohio in *Jones v. Davis*, 35 Ohio St. 474.

In that case the act of May 11, 1878, was before the court. It contained provisions similar to those of the Revised Statutes, requiring personal property of every description, moneys and credits, investments in bonds, stock, joint-stock companies, or otherwise, to be listed in the name of the person who is the owner thereof on the day preceding the second Monday of April in each year.

Section 11 of that act made provisions similar to those found in § 2744, requiring incorporated companies to list for taxation all their personal property which, by the terms of the statute, was made to include all such real estate as was necessary to the daily operation of the company, and all its moneys and credits within the state at their actual value in money. After citing *Bank Tax Case*, 2 Wall. 208, 17 L. ed. 795, and *Farrington v. Tennessee*, 95 U. S. 686, 24 L. ed. 560, Judge Boynton, delivering the opinion of the court, said:

"For the purposes of taxation, the capital stock is represented by whatever it is invested in. Personal property, by the express wording of the statute, is made to include the capital stock of a corporation; and [627] the provision above referred* to requires all corporations doing business in this state, except banking and others whose taxation is specifically provided for, to list all their personal property, including in the return thereof all such real estate as is necessary to the daily operation of their business, together with their moneys and credits of every description within the state. That the legislature intended, by this description of property, to embrace the capital stock of the company, is too obvious to be misunderstood. No other meaning can be drawn from the language employed, and no other construction is better calculated to do justice."

In *Lee v. Sturges*, 46 Ohio St. 153, 160, 2 L. R. A. 556, 558, 19 N. E. 560, 564, Judge Spear, speaking for the court, said:

"It may be assumed that 'capital stock' and 'capital and property' mean practically

the same thing. Primarily the 'capital stock' is the money paid in by the stockholders, in compliance with the terms of their subscriptions. It soon, however, takes the form of real estate or personal property, or both, including machinery, buildings, credits, rights in action, etc. So that it may here be taken to mean personal property, and such real estate as may be necessary to the daily operations of the company, and its moneys and credits. The capital is thus represented by the property in which it has been invested."

We think this language pertinent in the consideration of the case before us. While technically the bonds deposited with the insurance commissioner are investments in bonds, they are also a part of the capital stock of the company invested in Ohio, and required to be so invested for the security of domestic policy holders, and, for the purposes of taxation, to be considered a part of the capital stock of the company, and included within the definition of "personal property," as given in § 2730.

This conclusion is reinforced by the decision in *Hubbard v. Brush*, 61 Ohio St. 252, 55 N. E. 829. In that case the supreme court of Ohio held that a foreign corporation transacting business in Ohio was required to return its property within the state where *it was carrying on business, al-[628] though the corporation was organized under the laws of West Virginia.

The court admitted that the situs of intangible property is ordinarily at the local residence of the corporation, within the state where it was incorporated. Nevertheless, as the promissory notes and book accounts and other evidence of indebtedness must be presumed to have been in the company's office in this state, they were taxable as personal property under § 2744.

In the course of the opinion Judge Bradbury said:

"Where foreign corporations voluntarily bring their property and business into this state to avail themselves of advantages found here, which they believe will enhance the probabilities that the business they intend to pursue will be profitable, they should not be heard to complain of laws which tax them as domestic corporations are taxed by the state. We hold, therefore, that the provisions of § 2744, which make it the duty of foreign corporations to list for taxation in this state their choses in action, where they are held within this state and grow out of the business they conduct herein, is a valid exercise of the taxing powers vested in the state."

Under § 2744, corporations, foreign and domestic, are required to return all personal property for taxation, which, among

other things, the statute expressly declares shall include moneys and credits of such company or corporation within the state. If the construction contended for shall prevail, a corporation, with capital invested in bonds, would escape taxation, while one holding its investments in notes or certificates of deposit in bank will be compelled to return them for taxation,—a condition of things so manifestly unjust that we cannot hold it to have been within the intent of the legislature in framing taxing laws unless the statutes clearly admit of no other construction. The purpose of the Ohio Constitution and statutes passed in pursuance thereof, as has been frequently declared by the supreme court of Ohio, is to tax, by a uniform rule, all property owned or held [629] within the state. *A narrow construction, which will defeat this purpose, should not be adopted.

The statutes, specifically mentioning "investments in bonds," were intended to reach and tax, and not to exempt, that class of personal property. The purpose to tax all real and personal property, declared in the statute, was further emphasized by express mention of certain classes of property, such as investments in bonds, so that, by no process of exclusion, could such securities escape the burdens imposed upon all property owned or held within the state.

The sections taxing individuals holding such securities were not intended to put limitations upon other sections of the law taxing the property of corporations held within the state, and enjoying the protection of its laws, and affording a basis for credit in the transacting of business. There is no reason why the law should tax such securities in the hands of individual residents, whether owned or held by them for others, and permit them to escape taxation when they represent invested capital of incorporated companies, sharing the protection of the government and equally bound, in morals, at least, to help bear the burdens of the state.

That such securities might justly be taxed was freely admitted in the argument at bar, and the sole contention was that the lack of statutory power to tax these securities is a *casus omissus* in legislation which the courts cannot supply.

It may be conceded that no tax can be levied without express authority of law, but the statutes are to receive a reasonable construction with a view to carrying out their purpose and intent.

We have examined the decisions of the supreme court of Ohio, cited by counsel, construing the statutes of the state, and believe none of them to be inconsistent with the conclusions we have reached, and those above cited, in our opinion, are direct au-

thority for the construction given. All the sections must be construed together to attain the object and intent of the law. Section 2731, standing alone, might limit the *right to tax investments in bonds to resi-[630]dents of the state. It is certainly enlarged by § 2730 to include such investments when held for others by residents within the state. Read with §§ 2734, 2735, 2744, and 2746, we think the purpose is manifest to require the return and taxation of all personal property, except the small exemptions allowed, within the jurisdiction of the state.

But it is urged if § 2744 could otherwise be held to require a return of these bonds by the insurance company, that the company comes within the exception of the statute excluding banking or other corporations whose taxation is specifically provided for in other parts of the title. And it is argued that § 2745 of the Revised Statutes of Ohio makes express provision for the taxation of foreign insurance companies.

Examination of this section shows that it imposes a tax upon the business of the company in Ohio, and is not a property but a privilege tax. Insurance companies are required to return in each county the amount of the gross premium receipts of its agency for the previous calendar year, and, under certain regulations, the company is taxed upon the amount of business done.

This section does not levy a tax upon property. There are subsequent statutory provisions of a special character, upon which the exception of § 2744 may operate, taxing the property of railroad companies, banks, express, telegraph, and telephone companies, etc., but there is no other provision imposing a property tax upon foreign insurance companies within the state.

The requirement that these bonds should be deposited for the security of the local policy holders brought a part of the capital of such company into the state of Ohio, upon the strength of which it transacts its business and obtains credit within the state. Clearly, such property is not intended to be taxed within the provisions reaching the business done in the state of Ohio under § 2745.

*But it is said that there is no person [631] within the state required to return this property. We think it is the duty of the officers of the insurance company, under § 2744, to return the property, and that the place to return it is where the property is situated. This is clearly required by the terms of this section, and § 2735, making provision for the place of listing personal property, provides:

"And all other personal property, moneys, credits, and investments, except as otherwise specially provided, shall be listed in the township, city, or village in which the

person to be charged with taxes thereon may reside at the time of the listing thereof, if such person reside within the county where the same are listed, and if not, then in the township, city, or village where the property is when listed."

These bonds were the property of the corporation, taxable under the statutes, and, at the time when they should have been listed, were held in the city of Columbus, Franklin county, Ohio, and should have been there returned.

It is further argued that to distrain the property of the company for the collection of these taxes would be a violation of the constitutional rights of the insurance company, and the taking of its property without due process of law. Section 1095 provides:

"Sec. 1095. [*Overdue taxes may be collected by distress.*].—When taxes are past due and unpaid, as stated in the preceding section, the county treasurer, or his deputy, may distrain sufficient goods and chattels belonging to the person or persons charged with such taxes, if found within his county, to pay the taxes so remaining due and the costs that have accrued; and shall immediately proceed to advertise the same in three public places in the township where such property was taken, stating the time when, and the place where, such property will be sold; and if the taxes and costs which have accrued thereon are not paid before the day appointed for such sale, which shall be not less than ten days after the taking of such property, such treasurer, or his deputy, shall [632] proceed to sell such property *at public vendue, or so much thereof as will be sufficient to pay said taxes and the costs of such distress and sale. [29 v. 281, § 19; S. & C. 1586.]"

This section authorizes the distraint of goods to satisfy taxes lawfully levied against property within the county and state. This method of collecting taxes is one of the most ancient known to the law, and has frequently received the sanction of the courts. *Den ex dem. Murray v. Hoboken Land & Improv. Co.* 18 How. 272, 276, 15 L. ed. 372, 374; *Springer v. United States*, 102 U. S. 586, 26 L. ed. 253; *Cooley, Taxn.* 302; *Palmer v. McMahon*, 133 U. S. 660, 33 L. ed. 772, 10 Sup. Ct. Rep. 324.

There is nothing in the exemption of government bonds from taxation which prevents them from being seized for taxes due upon unexempt property. We have held that the taxes were lawfully assessed. The statute authorizing a distraint gave the right to proceed against personal property within the jurisdiction of the state. The taxes were lawful, and the property belonging to a foreign corporation which could be

seized within the authority of the state might be taken under this statute, and we do not perceive that any constitutional right of the company is violated by seizing its property under such circumstances. *Bristol v. Washington County*, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585; *Marye v. Baltimore & O. R. Co.* 127 U. S. 117, 32 L. ed. 94, 8 Sup. Ct. Rep. 1037.

As to the right to assess taxes for the year 1903, it appears that these municipal bonds were withdrawn from the state some time before the return day, which is the day preceding the second Monday in April, and such withdrawal was in the exercise of a lawful right of the company so to do, and other securities were substituted, as provided by law. We do not think that the fact that it had bonds in the state for a time which were taxable justified the imposition of this tax, where the nontaxable securities were substituted before the return day.

As to the question of personal liability of the insurance company to judgment in an action brought to recover the amount of the taxes, we think the court should not have issued an injunction, as was done, against the prosecution of civil suits *for this purpose. [633] If there is no personal liability for these taxes,—a point which we do not feel called upon to decide,—it is perfectly clear that, if service could be had which would make a personal judgment proper, the company could set up its defense by answer in the action at law, and there is no necessity to resort to a court of equity for relief. It will be presumed, if the claim of the company is right, no personal judgment will be rendered against it, and, if its theory of the controversy is correct, no such judgment can be lawfully rendered. In such case the authorities are uniform that equity will not interfere by injunction, but leave the party to his defense at law. *U. S. Rev. Stat. § 723*, *U. S. Comp. Stat.* 1901, p. 583; *Phoenix Mut. L. Ins. Co. v. Bailey*, 13 Wall. 616-623, 20 L. ed. 501-503; *Grand Chute v. Winegar*, 15 Wall. 373, 21 L. ed. 174; *Deweese v. Reinhard*, 165 U. S. 386, 41 L. ed. 757, 17 Sup. Ct. Rep. 340.

Upon the whole case we reach the conclusion that the circuit court was right in sustaining the demurrer so far as the bill averred the nontaxability of these bonds, or the right of the treasurer to proceed by distraint, and in overruling the demurrer as to the taxes for the year 1903; but, for the reasons stated, erred in enjoining the prosecution of a civil action seeking a personal judgment.

In this view, *the decree below will be reversed* and the cause remanded for further proceedings in conformity to this opinion.

MEMORANDA

OF

CASES DISPOSED OF WITHOUT OPINIONS.

[635]*SAMUEL A. V. HARTWELL, *Appellant*, v. JOHN H. HAVIGHORST. [No. 106.]

Appeal from the Supreme Court of the Territory of Oklahoma.

See same case below, 11 Okla. 189, 66 Pac. 337, and see *Paine v. Foster*, 9 Okla. 213, 257, 53 Pac. 109, 59 Pac. 252; *Acers v. Snyder*, 8 Okla. 659, 58 Pac. 780.

Messrs. William C. Prentiss and James R. Keaton for appellant.

Mr. A. G. C. Bierer for appellee.

December 19, 1904. Decree affirmed with costs. *Johnson v. Towsley*, 13 Wall. 72, 20 L. ed. 485; *Marquez v. Frisbie*, 101 U. S. 473, 25 L. ed. 800; *Quinby v. Conlan*, 104 U. S. 420, 26 L. ed. 800; *Gardner v. Bonestell*, 180 U. S. 362, 45 L. ed. 574, 21 Sup. Ct. Rep. 399; *Potter v. Hall*, 189 U. S. 292, 47 L. ed. 817, 23 Sup. Ct. Rep. 545; *Payne v. Robertson*, 169 U. S. 323, 42 L. ed. 764, 18 Sup. Ct. Rep. 337.

EX PARTE: IN THE MATTER OF EDWARD E. BESSETTE, *Petitioner*. [No. —, Original.]

Motion for Leave to File Petition for a Writ of Mandamus.

Mr. William Velpeau Rooker for petitioner.

December 19, 1904. *Denied*.

UNITED STATES, *Appellant*, v. JOCK COE [No. 314]; UNITED STATES, *Appellant*, v. BONG MENG [No. 315]; UNITED STATES, *Appellant*, v. WOO JOE [No. 316].

Appeals from the District Court of the United States for the Northern District of Ohio.

See same case below, 128 Fed. 199.

The Attorney General and Assistant Attorney General McReynolds for appellant.

Mr. J. P. Dawley for appellees.

January 9, 1905. Final orders and decrees reversed, and causes remanded for further proceedings in conformity to law. *Re United States*, 194 U. S. 194, 48 L. ed. 931, 24 Sup. Ct. Rep. 629; *Pong Yue Ting v. United States*, 149 U. S. 698, 37 L. ed. 905, 13 Sup. Ct. Rep. 1016; *Chin Bak *Kan v. United States*, 186 U. S. 193, 46 L. ed. 1121, 22 Sup. Ct. Rep. 891; *Ah How v. United States*, 193 U. S. 65, 48 L. ed. 619, 24 Sup. Ct. Rep. 357; *United States v. Sing Tuck*, 194 U. S. 161, 48 L. ed. 917, 24 Sup. Ct. Rep. 621.

196 U. S. U. S., Book 49.

EX PARTE: IN THE MATTER OF THOMAS E. BARRETT, *Petitioner* [No. —, Original];

EX PARTE: IN THE MATTER OF JOHN P. DOLAN, *Petitioner* [No. —, Original];

EX PARTE: IN THE MATTER OF FRANK GARRETT, *Petitioner* [No. —, Original].

Motions for Leave to File Petitions for Writs of Habeas Corpus.

Messrs. Chester H. Krum and James L. Minnis for petitioners.

January 9, 1905. *Denied*.

NG HONG LI, *Appellant*, v. UNITED STATES. [No. 140.]

Appeal from the District Court of the United States for the Eastern District of New York.

Messrs. Max J. Kohler and Jas. A. Donegan for appellant.

The Attorney General and Assistant Attorney General Robb for appellee.

January 23, 1905. Judgment affirmed, on the authority of *Ah How v. United States*, 193 U. S. 65, 48 L. ed. 619, 24 Sup. Ct. Rep. 357, and cases cited.

F. M. WIRGMAN *et al.*, *Appellants*, v. H. H. PERSONS *et al.*, *Receivers*, etc. [No. 189.]

Appeal from the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 62 C. C. A. 63, 126 Fed. 449-454.

Mr. F. H. Busbee for appellants.

Mr. Norris Morey for appellees.

January 23, 1905. Dismissed for the want of jurisdiction. *United States v. Jahn*, 155 U. S. 110, 39 L. ed. 88, 15 Sup. Ct. Rep. 39; *McLish v. Roff*, 141 U. S. 661, 35 L. ed. 893, 12 Sup. Ct. Rep. 118; *Robinson v. Caldwell*, 165 U. S. 359, 41 L. ed. 745, 17 Sup. Ct. Rep. 343; *American Sugar Ref. Co. v. *New Orleans*, 181 U. S. 277, 45 L. ed. 859, 21 Sup. Ct. Rep. 646; *Ayres v. Poldersfer*, 187 U. S. 585, 47 L. ed. 314, 23 Sup. Ct. Rep. 196; *Colorado Central Consol. Min. Co. v. Turek*, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35; *Ex parte Jones*, 164 U. S. 691, 41 L. ed. 601, 17 Sup. Ct. Rep. 222.

Petition for a writ of certiorari denied.

BOARD OF SUPERVISORS OF RIVERSIDE COUNTY, CAL., *et al.*, *Plaintiffs in Error*, v. ROBERT H. THOMPSON. [No. 156.]

In Error to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 122 Fed. 860, 54 C. A. 336, 116 Fed. 832.

Mr. John D. Works for plaintiffs in error.

Mr. C. C. Wright for defendant in error.

January 30, 1905. *Dismissed* for the want of jurisdiction. *Press Pub. Co. v. Monroe*, 164 U. S. 105, 41 L. ed. 367, 17 Sup. Ct. Rep. 40; *Ex parte Jones*, 164 U. S. 691, 41 L. ed. 601, 17 Sup. Ct. Rep. 222; *Benjamin v. New Orleans*, 139 U. S. 161, 42 L. ed. 700, 18 Sup. Ct. Rep. 298; *Rouse v. Letcher*, 156 U. S. 47, 39 L. ed. 341, 15 Sup. Ct. Rep. 266; *Gregory v. Van Ee*, 160 U. S. 643, 40 L. ed. 566, 16 Sup. Ct. Rep. 431.

THOMAS DENNISON, *Plaintiff in Error*, v. GEORGE M. CHRISTIAN. [No. 510.]

In Error to the Supreme Court of the State of Nebraska.

See same case below (Neb.) 101 N. W. 1045.

Messrs. W. J. Connell, C. J. Smyth, and E. P. Smith for plaintiff in error.

Mr. H. C. Brome for defendant in error.

January 30, 1905. Judgment *affirmed*, with costs. *Munsey v. Clough*, 196 U. S. 364, *ante*, 515, 25 Sup. Ct. Rep. 282; *Hyatt v. New York*, 188 U. S. 691, 47 L. ed. 657, 23 Sup. Ct. Rep. 456; *Roberts v. Reilly*, 116 U. S. 80, 29 L. ed. 544, 6 Sup. Ct. Rep. 291; *Dower v. Richards*, 151 U. S. 658, 38 L. ed. 305, 24 Sup. Ct. Rep. 452; *Egan v. Hart*, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; *Blythe v. Hinckley*, 180 U. S. 333, 45 L. ed. 557, 21 Sup. Ct. Rep. 390.

EMMA THOMAS *et al.*, *Plaintiffs in Error*, v. [638] *JOSEPH P. BLAIR *et al.*, *Executors*. [No. 388.]

In Error to the Supreme Court of the State of Louisiana.

See same case below, 111 La. 678, 35 So. 811.

Messrs. Henry L. Lazarus, Henry Denis, Elihu Root, and John G. Johnson for plaintiffs in error.

Messrs. George Denegre and Chas. Payne Fenner for defendants in error.

February 20, 1905. *Dismissed* for the want of jurisdiction. *Marrow v. Brinkley*, 129 U. S. 178, 32 L. ed. 654, 9 Sup. Ct. Rep. 267; *Israel v. Arthur*, 152 U. S. 355, 362, 38 L. ed. 474, 478, 14 Sup. Ct. Rep. 583; *Central Land Co. v. Laidley*, 159 U. S. 103, 112, 48 L. ed. 91, 95, 16 Sup. Ct. Rep. 80; *Harrison v. Morton*, 171 U. S. 38, 43 L. ed. 63, 18 Sup. Ct. Rep. 742; *Pierce v. Somerset R. Co.* 171 U. S. 641, 43 L. ed. 316, 19 Sup. Ct. Rep. 64.

630

JAMES L. LOMBARD, *Petitioner*, v. ANGLO-AMERICAN LAND MORTGAGE & AGENCY COMPANY, LIMITED [No. 454]; B. LOMBARD, JR., *Petitioner*, v. ANGLO-AMERICAN LAND MORTGAGE & AGENCY COMPANY, LIMITED [No. 455]; CHESHIRE PROVIDENT INSTITUTION, *Petitioner*, v. FREDERICK HERBERT RAMSDEN [No. 456]; KEENE FIVE CENT SAVINGS BANK, *Petitioner*, v. FREDERICK HERBERT RAMSDEN [No. 457].

Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 132 Fed. 721.

Mr. Frank Hagerman for petitioners.

Mr. John A. Eaton for respondents.

December 19, 1904. *Denied*.

EDWARD E. BESSETTE, *Petitioner*, v. W. B. CONKEY COMPANY. [No. 470.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 133 Fed. 165.

Mr. Wm. Velpeau Rooker for petitioner.

Messrs. Jacob Newman, Benj. V. Becker, and Solomon O. Levinson for respondent.

January 3, 1905. *Denied*.

*SHEWAN TOMES & Co., *Petitioner*, v. MER- [639] CHANTS' BANKING COMPANY, LIMITED. [No. 475.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 134 Fed. 727.

Messrs. Harrington Putnam and Appleton L. Clark for petitioner.

Mr. Frederick M. Brown for respondent.

January 9, 1905. *Denied*.

CITY OF DAVENPORT, *Petitioner*, v. WILLIAM RUSSELL ALLEN *et al.* [No. 471.]

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 132 Fed. 209.

Mr. Joe R. Lane for petitioner.

Mr. Frederick N. Judson for respondents.

January 16, 1905. *Denied*.

CHARLES W. MORSE *et al.*, *Petitioners*, v. READING COMPANY, Claimant, etc. [No. 465.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

See same case below, 64 C. C. A. 228, 129 Fed. 700.

Mr. Eugene P. Carver and Edward E. Blodgett for petitioners.

Messrs. Robert M. Morse and Wm. M. Richardson for respondent.

January 23, 1905. *Denied*.

196 U. S.

AUGUSTUS L. SHAFFER, *Petitioner*, v. UNITED STATES. [No. 488.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

See same case below, 33 Wash. L. Rep. 4.

Messrs. Henry E. Davis, D. W. Baker, and Wilton J. Lambert for petitioner.

The Attorney General and Solicitor General Hoyt for respondent.

January 23, 1905. *Denied*.

[640] THOMAS F. HOLDEN, *Petitioner*, v. UNITED STATES. [No. 474.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

See same case below, 33 Wash. L. Rep. 34.

Messrs. R. Ross Perry and R. Ross Perry, Jr., for petitioner.

The Attorney General and Solicitor General Hoyt for respondent.

January 30, 1905. *Denied*.

GEORGE E. LORENZ *et al.*, *Petitioners*, v. UNITED STATES. [No. 490.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

See same case below, 32 Wash. L. Rep. 822.

Messrs. Conrad H. Syme, Samuel Maddox, and Charles A. Douglass for petitioners.

The Attorney General, Solicitor General Hoyt, and Assistant Attorney General Purdy for respondent.

January 30, 1905. *Denied*.

MINERAL DEVELOPMENT COMPANY, *Petitioner*, v. WINFIELD SCOTT *et al.* [No. 506.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 64 C. C. A. 659, 130 Fed. 497.

Mr. S. B. Dishman for petitioner.

No appearance for respondents.

January 30, 1905. *Denied*.

RUSSIA CEMENT COMPANY, *Petitioner*, v. ABRAHAM B. FRAUENHAR *et al.* [No. 508.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 133 Fed. 518.

Messrs. John F. Dillon and John Dane, Jr., for petitioner.

Mr. Ralph Nathan for respondents.

January 30, 1905. *Denied*.

ALBERT R. MOULTON, *Petitioner*, v. GEORGE M. COBURN *et al.* [No. 511.]

[641] Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

See same case below, 131 Fed. 201.

196 U. S.

Messrs. Charles P. Searle and Lee M. Friedman for petitioner.

Mr. Frederic D. McKenney for respondents.

January 30, 1905. *Denied*.

EDWARD H. HARRIMAN *et al.*, *Petitioners*, v. NORTHERN SECURITIES COMPANY. [No. 512.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Messrs. William D. Guthrie, R. S. Lovett, D. T. Watson, John F. Dillon, and Maxwell Evarts for petitioners.

Messrs. John G. Johnson, Elihu Root, Francis Lynde Stetson, and John W. Griggs for respondent.

January 30, 1905. *Granted*.

WILLIAM E. BROWN, *Petitioner*, v. FIRST NATIONAL BANK OF NEWTON, KAN. [No. 467.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 132 Fed. 450.

Mr. Wm. Eugene Brown for petitioner.

Mr. David Overmyer for respondent.

February 20, 1905. *Denied*.

I. B. KLEINERT RUBBER COMPANY *et al.*, *Petitioners*, v. ALBERT STEIN *et al.* [No. 502.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 133 Fed. 228.

Mr. Louis C. Raegener for petitioners.

Messrs. James H. Peirce, George P. Fisher, Jr., and Wm. Henry Dennis for respondents.

February 20, 1905. *Denied*.

AMERICAN ALKALI COMPANY, by ARTHUR K. BROWN, Surviving Receiver, *Petitioner*, v. PEDRO G. SALOM. [No. 507.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 65 C. C. A. 284, 131 Fed. 46.

Mr. Reynolds D. Brown for petitioner.

Mr. Joseph C. Fraley for respondent.

February 20, 1905. *Denied*.

J. CAMPBELL THOMPSON, *Petitioner*, v. AUGUSTUS H. SKILLIN, Trustee, *etc.* [No. 518.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit or Other Writs.

See same case below, 134 Fed. 51.

Mr. Roger Foster for petitioner.

Mr. Wm. John Barr for respondent.

February 20, 1905. *Denied*.

BAQUERO & GANDARA *et al.*, *Appellants*, v. A. RAUSCHENPLAT. [No. 300.]

Appeal from the District Court of the United States for the District of Porto Rico. *Messrs. Frederic D. McKenney and J. Spalding Flannery* for appellants.

No appearance for appellee.

December 19, 1904. *Dismissed*, with costs, on motion of *Mr. J. Spalding Flannery* for the appellants.

CHARLES H. BROOKS, *Appellant*, v. UNITED STATES. [No. 485.]

Appeal from the Circuit Court of the United States for the Southern District of California.

The *Attorney General* and *Solicitor General Hoyt* for appellee.

No counsel opposed.

January 3, 1905. Docketed and *dismissed*, on motion of *Mr. Solicitor General Hoyt* for the appellee.

CARL C. L. WULFF, *Appellant*, v. L. LINDSAY *et al.* [No. 486.]

Appeal from the Supreme Court of the Territory of Arizona.

Mr. Charles L. Frailey for appellees.

No counsel opposed.

January 3, 1905. Docketed and *dismissed*, with costs, on motion of *Mr. Charles L. Frailey* for the appellees.

[643]*WILLIAM R. LYTLE, *Appellant*, v. ADOLPHUS GERALD, Chief of Police of the City of Montgomery, Ala. [No. 124.]

Appeal from the Circuit Court of the United States for the Middle District of Alabama.

Mr. W. S. Reese, Jr., for appellant.

No appearance for appellee.

January 9, 1905. *Dismissed*, with costs, pursuant to the Tenth Rule.

TERRITORY OF OKLAHOMA *ex rel.* OKLAHOMA GAS & ELECTRIC COMPANY, *Appellant*, v. J. E. DE WOLFE *et al.* [No. 132.]

Appeal from the Supreme Court of the Territory of Oklahoma.

See same case below, 13 Okla. 454, 74 Pac. 98.

Mr. Charles B. Ames for appellant.

No appearance for appellees.

January 16, 1905. *Dismissed*, with costs, on authority of counsel for the appellant.

HARTFORD FIRE INSURANCE COMPANY OF CONNECTICUT *et al.*, *Appellants*, v. JOHN C. PERKINS, Commissioner of Insurance. [No. 190.]

Appeal from the Circuit Court of the United States for the District of South Dakota.

See same case below, 125 Fed. 502.

Messrs. Abner E. Hitchcock and F. W. McReynolds for appellants.

No appearance for appellee.

January 17, 1905. *Dismissed*, with costs, on motion of *Mr. F. W. McReynolds* for the appellants.

ROBERT PHILPOT, *Appellant*, v. FULTON O'BRIEN *et al.* [No. 155.]

Appeal from the United States Circuit Court of Appeals for the First Circuit.

Mr. Edmund A. Whitman for appellant.

Mr. Frank H. Stewart for appellees.

January 20, 1905. *Dismissed*, with costs, pursuant to the Tenth Rule.

SOTIRIOS S. LONTOS CHARALAMBIS, *Appellant*, v. *WILLIAM WILLIAMS, Commissioner of Immigration, etc. [No. 127.]

Appeal from the Circuit Court of the United States for the Southern District of New York.

See same case below, 124 Fed. 637.

Mr. Alfred Hayes, Jr., for appellant.

No appearance for appellee.

January 23, 1905. *Dismissed*, with costs, on authority of counsel for appellant.

FRED SANDERS, *Plaintiff in Error*, v. COMMONWEALTH OF KENTUCKY. [No. 181.]

In Error to the Court of Appeals of the State of Kentucky.

Mr. Charles H. Gibson for plaintiff in error.

Mr. Napoleon B. Hays for defendant in error.

January 30, 1905. *Dismissed*, with costs, per stipulation.

MAX SCHUBACH, *Plaintiff in Error*, v. WARWICK HOUGH, Judge, etc., *et al.* [No. 187.]

In Error to the Supreme Court of the State of Missouri.

See same case below, 179 Mo. 133, 65 L. R. A. 136, 101 Am. St. Rep. 452, 78 S. W. 1020.

Messrs. Henry W. Bond and Frederick N. Judson for plaintiff in error.

Messrs. John F. Dillon and Martin L. Clardy for defendants in error.

February 20, 1905. *Dismissed*, with costs, on authority of counsel for the plaintiff in error.

RICHARD DILLON, *Plaintiff in Error*, v. FRANK MARES. [No. 252.]

In Error to the Supreme Court of the State of Montana.

See same case below (Mont.) 75 Pac. 969.

Mr. Thomas J. Walsh for plaintiff in error.

Mr. Henry G. McIntire for defendant in error.

February 20, 1905. *Dismissed*, with costs, on authority of counsel for the plaintiff in error.

CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES,

AT

OCTOBER TERM, 1904.

Vol. 197.

REFERENCE TABLE
 OF SUCH CASES
 DECIDED IN U. S. SUPREME COURT,
 OCTOBER TERM, 1904,
 AND REPORTED HEREIN,

VOLUME 197,

 AS ALSO APPEAR IN
OFFICIAL REPORTER'S EDITION.

Off. Rep. 197 U. S.	Title.	Here in.	Off. Rep. 197 U. S.	Title.	Here in.
1	Northern Pac. R. Co. v. Ely	639	98-100	San Francisco Nat. Bank v.	
2-5	"	640		Dodge	682
5-7	"	641	100-103	"	683
7-9	"	642	103-105	"	684
9-10	Northern Pac. R. Co. v. Hasse	642	105-108	"	685
10	"	643	108-110	"	686
11	Jacobson v. Massachusetts	643	110-112	"	687
12-14	"	647	112-115	"	688
14	"	648	115-117	National Cotton Oil Co. v.	
22-23	"	648		Texas	689
23-26	"	649	117-118	"	690
26-28	"	650	127-128	"	693
28-31	"	651	128-130	"	694
31-34	"	652	130-133	"	695
34-35	"	653	133	"	696
35-38	"	654	134-135	Southern Cotton Oil Co. v.	
38-39	"	655		Texas	696
40	Utermehle v. Norment	655	135	United States v. Whitridge	696
40-42	"	656	140-141	"	697
42-45	"	657	141-144	"	698
45-47	"	658	144-146	"	699
52-53	"	660	146	District of Columbia v. Barnes	699
53-56	"	661	147	"	700
56-58	"	662	149-150	"	700
58-60	"	663	150-153	"	701
60	Kehrer v. Stewart	663	153-154	"	702
61	"	664	154-155	McClaine v. Rankin	702
64-66	"	666	155-157	"	703
66-68	"	667	158	"	704
68-70	"	668	158-161	"	705
70	San Francisco Nat. Bank v.		161-163	"	706
	Dodge	669	163-166	"	707
75	"	672	166-168	"	708
75-78	"	673	168-169	"	709
78-80	"	674	169	Dallemagne v. Moisan	709
80-82	"	675	170-171	"	710
82-85	"	676	173-175	"	711
85-88	"	677	175-177	"	712
88-90	"	678	177-178	"	713
90-93	"	679	178	Dawson v. Columbia Avenue	
93-95	"	680		Saving Fund, S. D. T. & T.	
95-98	"	681		Co.	713

REFERENCE TABLE.

Off. Rep. 197 U. S.	Title.	Here in.	Off. Rep. 197 U. S.	Title.	Here in.
179-180	Davidson v. Columbia Avenue Saving Fund, S. D. T. & T. Co.	715	319-320	Chrisman v. Miller	772
180-182	" "	716	320-322	" "	773
182	" "	717	322-323	" "	774
183	Gregg v. Metropolitan Trust Co.	717	324-325	Strauss, Re	774
186-187	" "	718	325-326	" "	775
187-189	" "	719	329-331	" "	778
189-192	" "	720	331-334	" "	779
192-194	" "	721	334-335	Bishop v. United States	780
194-197	" "	721	336-337	" "	781
197	" "	723	337-339	" "	782
197-199	Caro v. Davidson	723	339-341	" "	783
199-200	" "	724	341-343	" "	784
200-201	United States v. Stinson	724	343	McMillen v. Ferrum Min. Co.	784
204-206	" "	725	343-345	" "	785
206-207	" "	726	345-346	" "	786
207-208	Clyatt v. United States	726	346-348	" "	787
208-209	" "	727	348	Carter v. Gear	787
215-217	" "	729	348-349	" "	788
217-219	" "	730	352-353	" "	788
219-222	" "	731	353-355	" "	789
222-223	" "	732	355	" "	790
223-224	United States v. Mills	732	356-357	Keppel v. Tiffin Savings Bank	790
224-226	" "	733	359	" "	790
226-229	" "	734	359-362	" "	791
229	" "	735	362-364	" "	792
230	Bartlett v. United States	735	364-367	" "	793
232	" "	735	367-369	" "	794
232-234	" "	736	369-372	" "	795
235	Greer County v. Texas	736	372-374	" "	796
240-242	" "	738	374-377	" "	797
242-243	" "	739	377-379	" "	798
244	Harriman v. Northern Securi- ties Co.	739	379-382	" "	799
245-247	" "	740	382-384	" "	800
247-249	" "	741	384-386	" "	801
249-252	" "	742	386	United States v. Smith	801
252-254	" "	743	386-387	" "	802
254-257	" "	744	391-392	" "	802
257-259	" "	745	392-393	" "	803
259-261	" "	746	394	Middletown Nat. Bank v. To- ledo, A. A. & N. M. R. Co.	803
286-288	" "	760	394-396	" "	804
288-291	" "	761	396-398	" "	805
291-294	" "	762	403-404	" "	809
294-296	" "	763	404-406	" "	810
296-299	" "	764	407	Pennsylvania Lumbermen's Mut. F. Ins. Co. v. Meyer	810
299	" "	765	407-409	" "	811
299	Western Electrical Supply Co. v. Abbeville Elec. Light & P. Co.	765	409	" "	812
301-302	" "	765	412	" "	813
302-303	" "	766	412-415	" "	814
304	McMichael v. Murphy	766	415-417	" "	815
304-306	" "	768	417-419	" "	816
306	" "	769	419	{ Lincoln v. United States { Warner, Barnes, & Co. v. { United States	816
310-312	" "	769	427-428	" "	818
312-313	" "	770	428-429	" "	819
313-314	Chrisman v. Miller	770	430	Louisville & N. R. Co. v. Bar- ber Asphalt Pav. Co.	819
314-316	" "	771	432-434	" "	821
636			434-435	" "	822

REFERENCE TABLE

Off. Rep. 197 U. S.	Title.	Here In.	Off. Rep. 197 U. S.	Title.	Here In.
436	Stillman v. Combe	822	528-530	Rasmussen v. United States	867
438-439	" "	824	530-533	" "	868
439-442	" "	825	533-535	" "	869
442	" "	826	535-536	" "	870
442-444	H. Hackfeld & Co. v. United States	826	536	Knapp v. Lake Shore & M. S. R. Co. ("United States ex rel. Knapp v. Lake Shore & M. S. R. Co.")	870
444	" "	827		" "	870
446-447	" "	828		" "	871
447-450	" "	829	540	" "	872
450-452	" "	830	540-543	" "	872
452-453	" "	831	543	" "	872
453-454	New Orleans Gaslight Co. v. New Orleans Drainage Commission	831	544-545	Muhlker v. New York & H. R. Co.	872
454-455	" "	832	545-548	" "	873
458-460	" "	834	560-562	" "	874
460-462	" "	835	562-565	" "	875
463-464	Iron Cliffs Co. v. Negaunee Iron Co.	836	565-567	" "	876
464-467	" "	837	567-570	" "	877
467-469	" "	838	570-572	" "	878
470-472	" "	840	572-574	" "	879
472-474	" "	841	574-577	" "	880
474-475	" "	842	577-579	} Missouri v. Nebraska } Nebraska v. Missouri	881
475	United States v. Cadarr	842	579		
476-477	" "	843	580-581	" "	882
477-480	" "	844	582	" "	884
480-481	" "	845	583-584	" "	885
482	Massachusetts, Re	845	585	" "	886
482-484	" "	846	586-588	" "	887
487-488	" "	848	589	" "	888
488-489	Heff, Re	848	590-591	" "	889
489-492	" "	849	592	" "	890
492	" "	850	593-595	" "	891
497-498	" "	852	596	" "	892
498-501	" "	853	597-599	" "	893
501-503	" "	854	600-601	" "	894
503-505	" "	855	601-602	" "	895
505-508	" "	856	603	" "	896
508-509	" "	857	604-605	" "	897
510	Whitaker v. McBride	857	606	" "	898
510-511	" "	858	607-608	" "	899
511-512	" "	860	609	" "	900
512-515	" "	861	610-611	" "	901
515-516	" "	862	612	" "	902
516	Rasmussen v. United States	862	613-614	" "	903
518	" "	862	615	" "	904
518-521	" "	863	616	" "	905
521-523	" "	864	617	" "	906
523-526	" "	865	618	" "	907
526-528	" "	866	619-626	Memorandum Cases	908
197 U. S.					909-912

THE DECISIONS

OF THE

Supreme Court of the United States

AT

OCTOBER TERM, 1904.

[1]*NORTHERN PACIFIC RAILWAY COMPANY, *Plff. in Err.*,
v.

WILLIAM S. ELY, Marvin Arnold, Julia Arnold, *et al.* (No. 102.)

NORTHERN PACIFIC RAILWAY COMPANY, *Plff. in Err.*,
v.

WILLIAM S. ELY *et al.* (No. 88.)

(See S. C. Reporter's ed. 1-9.)

Error to state court—formality of writ of error—description of judgment—adverse possession—of railroad right of way.

1. A writ of error to a state court, which incorrectly states the date of the judgment in the court below, may be dismissed without prejudice to proceedings under a second writ of error, which correctly describes the judgment.
2. Title to the right of way granted by Congress to the Northern Pacific Railroad Company for the construction of its road cannot be acquired by adverse possession for private use under a state statute of limitations except so far as the land so adversely held was so situated that a conveyance from the grantee company or its successor would have been confirmed by the act of April 28, 1904, validating such conveyances of the right of way as should not diminish it to a less width than 100 feet on each side of the center of the main track.

[Nos. 102, 88.]

Submitted December 15, 1904. Decided February 20, 1905.

NOTE.—On the practice and procedure governing the transfer of causes to the Federal Supreme Court on writ of error or appeal—see note to *Wedding v. Meyler*, 66 L. R. A. 833.

On adverse possession of railroad right of way—see note to *Illinois C. R. Co. v. Houghton*, 1 L. R. A. 214.

197 U. S.

TWO WRITS OF ERROR to the Supreme Court of the State of Washington to review a judgment which affirmed a judgment of the Superior Court of Spokane County, in that State, in favor of defendants in a suit to quiet title, remove clouds, and recover possession of certain real property alleged to be portions of a railroad right of way. Writ of error in No. 88 *dismissed*; judgment *reversed* in No. 102, and cause remanded for further proceedings.

See same case below, 25 Wash. 384, 54 L. R. A. 526, 87 Am. St. Rep. 766, 65 Pac. 555.

The facts are stated in the opinion.

Messrs. C. W. Bunn and James B. Kerr submitted the cause for plaintiff in error.

Mr. Harold Preston submitted the cause for defendants in error *Browne et al.* Mr. F. T. Post was on his brief.

Mr. William E. Cullen submitted the cause for defendant in error Ely. Mr. Samuel R. Stern was on his brief.

Mr. Chief Justice Fuller delivered the opinion of the court:

This was a suit brought by the Northern Pacific Railway Company, successor to the Northern Pacific Railroad Company, in the superior court of the county of Spokane, state of Washington, against a large number of persons, to quiet title, remove clouds, and recover possession of certain parcels of real estate, alleged to be portions of its right of way in that county.

The complaint alleged that plaintiff was the owner and entitled to a strip of land, 400 feet wide, on which defendants had wrongfully entered. Some of the defendants were defaulted. Separate answers were interposed by others, separate trials had, separate verdicts rendered, and bill of exceptions granted. As to one defendant, the case was submitted to the court for trial, and findings

of fact and conclusions of law were made and filed.

A single decree was rendered in favor of contesting defendants, from which the railway company appealed to the supreme court of the state, where the decree was affirmed. 25 Wash. 384, 54 L. R. A. 526, 87 Am. St. Rep. 766, 65 Pac. 555.

- [3] *The opinion of that court was filed June 29, 1901, and judgment of affirmance entered July 30, 1901. On May 4, 1903, the case of *Northern P. R. Co. v. Townsend*, 190 U. S. 267, 47 L. ed. 1044, 23 Sup. Ct. Rep. 671, was decided. May 28, 1903, the railway company was allowed a writ of error from this court, the judgment of the state supreme court being described as entered June 29, 1901. The case was docketed July 23, 1903, and is now numbered 88. June 30 a second writ of error was taken out and filed below, the papers correctly describing the judgment as entered July 30, 1901, and was docketed here August 13, 1903, and is now numbered 102.

Plaintiff moved for leave to amend the record in No. 88 so that the date of the judgment might be correctly given, and that thereupon No. 102 be dismissed, or, in the alternative, that No. 88 be dismissed. We grant the latter application, and dismiss No. 88 without prejudice to proceeding in No. 102. *Wheeler v. Harris*, 13 Wall. 51, 20 L. ed. 531; *Silsby v. Foote*, 20 How. 290, 15 L. ed. 822.

The facts on which the state supreme court proceeded are thus stated:

- "It may be conceded, we think, that the right of way which embraces the land in dispute was granted to the Northern Pacific Railroad Company by act of Congress in 1864, and that, to the title to the right of way thus granted to the Northern Pacific Railroad Company, the Northern Pacific Railway Company has succeeded. It may also be conceded, for the purposes of this case, that the Northern Pacific Railway Company has complied with all the terms and provisions of the act of Congress aforesaid, and has constructed its railroad through the whole of the line of road between the points named in the granting act; that a map of definite location was filed October 4, 1880, prior to the acquiring of the title to the land in question by the defendants or their predecessors or grantors; and that said railroad had been continuously operated since its construction. The defendants, answering, claim title by patent from the United States government." The land was acquired under the pre-emption and
- [4] homestead acts, respectively, *and all the defendants or their grantors have been in quiet, peaceful, undisturbed, and undisputed possession of said land for more than ten

years immediately prior to the commencement of this action, many of them for nearly twenty years. Valuable improvements have been made by the defendants, the said land consisting of town lots in the city of Spokane, and having been platted and laid out as additions to the city of Spokane by the defendants or their grantors after acquiring title to the same from the United States government. During all these years no claim whatever to these lands has been made by the appellant. It has stood by and seen improvements made thereon, and, in the case of defendant Brown, an agreement was entered into between him and General Sprague, who was then the general superintendent of the Northern Pacific Railroad Company, that they would plat their lots so that the streets of the addition which the railroad company was dedicating would correspond with and meet the streets which Brown was dedicating to the city of Spokane, and the agreement was carried out by arranging the streets in accordance therewith. These streets have been used by the public for from ten to eighteen years. The testimony shows that, in addition to the improvements which these defendants have made upon their lots, many thousands of dollars have been paid by them for assessments levied upon abutting land for the improvement of streets running through this right of way; that the appellant has never paid these assessments; that they have never been assessed to the appellant, and that no question has ever been raised by the appellant as to the right and obligation of the defendants to pay the same. While the record does not show that any of the lands owned by the defendants were deeded to them by the appellant, it does show that the Northern Pacific Railroad Company has deeded to other parties lots in the city of Spokane situated within the 400 feet of right of way, upon which valuable improvements have been made by its grantees."

It may be added that it was only as to some of the parcels *that the filing of the [5] map of definite location and the construction of the railroad preceded the filing of the entries. But we regard the case as falling within the rule holding the grant of the right of way effective from the date of the act. *St. Joseph & D. C. R. Co. v. Baldwin*, 103 U. S. 426, 26 L. ed. 578.

The supreme court held that the action was barred by the statute of limitations; that the company was estopped from asserting title by reason of the circumstances; and that: "Where, through the negligence and laches of a railroad company, the occupancy by others of portions of the right of way granted to it by the government has ripened into title by adverse possession, the

company cannot set up the defense that the right of way was granted for public purposes only, and that it would be against public policy to permit either its abandonment by the company or the acquisition of adverse rights therein by way of estoppel or of the bar of the statute of limitations."

As before stated, on the 4th day of May, 1903, the decision of this court in *Northern P. R. Co. v. Townsend*, 190 U. S. 267, 47 L. ed. 1044, 23 Sup. Ct. Rep. 671, was announced. We there ruled that individuals could not, for private purposes, acquire by adverse possession, under a state statute of limitations, any portion of a right of way granted by the United States to a railroad company in the manner and under the conditions that the right of way was granted to the Northern Pacific Railroad Company. At the same time it was not denied that such right of way granted through the public domain within a state was amenable to the police power of the state. And we said: "Congress must have assumed, when making this grant, for instance, that in the natural order of events, as settlements were made along the line of the railroad, crossings of the right of way would become necessary, and that other limitations in favor of the general public upon an exclusive right of occupancy by the railroad of its right of way might be justly imposed. But such limitations are in no sense analogous to claim of adverse ownership for private use."

[6] *We are not prepared to overrule that decision, and, tested by it, the judgment in this case must be reversed. But we were then dealing with the original right of way, which was of a width of 400 feet. April 28, 1904, an act of Congress entitled "An Act Validating Certain Conveyances of the Northern Pacific Railroad Company and the Northern Pacific Railway Company," was approved (33 Stat. at L. 538, chap. 1782), reading as follows:

"That all conveyances heretofore made by the Northern Pacific Railroad Company or by the Northern Pacific Railway Company, of land forming a part of the right of way of the Northern Pacific Railroad, granted by the government by any act of Congress, are hereby legalized, validated, and confirmed: *Provided*, That no such conveyance shall have effect to diminish said right of way to a less width than one hundred feet on each side of the center of the main track of the railroad as now established and maintained.

"Sec. 2. That this act shall have no validating force until the Northern Pacific Railway Company shall file with the Secretary of the Interior an instrument in writing, accepting its terms and provisions."

The terms and provisions of the act were

accepted by the railway company June 22, 1904, and the acceptance, duly certified, was filed in the Interior Department July 7, 1904.

In *Townsend's Case* it was said, among other things:

"Manifestly, the land forming the right of way was not granted with the intent that it might be absolutely disposed of at the volition of the company. On the contrary, the grant was explicitly stated to be for a designated purpose, one which negated the existence of the power to voluntarily alienate the right of way or any portion thereof. The substantial consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad, just as though the land had been conveyed in terms to have and to hold the same so long as it was used for the railroad right of way. In effect the grant was of a limited fee, made on an implied condition *of reversion [7] or in the event that the company ceased to use or retain the land for the purpose for which it was granted. . . . Congress having plainly manifested its intention that the title to and possession of the right of way should continue in the original grantee, its successors and assigns, so long as the railroad was maintained, the possession by individuals of portions of the right of way cannot be treated, without overthrowing the act of Congress, as forming the basis of an adverse possession which may ripen into a title good as against the railroad company." 190 U. S. 271, 272, 47 L. ed. 1046, 1047, 23 Sup. Ct. Rep. 672, 673.

The act of April 28, 1904, in view of our decision in that case, was obviously intended to and did have the effect to narrow the right of way to 200 feet in width, so far, at least, as, outside of that strip, the original right of way had been parted with.

The rule in the state of Washington as to adverse possession is thus stated by the supreme court in this case:

"One holding land adversely to the rights of another can be divested only by the action of the other, even with a better right, within the time prescribed by the statute of limitations; and this is true, even though he may have originally entered under a void grant of sale. But his claim ripens into a perfect title and becomes absolute, if such possession is not disturbed within the time prescribed. As is said by 3 Washburn on Real Property, 5th ed. p. 176:

"The operation of the statute takes away the title of the real owner, and transfers it, not in form, indeed, but in legal effect, to the adverse occupant. In other words, the statute of limitations gives a perfect title. The doctrine is stated thus strongly because it seems to be the result of modern deci-

sions, although it was once held that the effect of the statute was merely to take away the remedy, and did not bind the estate, or transfer the title.'” 25 Wash. 388, 54 L. R. A. 530, 87 Am. St. Rep. 768, 65 Pac. 556.

In *Sharon v. Tucker*, 144 U. S. 533, 543, 36 L. ed. 532, 535, 12 Sup. Ct. Rep. 720, 722, where the statute of limitations in force in the District of Columbia was applied, Mr. Justice Field, speaking for the court, said:

[8] **“It is now well settled that, by adverse possession for the period designated by the statute, not only is the remedy of the former owner gone, but his title has passed to the occupant, so that the latter can maintain ejectment for the possession against such former owner, should he intrude upon the premises. In several of the states this doctrine has become a positive rule, by their statutes of limitations declaring that uninterrupted possession for the period designated to bar an action for the recovery of land shall, of itself, constitute a complete title. Leffingwell v. Warren, 2 Black, 599, 17 L. ed. 261; Campbell v. Holt, 115 U. S. 620, 623, 29 L. ed. 483, 485, 6 Sup. Ct. Rep. 209.”*

This was quoted in *Toltec Ranch Co. v. Cook*, 191 U. S. 532, 538, 48 L. ed. 291, 292, 24 Sup. Ct. Rep. 166, 167, and it was remarked:

“Adverse possession, therefore, may be said to transfer the title as effectually as a conveyance from the owner; it may be considered as tantamount to a conveyance.”

So far as title to portions of the right of way could be lawfully acquired from the railway company, defendants below, appellees in the supreme court, had acquired title to their parcels by adverse possession, and occupied the same position as if they had received conveyances, which the act of April 28, 1904, operated to confirm. The act is remedial, and to be construed accordingly. The lots of some of the defendants were outside of the 200 feet. The lots of others were partly within and partly without the strip. But the act was passed after the judgment of the supreme court was rendered, and while the case was pending here, and it must be left to the state courts to deal with the matter in the light of the conclusions at which we have arrived.

In *Kansas P. R. Co. v. Twombly*, 100 U. S. 78, 25 L. ed. 550, which was a writ of error to the supreme court of the territory of Colorado, the act authorizing the action was repealed while the writ was pending in this court, and we, in the exercise of appellate jurisdiction, declined to send the case back to the court below with instructions to enter a judgment of nonsuit, and affirmed the judgment because we found no error.

[9] *In the present case, the parties will not
642

be compelled to resort to some form of original proceeding to obtain relief under the act of April 28, 1904, as, apart from that statute, the decree must be reversed, and thereupon the record will be open for such adjudication as the then situation may demand.

In No. 88, writ of error dismissed; in No. 102, decree reversed and cause remanded for further proceedings not inconsistent with this opinion.

Mr. Justice **Harlan** was of opinion that the decree of the state supreme court should be affirmed for the reasons given, and, therefore, dissented.

NORTHERN PACIFIC RAILWAY COMPANY, *Plff. in Err.*,

v.

AUGUST HASSE and ——— Hasse, His Wife.

(See S. C. Reporter's ed. 9, 10.)

Adverse possession — of railroad right of way.

This case is governed by the decision in *Northern P. R. Co. v. Ely*, ante, 639.

[No. 118.]

Submitted January 6, 1905. Decided February 20, 1905.

IN ERROR to the Supreme Court of the State of Washington to review a judgment which reversed a judgment of the Superior Court of Kittitas County, in that State, in favor of the Northern Pacific Railway Company, in an action of ejectment to recover possession of a part of its right of way, and remanded the cause, with directions to dismiss the action. *Reversed.*

See same case below, 28 Wash. 353, 92 Am. St. Rep. 840, 68 Pac. 882.

The facts are stated in the opinion.

Messrs. **C. W. Bunn** and **James B. Kerr** submitted the cause for plaintiff in error.

No brief was filed for defendants in error.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

This was an action of ejectment brought by the Northern Pacific Railway Company in the superior court of Kittitas county, [10] Washington, to recover possession of part of its right of way, the land being partly within and partly without a right of way of 200 feet in width. Defendants asserted title by virtue of a homestead application, filed May 24, 1883, final proof July 12, 1888, and pat-
197 U. S.

ent September 27, 1889; and adverse possession for the period named in the statute of limitations. Judgment was entered in favor of the railway company, and defendants carried the case by appeal to the supreme court of Washington, which held the statute of limitations applicable, reversed the judgment below, and remanded the case with directions to dismiss the action. 28 Wash. 353, 92 Am. St. Rep. 840, 68 Pac. 882.

The grant of right of way, unlike the land grant, was effective from the date of the act, and the fact that the railroad was not built until after defendants' entry does not affect the disposition of the case. *St. Joseph & D. C. R. Co. v. Baldwin*, 103 U. S. 426, 26 L. ed. 578; *Bybee v. Oregon & C. R. Co.* 139 U. S. 663, 679, 35 L. ed. 305, 308, 11 Sup. Ct. Rep. 687.

The judgment must be reversed on the authority of *Northern P. R. Co. v. Townsend*, 190 U. S. 267, 47 L. ed. 1044, 23 Sup. Ct. Rep. 671, and remanded for further proceedings not inconsistent with the opinion of this court in *Northern P. R. Co. v. Ely*, 197 U. S. 1, ante, 639, 25 Sup. Ct. Rep. 302.

Judgment reversed.

Mr. Justice Harlan dissented.

[11] *HENNING JACOBSON, *Plff. in Err.*,
v.

COMMONWEALTH OF MASSACHUSETTS.

(See S. C. Reporter's ed. 11-39.)

Constitutional law—compulsory vaccination—personal liberty—equal protection of the laws—evidence—judicial notice.

1. The spirit of the Federal Constitution or its preamble cannot be invoked, apart from the words of that instrument, to invalidate a state statute.
2. The scope and meaning of a state statute, as indicated by the exclusion of evidence on the ground of its incompetency or immateriality under that statute, are conclusive on the Federal Supreme Court in determining, on

writ of error to the state court, the question of the validity of the statute under the Federal Constitution.

3. The personal liberty secured by U. S. Const., 14th Amend., against state deprivation, is not infringed by Mass. Rev. Laws, chap. 75, § 137, authorizing compulsory vaccination by local boards of health when deemed necessary for the public health or safety, under which, as construed by the highest state court, vaccination may be required of all the inhabitants of a city where smallpox is prevalent and increasing.
4. Lack of any exception in favor of adults certified by a registered physician to be unfit subjects for vaccination does not render invalid Mass. Rev. Laws, chap. 75, § 137, authorizing compulsory vaccination by local boards of health, as denying the equal protection of the laws, although an exception in favor of children in like condition is made by § 139 of that act, since the statute is equally applicable to all adults.
5. Judicial notice will be taken that vaccination is commonly believed to be a safe and valuable means of preventing the spread of smallpox, and that this belief is supported by high medical authority.
6. A state legislature, in enacting a statute purporting to be for the protection of local communities against the spread of smallpox, is entitled to choose between the theory of those of the medical profession who think vaccination worthless for this purpose, and believe its effect to be injurious and dangerous, and the opposite theory, which is in accord with common belief, and is maintained by high medical authority; and is not compelled to commit a matter of this character, involving the public health and safety, to the final decision of a court or jury.
7. An adult cannot claim to have been deprived of the liberty secured by U. S. Const., 14th Amend., against state deprivation, by the enforcement against him of a compulsory vaccination law,—at least, where he does not show, with reasonable certainty, that he is not at the time a fit subject of vaccination, or that vaccination, by reason of his then condition, will seriously impair his health, or possibly cause his death.

[No. 70.]

Argued December 6, 1904. Decided February 20, 1905.

NOTE.—On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to *Missouri ex rel. Hill v. Dockery*, 63 L. R. A. 571.

As to the validity of class legislation—see *State v. Goodwill*, 6 L. R. A. 621, and note; and *State v. Loomis*, 21 L. R. A. 789, and note.

As to constitutional equality of privileges, immunities, and protection—see *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* 14 L. R. A. 579, and note.

On the question of judicial notice—see note to *Olive v. State*, 4 L. R. A. 33.

Constitutionality of compulsory vaccination.

The question of the constitutionality of
197 U. S.

compulsory vaccination has very seldom arisen in the courts. Cases dealing with vaccination problems have generally grown out of the action of the authorities in excluding unvaccinated children from the public schools. Failure has been the result of every effort to contest the validity of such action when authorized by the legislature. *Dunfield v. Williamsport School District*, 162 Pa. 476, 25 L. R. A. 152, 29 Atl. 742; *Field v. Robinson*, 198 Pa. 638, 48 Atl. 873; *Abeel v. Clark*, 84 Cal. 226, 24 Pac. 383; *French v. Davidson*, 143 Cal. 658, 77 Pac. 663; *Bissell v. Davison*, 65 Conn. 183, 29 L. R. A. 251, 32 Atl. 348; *Re Vlemelster*, 179 N. Y. 235, 72 N. E. 97; *Blue v. Beach*, 155 Ind. 121, 50 L. R. A. 64, 80 Am. St. Rep. 195, 56 N. E. 89; *State ex rel. Freeman v. Zimmerman*, 86 Minn.

[N ERROR to the Superior Court of the State of Massachusetts for the County of Middlesex to review a judgment entered on a verdict of guilty in a prosecution under the compulsory vaccination law of that State, after defendant's exceptions were overruled by the Massachusetts Supreme Judicial Court. *Affirmed.*

See same case below, 183 Mass. 242, 66 N. E. 719.

The facts are stated in the opinion.

Mr. George Fred Williams argued the cause, and, with **Mr. James A. Halloran**, filed a brief for plaintiff in error:

The only cases in which general compulsory vaccination laws have been considered are—

State v. Hay, 126 N. C. 999, 49 L. R. A. 588, 78 Am. St. Rep. 691, 35 S. E. 459; *Morris v. Columbus*, 102 Ga. 792, 42 L. R. A. 175, 66 Am. St. Rep. 243, 30 S. E. 850; *Re Smith*, 146 N. Y. 68, 28 L. R. A. 820, 4 Am. St. Rep. 769, 40 N. E. 497.

In the North Carolina case it was assumed that due process of law entitled a defendant to offer evidence that vaccination would be injurious to him.

In the Georgia case provision was made for the exemption of a person who presented a certificate that vaccination would be injurious.

In the New York case it was held that the fact of existence of a contagious disease, or of exposure to it, must be established before the health authorities could exercise the police power of quarantine or isolation of persons refusing to be vaccinated.

The laws providing that unvaccinated children shall not attend the public schools are widely variant from laws compelling the vaccination of adult citizens. The public school is a state institution in the nature of a beneficent business enterprise for the improvement of the population. No right to attend the schools is inherent in our laws unless the state Constitution confers it. Attendance at school is a privilege. The school is a part of the state's domestic economy, and the state may regulate it in its own discretion. It may exclude anyone it

chooses. To provide vaccination as one of the conditions of admission to school is widely different in legal status from providing a legal penalty upon citizens for refusing vaccination.

The police power is for the security of liberty, and not for oppression.

Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357.

To justify the exercise of the police power beyond the mere suppression of nuisances, it must appear that the interests of the public are affected, and that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.

Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499.

The police power rests upon well-founded principles, all of which have their basis and reason in existing offensive acts or conditions.

4 Bl. Com. 162; Cooley, Const. Lim. p. 704; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 470, 24 L. ed. 527, 529.

The defendant in error will hardly care to contend that the state has a right to seize upon the citizen and insert into his blood the virus of vaccination, although in England, under the act of 1867 (30 & 31 Vict. chap. 84), vaccination was enforced upon children in many cases, and it was judicially determined that where a parent had refused to cause the vaccination of a child the court might order the child to be vaccinated.

Queen v. Cinque Ports Justice, L. R. 17 Q. B. Div. 191; *Dutton v. Atkinson*, L. R. 6 Q. B. 373.

The utmost that the law undertakes to do is to provide a penalty for its violation. After I have paid the penalty I am as much a menace to the community as I was before, and, if the effect of the law be that with one payment I may continue to be a menace to the public health, as was held in England (*Pilcher v. Stafford*, 4 Best & S. 775), the law is too absurd to justify its existence.

If I may be repeatedly fined for recalcitrance, as was provided by the English act

353, 58 L. R. A. 78, 91 Am. St. Rep. 351, 90 N. W. 783.

In Georgia and North Carolina the constitutionality of compulsory vaccination has been presented for determination, and the decision in each instance is in accord with *JACOBSON v. MASSACHUSETTS*.

Morris v. Columbus, 102 Ga. 792, 42 L. R. A. 175, 66 Am. St. Rep. 243, 30 S. E. 850, is the first of these cases. Here legislation under which compulsory vaccination of all persons within the limits of a city could be ordered when an epidemic of smallpox existed or was reasonably to be apprehended was held to be a valid exercise of the police power. Similar legislation was sustained in *State v. Hay*, 126 N. C. 999, 49 L. R. A. 588, 78 Am. St. Rep. 691, 35

S. E. 459, where it was also held that an ordinance requiring compulsory vaccination was not vitiated because of a failure to except from its operation persons whose health is such that it would be unsafe for them to submit to vaccination. The court admitted that the existence of such a condition would, however, be a sufficient excuse for noncompliance, but added that such noncompliance would not be justified by one's own opinion, or that of his physician, that it would be dangerous for him to be vaccinated, or that he is sufficiently protected by former vaccination.

See also notes to *Duffield v. Williamsport School District*, 25 L. R. A. 152, and *Thomas v. Mason*, 26 L. R. A. 727.

30 & 31 Vict. chap. 84, 31 (see *Allen v. Worthy*, L. R. 5 Q. B. 163; *Tebb v. Jones*, 37 L. T. N. S. 576), then the argument made by the supreme court of Massachusetts as to the insignificance of the fine of \$5 is fallacious and unjust.

Compulsion to introduce disease into a healthy system is a violation of liberty.

Slaughter House Cases, 16 Wall. 36, 21 L. ed. 394.

In *Miller v. Horton*, 152 Mass. 546, 10 L. R. A. 116, 23 Am. St. Rep. 850, 26 N. E. 100, it was decided, under a law providing for the killing of infected animals, that a public officer would be liable in damages if an animal killed was not in point of fact infected with the disease. If the owner of an animal is entitled thus to recover for loss of property, shall he be held to be without remedy where his own health is injured by the state?

The vaccination law is not within any cognizable principle of criminal law.

1 Bishop, Crim. Law, §§ 204, 230, 490; *Com. v. Thompson*, 6 Mass. 134.

This attack upon the person of the citizen is no more to be justified by a mere legislative act than would be acts of attainder, bills of pains and penalties, and acts of confiscation, which would not be cognizable or constitutional in the United States.

Dartmouth College v. Woodward, 4 Wheat. 518, 581, 4 L. ed. 629, 645.

The exemptions in the Massachusetts act are unconstitutional.

West v. Louisiana, 194 U. S. 258, 262, 48 L. ed. 965, 969, 24 Sup. Ct. Rep. 650; *Missouri, K. & T. R. Co. v. May*, 194 U. S. 267, 48 L. ed. 971, 24 Sup. Ct. Rep. 638; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255.

The board of health is intrusted with arbitrary powers.

Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663.

The Massachusetts law has not the justification of necessity.

Miller v. Horton, 152 Mass. 546, 10 L. R. A. 116, 23 Am. St. Rep. 850, 26 N. E. 100; *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 47 L. ed. 90, 23 Sup. Ct. Rep. 33.

Mr. Frederick H. Nash argued the cause, and, with **Mr. Herbert Parker**, filed a brief for defendant in error:

It is no argument that the conviction was repugnant to the spirit or to the preamble of the Constitution. An act of the legislature of a state, and regular proceedings under it, are to be overthrown only by virtue

of some specific prohibition in the paramount law.

Forsythe v. Hammond, 68 Fed. 774; *Walker v. Cincinnati*, 21 Ohio St. 14, 8 Am. Rep. 24; *State v. Staten*, 6 Coldw. 233; *State v. Gerhardt*, 145 Ind. 439, 450, 33 L. R. A. 313, 44 N. E. 469; *State ex rel. Heron v. Smith*, 44 Ohio St. 348, 7 N. E. 447, 12 N. E. 829; *People v. Fisher*, 24 Wend. 214; *Redell v. Moores*, 63 Neb. 219, 55 L. R. A. 740, 93 Am. St. Rep. 431, 88 N. W. 243; *State ex rel. Atty. Gen. v. Moores*, 55 Neb. 480, 41 L. R. A. 624, 76 N. W. 175.

The 5th Amendment does not apply to an action by a state.

Barron v. Baltimore, 7 Pet. 243, 247, 8 L. ed. 672, 674; *Eilenbecker v. Plymouth County Dist. Court*, 134 U. S. 31, 33 L. ed. 801, 10 Sup. Ct. Rep. 424; *McElwaine v. Brush*, 142 U. S. 155, 158, 35 L. ed. 971, 973, 12 Sup. Ct. Rep. 156; *Brown v. New Jersey*, 175 U. S. 172, 44 L. ed. 119, 20 Sup. Ct. Rep. 77; *Capital City Dairy Co. v. Ohio*, 183 U. S. 238, 46 L. ed. 171, 22 Sup. Ct. Rep. 120; *Ohio ex rel. Lloyd v. Dollison*, 194 U. S. 445, 48 L. ed. 1062, 24 Sup. Ct. Rep. 703; *Slaughter House Cases*, 16 Wall. 36, 21 L. ed. 394; *Maxwell v. Dow*, 176 U. S. 581, 44 L. ed. 597, 20 Sup. Ct. Rep. 448, 494.

In its unquestioned power to preserve and protect the public health, it is for the legislature of each state to determine whether vaccination is effective in preventing the spread of smallpox or not, and, deciding in the affirmative, to require doubting individuals to yield for the welfare of the community.

Re Smith, 146 N. Y. 68, 28 L. R. A. 820, 48 Am. St. Rep. 769, 40 N. E. 497.

No one will dispute the right of the legislature to enact such measures as will protect all persons from the impending calamity of a pestilence, and to vest in local authorities such comprehensive powers as will enable them to act effectively.

Powell v. Pennsylvania, 127 U. S. 678, 683, 3 L. ed. 253, 256, 8 Sup. Ct. Rep. 992, 1257.

There can be no doubt that the statute in the present case was enacted as a health measure, and has a real and substantial relation to that object. It cannot be seriously contended that this statute has some ulterior object which it seeks to conceal under a pretended desire to promote the public health.

Compare, by contrast, the statute forbidding the manufacture of cigars in tenement houses (*Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636); the statute forbidding people to give away articles in connection with a sale of food (*People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343); and the statute forbidding bakers' employees to work

more than ten hours a day (*People v. Lochner*, 177 N. Y. 145, 101 Am. St. Rep. 773, 69 N. E. 373, dissenting opinion).

Only in such cases of legislative dissimulation is it held that a law, apparently looking to the protection of the public health and working without undue classification, is a violation of the 14th Amendment.

Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Sentell v. New Orleans & C. R. Co.* 166 U. S. 698, 704, 705, 41 L. ed. 1169, 1171, 1172, 17 Sup. Ct. Rep. 693; *Hawker v. New York*, 170 U. S. 189, 192, 42 L. ed. 1002, 1004, 18 Sup. Ct. Rep. 573; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383.

In *Lawton v. Steele*, 152 U. S. 133, 136, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499, it is said, by way of illustration, that compulsory vaccination is a proper exercise of the police power.

It has been directly so held in *Morris v. Columbus*, 102 Ga. 792, 42 L. R. A. 175, 66 Am. St. Rep. 243, 30 S. E. 850, and *State v. Hay*, 126 N. C. 999, 49 L. R. A. 588, 78 Am. St. Rep. 691, 35 S. E. 459.

The courts may not listen to conflicting expert testimony as to the efficacy or hurtfulness of vaccination in general. The legislature is the only body which has power to determine whether the anti-vaccinationists, or the majority of the medical profession, are in the right.

See *Powell v. Pennsylvania*, 127 U. S. 678, 3 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257.

That the legislature has large discretion to determine what personal sacrifice the public health, morals, and safety require from individuals is elementary.

Booth v. Illinois, 184 U. S. 425, 46 L. ed. 623, 22 Sup. Ct. Rep. 425; *Austin v. Tennessee*, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132; *Lawton v. Steele*, 152 U. S. 133, 136, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 486; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. ed. 1036.

The advantage of uniform and general laws is best attained by vesting discretionary power in local administrative bodies.

Wilson v. Eureka City, 173 U. S. 32, 43 L. ed. 603, 19 Sup. Ct. Rep. 317. See *Health Department v. Trinity Church*, 145 N. Y. 32, 27 L. R. A. 710, 45 Am. St. Rep. 579, 39 N. E. 833.

It is wise legislation which leaves the necessity for general vaccination and the decision as to the time for vaccination of each individual to the local boards of health. If they act in an arbitrary manner, depriving any individual of a right protected by the 14th Amendment, their action in such individual case is void. Thus the law in

general stands, but particular cases of oppression may be prevented.

Compare *Yiek Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064, and *Jew Ho v. Williamson*, 103 Fed. 10, with *Williams v. Mississippi*, 170 U. S. 213, 42 L. ed. 1012, 18 Sup. Ct. Rep. 583. See *Ex parte Virginia*, 100 U. S. 339, 25 L. ed. 676; *Carter v. Texas*, 177 U. S. 442, 44 L. ed. 839, 20 Sup. Ct. Rep. 687; *Tarrance v. Florida*, 188 U. S. 519, 47 L. ed. 572, 23 Sup. Ct. Rep. 402.

All the cases holding orders requiring vaccination to be invalid are decided on the ground that the orders were broader than the authority given by statute.

Mathews v. Kalamazoo Bd. of Edu. 127 Mich. 530, 54 L. R. A. 736, 86 N. W. 1036; *Potts v. Breen*, 167 Ill. 67, 39 L. R. A. 152, 59 Am. St. Rep. 262, 47 N. E. 81; *State ex rel. Adams v. Burdge*, 95 Wis. 390, 37 L. R. A. 157, 60 Am. St. Rep. 123, 70 N. W. 347; *Lawbaugh v. District No. 2 Bd. of Edu.* 177 Ill. 572, 52 N. E. 850; *Re Smith*, 146 N. Y. 68, 28 L. R. A. 820, 48 Am. St. Rep. 769, 40 N. E. 497. See also *Wong Wai v. Williamson*, 103 Fed. 1.

Compare similar quarantine regulations held to be unauthorized because broader than any statutory basis for them.

Wilson v. Alabama G. S. R. Co. 77 Miss. 714, 52 L. R. A. 357, 78 Am. St. Rep. 543, 28 So. 567; *Hurst v. Warner*, 102 Mich. 238, 26 L. R. A. 484, 47 Am. St. Rep. 525, 60 N. W. 440.

Even without express statutory authority, if smallpox is prevalent it is held that a board of health may require vaccination as a condition of attending school.

Duffield v. Williamsport School District, 162 Pa. 476, 25 L. R. A. 152, 29 Atl. 742; *Field v. Robinson*, 198 Pa. 638, 48 Atl. 873; *State ex rel. Cox v. Board of Edu.* 21 Utah, 401, 60 Pac. 1013.

All such orders passed, as in the present case, in the exercise of special authority from the legislature, have been sustained by the state courts wherever their validity has been questioned.

Blue v. Beach, 155 Ind. 121, 50 L. R. A. 64, 80 Am. St. Rep. 195, 56 N. E. 89; *Bissell v. Davison*, 65 Conn. 183, 29 L. R. A. 251, 32 Atl. 348; *Morris v. Columbus*, 102 Ga. 792, 42 L. R. A. 175, 66 Am. St. Rep. 243, 30 S. E. 850; *State v. Hay*, 126 N. C. 999, 49 L. R. A. 588, 78 Am. St. Rep. 691, 35 S. E. 459. See also *Abeel v. Clark*, 84 Cal. 226, 24 Pac. 383; *State ex rel. Horne v. Beil*, 157 Ind. 25, 60 N. E. 672; *State ex rel. Freeman v. Zimmerman*, 86 Minn. 353, 58 L. R. A. 78, 91 Am. St. Rep. 351, 90 N. W. 783; *Re Walters*, 84 Hun, 457, 32 N. Y. Supp. 322.

It is conceded that arbitrary action by the

board of health "with evil mind" might result in a denial of due process of law. If they picked out one class of persons arbitrarily for immediate vaccination, while indefinitely postponing action toward all others; or if they abused their discretion as to time and manner of proceeding by requiring everybody to be vaccinated at a certain time, without regard to the state or his health,—their action might be in violation of the 14th Amendment.

Yick Wo v. Hopkins, 118 U. S. 356, 373, 30 L. ed. 220, 227, 6 Sup. Ct. Rep. 1064; *Wong Wai v. Williamson*, 103 Fed. 1; *Jew Ho v. Williamson*, 103 Fed. 10; *Williams v. Mississippi*, 170 U. S. 213, 42 L. ed. 1012, 18 Sup. Ct. Rep. 583.

But there is no suggestion of arbitrary conduct. It is not even hinted that, in the exercise of their discretion, they failed to make proper discrimination as to temporary conditions. If there were special reasons why the plaintiff in error could not be vaccinated at the time required by the board of health, he should have made them a ground of his refusal, and, if the board neglected to consider them, a defense to his prosecution.

State v. Hay, 126 N. C. 999, 49 L. R. A. 588, 78 Am. St. Rep. 691, 35 S. E. 459; *State, Pennsylvania R. Co., Prosecutor, v. Jersey City*, 47 N. J. L. 286.

The statute did not require the vaccination and revaccination of all the inhabitants, without discrimination, but left the matter to the discretion of the local authorities. This was an unobjectionable method of legislation.

Marshall Field & Co. v. Clark, 143 U. S. 649, 693, 694, 36 L. ed. 294, 310, 12 Sup. Ct. Rep. 495.

Mr. Justice **Harlan** delivered the opinion of the court:

This case involves the validity, under the Constitution of the United States, of certain provisions in the statutes of Massachusetts relating to vaccination.

The Revised Laws of that commonwealth, chap. 75, § 137, provide that "the board of health of a city or town, if, in its opinion, it is necessary for the public health or safety, shall require and enforce the vaccination and revaccination of all the inhabitants thereof, and shall provide them with the means of free vaccination. Whoever, being over twenty-one years of age and not under guardianship, refuses or neglects to comply with such requirement shall forfeit \$5."

An exception is made in favor of "children who present a certificate, signed by a registered physician, that they are unfit subjects for vaccination." § 139.

Proceeding under the above statutes, the

board of health of the city of Cambridge, Massachusetts, on the 27th day of February, 1902, adopted the following regulation: "Whereas, smallpox has been prevalent to some extent in the city of Cambridge, and still continues to increase; and whereas, it is necessary for the speedy extermination of the disease that all persons not protected by vaccination should be vaccinated; and whereas, in the opinion of the board, the public health and safety require the vaccination or revaccination of *all the inhabitants[13] of Cambridge; be it ordered, that all the inhabitants of the city who have not been successfully vaccinated since March 1st, 1897, be vaccinated or revaccinated."

Subsequently, the board adopted an additional regulation empowering a named physician to enforce the vaccination of persons as directed by the board at its special meeting of February 27th.

The above regulations being in force, the plaintiff in error, Jacobson, was proceeded against by a criminal complaint in one of the inferior courts of Massachusetts. The complaint charged that on the 17th day of July, 1902, the board of health of Cambridge, being of the opinion that it was necessary for the public health and safety, required the vaccination and revaccination of all the inhabitants thereof who had not been successfully vaccinated since the 1st day of March, 1897, and provided them with the means of free vaccination; and that the defendant, being over twenty-one years of age and not under guardianship, refused and neglected to comply with such requirement.

The defendant, having been arraigned, pleaded not guilty. The government put in evidence the above regulations adopted by the board of health, and made proof tending to show that its chairman informed the defendant that, by refusing to be vaccinated, he would incur the penalty provided by the statute, and would be prosecuted therefor; that he offered to vaccinate the defendant without expense to him; and that the offer was declined, and defendant refused to be vaccinated.

The prosecution having introduced no other evidence, the defendant made numerous offers of proof. But the trial court ruled that each and all of the facts offered to be proved by the defendant were immaterial, and excluded all proof of them.

The defendant, standing upon his offers of proof, and introducing no evidence, asked numerous instructions to the jury, among which were the following:

That § 137 of chapter 75 of the Revised Laws of Massachusetts was in derogation of the rights secured to the defendant by the preamble to the Constitution of the United

*States, and tended to subvert and defeat[14]

the purposes of the Constitution as declared in its preamble;

That the section referred to was in derogation of the rights secured to the defendant by the 14th Amendment of the Constitution of the United States, and especially of the clauses of that amendment providing that no state shall make or enforce any law abridging the privileges or immunities of citizens of the United States, nor deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws; and

That said section was opposed to the spirit of the Constitution.

Each of defendant's prayers for instructions was rejected, and he duly excepted. The defendant requested the court, but the court refused, to instruct the jury to return a verdict of not guilty. And the court instructed the jury, in substance, that, if they believed the evidence introduced by the commonwealth, and were satisfied beyond a reasonable doubt that the defendant was guilty of the offense charged in the complaint, they would be warranted in finding a verdict of guilty. A verdict of guilty was thereupon returned.

The case was then continued for the opinion of the supreme judicial court of Massachusetts. That court overruled all the defendant's exceptions, sustained the action of the trial court, and thereafter, pursuant to the verdict of the jury, he was sentenced by the court to pay a fine of \$5. And the court ordered that he stand committed until the fine was paid.

We pass without extended discussion the suggestion that the particular section of the statute of Massachusetts now in question (§ 137, chap. 75) is in derogation of rights secured by the preamble of the Constitution of the United States. Although that preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the government of the United States, or on any of its departments. Such powers embrace only those expressly granted in the body of the Constitution, and such as may be implied from those so granted. Although, therefore, one of the declared objects of the Constitution was to secure the blessings of liberty to all under the sovereign jurisdiction and authority of the United States, no power can be exerted to that end by the United States, unless, apart from the preamble, it be found in some express delegation of power, or in some power to be properly implied therefrom. 1 Story, Const. § 462.

We also pass without discussion the sug-

gestion that the above section of the statute is opposed to the spirit of the Constitution. Undoubtedly, as observed by Chief Justice Marshall, speaking for the court in *Sturges v. Crowninshield*, 4 Wheat. 122, 202, 4 L. ed. 529, 550, "the spirit of an instrument, especially of a constitution, is to be respected not less than its letter; yet the spirit is to be collected chiefly from its words." We have no need in this case to go beyond the plain, obvious meaning of the words in those provisions of the Constitution which, it is contended, must control our decision.

What, according to the judgment of the state court, are the "scope and effect of the statute? What results were intended to be accomplished by it? These questions must be answered.

The supreme judicial court of Massachusetts said in the present case: "Let us consider the offer of evidence which was made by the defendant Jacobson. The ninth of the propositions which he offered to prove, as to what vaccination consists of, is nothing more than a fact of common knowledge, upon which the statute is founded, and proof of it was unnecessary and immaterial. The thirteenth and fourteenth involved matters depending upon his personal opinion, which could not be taken as correct, or given effect, merely because he made it a ground of refusal to comply with the requirement. Moreover, his views could not affect the validity of the statute, nor entitle him to be excepted from its provisions. *Com. v. Connolly*, 163 Mass. 539, 40 N. E. 862; *Com. v. Has*, 122 Mass. 40; *Reynolds v. United States*, 98 U. S. 145, 25 L. ed. 244; *Reg. v. Downes*, 13 Cox, C. C. 111. The other eleven propositions all relate to alleged injurious or dangerous effects of vaccination. The defendant 'offered to prove and show by competent evidence' these so-called facts. Each of them, in its nature, is such that it cannot be stated as a truth, otherwise than as a matter of opinion. The only 'competent evidence' that could be presented to the court to prove these propositions was the testimony of experts, giving their opinions. It would not have been competent to introduce the medical history of individual cases. Assuming that medical experts could have been found who would have testified in support of these propositions, and that it had become the duty of the judge, in accordance with the law as stated in *Com. v. Anthes*, 5 Gray, 185, to instruct the jury as to whether or not the statute is constitutional, he would have been obliged to consider the evidence in connection with facts of common knowledge, which the court will always regard in passing upon the constitutionality of a statute. He would have

considered this testimony of experts in connection with the facts that for nearly a century most of the members of the medical [24]profession *have regarded vaccination, repeated after intervals, as a preventive of smallpox; that, while they have recognized the possibility of injury to an individual from carelessness in the performance of it, or even in a conceivable case without carelessness, they generally have considered the risk of such an injury too small to be seriously weighed as against the benefits coming from the discreet and proper use of the preventive; and that not only the medical profession and the people generally have for a long time entertained these opinions, but legislatures and courts have acted upon them with general unanimity. If the defendant had been permitted to introduce such expert testimony as he had in support of these several propositions, it could not have changed the result. It would not have justified the court in holding that the legislature had transcended its power in enacting this statute on their judgment of what the welfare of the people demands." *Com. v. Jacobson*, 183 Mass. 242, 66 N. E. 719.

While the mere rejection of defendant's offers of proof does not strictly present a Federal question, we may properly regard the exclusion of evidence upon the ground of its incompetency or immateriality under the statute as showing what, in the opinion of the state court, are the scope and meaning of the statute. Taking the above observations of the state court as indicating the scope of the statute,—and such is our duty (*Leffingwell v. Warren*, 2 Black, 599, 603, 17 L. ed. 261, 262; *Morley v. Lake Shore & M. S. R. Co.* 146 U. S. 162, 167, 36 L. ed. 925, 928, 13 Sup. Ct. Rep. 54; *Tullis v. Lake Erie & W. R. Co.* 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; *W. W. Cargill Co. v. Minnesota*, 180 U. S. 452, 466, 45 L. ed. 619, 625, 21 Sup. Ct. Rep. 423),—we assume, for the purposes of the present inquiry, that its provisions require, at least as a general rule, that adults not under guardianship and remaining within the limits of the city of Cambridge must submit to the regulation adopted by the board of health. Is the statute, so construed, therefore, inconsistent with the liberty which the Constitution of the United States secures to every person against deprivation by the state?

The authority of the state to enact this [25]statute is to be *referred to what is commonly called the police power,—a power which the state did not surrender when becoming a member of the Union under the Constitution. Although this court has refrained from any attempt to define the limits of that power, yet it has distinctly recognized the authority of a state to enact quar-

antine laws and "health laws of every description;" indeed, all laws that relate to matters completely within its territory and which do not by their necessary operation affect the people of other states. According to settled principles, the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety. *Gibbons v. Ogden*, 9 Wheat. 1, 203, 6 L. ed. 23, 71; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 470, 24 L. ed. 527, 530; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 661, 29 L. ed. 516, 520, 6 Sup. Ct. Rep. 252; *Lawson v. Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499. It is equally true that the state may invest local bodies called into existence for purposes of local administration with authority in some appropriate way to safeguard the public health and the public safety. The mode or manner in which those results are to be accomplished is within the discretion of the state, subject, of course, so far as Federal power is concerned, only to the condition that no rule prescribed by a state, nor any regulation adopted by a local governmental agency acting under the sanction of state legislation, shall contravene the Constitution of the United States, nor infringe any right granted or secured by that instrument. A local enactment or regulation, even if based on the acknowledged police powers of a state, must always yield in case of conflict with the exercise by the general government of any power it possesses under the Constitution, or with any right which that instrument gives or secures. *Gibbons v. Ogden*, 9 Wheat. 1, 210, 6 L. ed. 23, 73; *Sinnot v. Davenport*, 22 How. 227, 243, 16 L. ed. 243, 247; *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 626, 42 L. ed. 878, 882, 18 Sup. Ct. Rep. 488.

We come, then, to inquire whether any right given or secured by the Constitution is invaded by the statute as interpreted *by [26] the state court. The defendant insists that his liberty is invaded when the state subjects him to fine or imprisonment for neglecting or refusing to submit to vaccination; that a compulsory vaccination law is unreasonable, arbitrary, and oppressive, and, therefore, hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best; and that the execution of such a law against one who objects to vaccination, no matter for what reason, is nothing short of an assault upon his person. But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in

each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others. This court has more than once recognized it as a fundamental principle that "persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state; of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles ever can be, made, so far as natural persons are concerned." *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 471, 24 L. ed. 527, 530; *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 628, 629, 42 L. ed. 878-883, 18 Sup. Ct. Rep. 488; *Thorpe v. Rutland & B. R. Co.* 27 Vt. 148, 62 Am. Dec. 625. In *Crowley v. Christensen*, 137 U. S. 86, 89, 34 L. ed. 620, 621, 11 Sup. Ct. Rep. 13, we said: "The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community. Even [27] liberty *itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is, then, liberty regulated by law." In the Constitution of Massachusetts adopted in 1780 it was laid down as a fundamental principle of the social compact that the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for "the common good," and that government is instituted "for the common good, for the protection, safety, prosperity, and happiness of the people, and not for the profit, honor, or private interests of any one man, family, or class of men." The good and welfare of the commonwealth, of which the legislature is primarily the judge, is the basis on which the police power rests in Massachusetts. *Com. v. Alger*, 7 Cush. 84.

Applying these principles to the present case, it is to be observed that the legislature of Massachusetts required the inhabitants of a city or town to be vaccinated only when, in the opinion of the board of health, that was necessary for the public health or the public safety. The authority to determine for all what ought to be done in such an emergency must have been lodged somewhere or in some body; and surely it was appropriate for the legislature to refer that question, in the first instance, to a board of health composed of persons residing in the locality affected, and appointed, presumably, because of their fitness to determine such questions. To invest such a body with authority over such matters was not an unusual, nor an unreasonable or arbitrary, requirement. Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members. It is to be observed that when the regulation in question was adopted smallpox, according to the recitals in the regulation adopted by the board of health, was prevalent to some extent in the city of Cambridge, and the disease was increasing. If such was *the situation,—and [28] nothing is asserted or appears in the record to the contrary,—if we are to attach any value whatever to the knowledge which, it is safe to affirm, is common to all civilized peoples touching smallpox and the methods most usually employed to eradicate that disease, it cannot be adjudged that the present regulation of the board of health was not necessary in order to protect the public health and secure the public safety. Smallpox being prevalent and increasing at Cambridge, the court would usurp the functions of another branch of government if it adjudged, as matter of law, that the mode adopted under the sanction of the state to protect the people at large was arbitrary, and not justified by the necessities of the case. We say necessities of the case, because it might be that an acknowledged power of a local community to protect itself against an epidemic threatening the safety of all might be exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons. *Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 301, 45 L. ed. 194, 201, 21 Sup. Ct. Rep. 115; 1 Dill. Mun. Corp. 4th ed. §§ 319-325, and authorities in notes; *Freurid, Police Power*, §§ 63 *et seq.* In *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 471-473, 24 L. ed. 527, 530, 531, this court recognized the right of a state to pass sanitary laws, laws for the protection of life, liberty, health, or property within its limits, laws to prevent persons and animals suffering under contagious or infectious dis-

eases, or convicts, from coming within its borders. But, as the laws there involved went beyond the necessity of the case, and, under the guise of exerting a police power, invaded the domain of Federal authority, and violated rights secured by the Constitution, this court deemed it to be its duty to hold such laws invalid. If the mode adopted by the commonwealth of Massachusetts for the protection of its local communities against smallpox proved to be distressing, inconvenient, or objectionable to some,—if

[29] nothing more could be reasonably *affirmed of the statute in question,—the answer is that it was the duty of the constituted authorities primarily to keep in view the welfare, comfort, and safety of the many, and not permit the interests of the many to be subordinated to the wishes or convenience of the few. There is, of course, a sphere within which the individual may assert the supremacy of his own will, and rightfully dispute the authority of any human government,—especially of any free government existing under a written constitution,—to interfere with the exercise of that will. But it is equally true that in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand. An American citizen arriving at an American port on a vessel in which, during the voyage, there had been cases of yellow fever or Asiatic cholera, he, although apparently free from disease himself, may yet, in some circumstances, be held in quarantine against his will on board of such vessel or in a quarantine station, until it be ascertained by inspection, conducted with due diligence, that the danger of the spread of the disease among the community at large has disappeared. The liberty secured by the 14th Amendment, this court has said, consists, in part, in the right of a person “to live and work where he will” (*Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427); and yet he may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country, and risk the chance of being shot down in its defense. It is not, therefore, true that the power of the public to guard itself against imminent danger depends in every case involving the control of one’s body upon his willingness to submit to reasonable regulations established by the constituted authorities, under

[30] the *sanction of the state, for the purpose of
197 U. S.

protecting the public collectively against such danger.

It is said, however, that the statute, as interpreted by the state court, although making an exception in favor of children certified by a registered physician to be unfit subjects for vaccination, makes no exception in case of adults in like condition. But this cannot be deemed a denial of the equal protection of the laws to adults; for the statute is applicable equally to all in like condition, and there are obviously reasons why regulations may be appropriate for adults which could not be safely applied to persons of tender years.

Looking at the propositions embodied in the defendant’s rejected offers of proof, it is clear that they are more formidable by their number than by their inherent value. Those offers in the main seem to have had no purpose except to state the general theory of those of the medical profession who attach little or no value to vaccination as a means of preventing the spread of smallpox, or who think that vaccination causes other diseases of the body. What everybody knows the court must know, and therefore the state court judicially knew, as this court knows, that an opposite theory accords with the common belief, and is maintained by high medical authority. We must assume that, when the statute in question was passed, the legislature of Massachusetts was not unaware of these opposing theories, and was compelled, of necessity, to choose between them. It was not compelled to commit a matter involving the public health and safety to the final decision of a court or jury. It is no part of the function of a court or a jury to determine which one of two modes was likely to be the most effective for the protection of the public against disease. That was for the legislative department to determine in the light of all the information it had or could obtain. It could not properly abdicate its function to guard the public health and safety. The state legislature proceeded upon the theory which recognized vaccination as at least an effective, if not the best-known, way in which to meet and suppress the *evils of a smallpox epi- [31]demic that imperiled an entire population. Upon what sound principles as to the relations existing between the different departments of government can the court review this action of the legislature? If there is any such power in the judiciary to review legislative action in respect of a matter affecting the general welfare, it can only be when that which the legislature has done comes within the rule that, if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation

to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution. *Mugler v. Kansas*, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; *Minnesota v. Barber*, 136 U. S. 313, 320, 34 L. ed. 455, 458, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Atkin v. Kansas*, 191 U. S. 207, 223, 48 L. ed. 148, 158, 24 Sup. Ct. Rep. 124.

Whatever may be thought of the expediency of this statute, it cannot be affirmed to be, beyond question, in palpable conflict with the Constitution. Nor, in view of the methods employed to stamp out the disease of smallpox, can anyone confidently assert that the means prescribed by the state to that end has no real or substantial relation to the protection of the public health and the public safety. Such an assertion would not be consistent with the experience of this and other countries whose authorities have dealt with the disease of smallpox.† And the principle of vaccination [32] as a means to *prevent the spread of smallpox has been enforced in many states by statutes making the vaccination of children a condition of their right to enter or remain

in public schools. *Blue v. Beach*, 155 Ind. 121, 50 L. R. A. 64, 80 Am. St. Rep. 195, 56 N. E. 89; *Morris v. Columbus*, 102 *Ga. 792, [33] 42 L. R. A. 175, 66 Am. St. Rep. 243, 30 S. E. 850; *State v. Hay*, 126 N. C. 999, 49 L. R. A. 588, 78 Am. St. Rep. 691, 35 S. E. 459; *Abeel v. Clark*, 84 Cal. 226, 24 Pac. 383; *Bissell v. Davison*, 65 Conn. 183, 29 L. R. A. 251, 32 Atl. 348; *Hazen v. Strong*, 2 Vt. 427; *Duffield v. Williamsport School District*, 162 Pa. 476, 25 L. R. A. 152, 29 Atl. 742.

*The latest case upon the subject of which [34] we are aware is *Viemester v. White*, decided very recently by the court of appeals of New York. That case involved the validity of a statute excluding from the public schools all children who had not been vaccinated. One contention was that the statute and the regulation adopted in exercise of its provisions was inconsistent with the rights, privileges, and liberties of the citizen. The contention was overruled, the court saying, among other things: "Smallpox is known of all to be a dangerous and contagious disease. If vaccination strongly tends to prevent the transmission or spread of this disease, it logically follows that children may be refused admission to the

†"State-supported facilities for vaccination began in England in 1808 with the National Vaccine Establishment. In 1840 vaccination fees were made payable out of the rates. The first compulsory act was passed in 1853, the guardians of the poor being intrusted with the carrying out of the law; in 1854 the public vaccinations under one year of age were 408,824 as against an average of 180,960 for several years before. In 1867 a new act was passed, rather to remove some technical difficulties than to enlarge the scope of the former act; and in 1871 the act was passed which compelled the boards of guardians to appoint vaccination officers. The guardians also appoint a public vaccinator, who must be duly qualified to practise medicine, and whose duty it is to vaccinate (for a fee of one shilling and sixpence) any child resident within his district brought to him for that purpose, to examine the same a week after, to give a certificate, and to certify to the vaccination officer the fact of vaccination or of insusceptibility. . . . Vaccination was made compulsory in Bavaria in 1807, and subsequently in the following countries: Denmark (1810), Sweden (1814), Württemberg, Hesse, and other German states (1818), Prussia (1835), Roumania (1874), Hungary (1876), and Servia (1881). It is compulsory by cantonal law in 10 out of the 22 Swiss cantons; an attempt to pass a Federal compulsory law was defeated by a plebiscite in 1881. In the following countries there is no compulsory law, but governmental facilities and compulsion on various classes more or less directly under governmental control, such as soldiers, state employees, apprentices, school pupils, etc.: France, Italy, Spain, Portugal, Belgium, Norway, Austria, Turkey. . . . Vaccination has been compulsory in South Australia since 1872, in Victoria since 1874, and in Western Australia since 1878.

652

In Tasmania a compulsory act was passed in 1882. In New South Wales there is no compulsion, but free facilities for vaccination. Compulsion was adopted at Calcutta in 1880, and since then at 80 other towns of Bengal, at Madras in 1884, and at Bombay and elsewhere in the presidency a few years earlier. Revaccination was made compulsory in Denmark in 1871, and in Roumania in 1874; in Holland it was enacted for all school pupils in 1872. The various laws and administrative orders which had been for many years in force as to vaccination and revaccination in the several German states were consolidated in an imperial statute of 1874." 24 Encyclopædia Britannica (1894), *Vaccination*.

"In 1857 the British Parliament received answers from 552 physicians to questions which were asked them in reference to the utility of vaccination, and only two of these spoke against it. Nothing proves this utility more clearly than the statistics obtained. Especially instructive are those which Flinzer compiled respecting the epidemic in Chemnitz which prevailed in 1870-71. At this time in the town there were 64,255 inhabitants, of whom 53,891, or 83.87 per cent, were vaccinated, 5,712, or 8.89 per cent were unvaccinated, and 4,652, or 7.24 per cent, had had the smallpox before. Of those vaccinated 953, or 1.77 per cent, became affected with smallpox, and of the unvaccinated 2,643, or 46.3 per cent, had the disease. In the vaccinated the mortality from the disease was 0.73 per cent, and in the unprotected it was 9.16 per cent. In general, the danger of infection is six times as great, and the mortality 68 times as great, in the unvaccinated as in the vaccinated. Statistics derived from the civil population are in general not so instructive as those derived from armies, where vaccination is usually more carefully performed,

197 U. S.

public schools until they have been vaccinated. The appellant claims that vaccination does not tend to prevent smallpox, but tends to bring about other diseases, and that it does much harm, with no good. It must be conceded that some laymen, both learned and unlearned, and some physicians of great skill and repute, do not believe that vaccination is a preventive of smallpox. The common belief, however, is that it has a decided tendency to prevent the spread of this fearful disease, and to render it less dangerous to those who contract it. While not accepted by all, it is accepted by the mass of the people, as well as by most members of the medical profession. It has been general in our state, and in most civilized [35] nations for generations. It is generally accepted in theory, and generally applied in practice, both by the voluntary action of the people, and in obedience to the command of law. Nearly every state in the Union has statutes to encourage, or directly or indirectly to require, vaccination; and this is true of most nations of Europe. . . . A common belief, like common knowledge, does not require evidence to establish its existence, but may be acted upon without proof by the legislature and the courts. . . .

and where statistics can be more accurately collected. During the Franco-German war (1870-71) there was in France a widespread epidemic of smallpox, but the German army lost during the campaign only 450 cases, or 58 men to the 100,000; in the French army, however, where vaccination was not carefully carried out, the number of deaths from smallpox was 23,400." 8 Johnson's Universal Cyclopædia (1897), *Vaccination*.

"The degree of protection afforded by vaccination thus became a question of great interest. Its extreme value was easily demonstrated by statistical researches. In England, in the last half of the eighteenth century, out of every 1,000 deaths, 96 occurred from smallpox; in the first half of the present century, out of every 1,000 deaths, but 35 were caused by that disease. The amount of mortality in a country by smallpox seems to bear a fixed relation to the extent to which vaccination is carried out. In all England and Wales, for some years previous to 1853, the proportional mortality by smallpox was 21.9 to 1,000 deaths from all causes; in London it was but 16 to 1,000; in Ireland, where vaccination was much less general, it was 49 to 1,000, while in Connaught it was 60 to 1,000. On the other hand, in a number of European countries where vaccination was more or less compulsory, the proportionate number of deaths from smallpox about the same time varied from 2 per 1,000 of all causes in Bohemia, Lombardy, Venice, and Sweden, to 8.33 per 1,000 in Saxony. Although in many instances persons who had been vaccinated were attacked with smallpox in a more or less modified form, it was noticed that the persons so attacked had been commonly vaccinated many years previously." 16 American Cyclopædia, *Vaccination* (1883).

"Dr. Buchanan, the medical officer of the Lon-

The fact that the belief is not universal is not controlling, for there is scarcely any belief that is accepted by everyone. The possibility that the belief may be wrong, and that science may yet show it to be wrong, is not conclusive; for the legislature has the right to pass laws which, according to the common belief of the people, are adapted to prevent the spread of contagious diseases. In a free country, where the government is by the people, through their chosen representatives, practical legislation admits of no other standard of action, for what the people believe is for the common welfare must be accepted as tending to promote the common welfare, whether it does in fact or not. Any other basis would conflict with the spirit of the Constitution, and would sanction measures opposed to a Republican form of government. While we do not decide, and cannot decide, that vaccination is a preventive of smallpox, we take judicial notice of the fact that this is the common belief of the people of the state, and, with this fact as a foundation, we hold that the statute in question is a health law, enacted in a reasonable and proper exercise of the police power." 179 N. Y. 235, 72 N. E. 97. Since, then, vaccination, as a means of

don Government Board, reported [1881] as the result of statistics that the smallpox death rate among adult persons vaccinated was 90 to a million; whereas among those unvaccinated it was 3,350 to a million; whereas among vaccinated children under five years of age, 42½ per million; whereas among unvaccinated children of the same age it was 5,950 per million." Hardway, *Essentials of Vaccination* (1882). The same author reports that, among other conclusions reached by the Académie de Médecine of France, was one that, "without vaccination, hygienic measures (isolation, disinfection, etc.) are of themselves insufficient for preservation from smallpox." *Ibid*.

The Belgian Academy of Medicine appointed a committee to make an exhaustive examination of the whole subject, and among the conclusions reported by them were: 1. "Without vaccination, hygienic measures and means, whether public or private, are powerless in preserving mankind from smallpox. . . . 3. Vaccination is always an inoffensive operation when practised with proper care on healthy subjects. . . . 4. It is highly desirable, in the interests of the health and lives of our countrymen, that vaccination should be rendered compulsory." Edwards, *Vaccination* (1882.)

The English Royal Commission, appointed with Lord Herschell, the Lord Chancellor of England, at its head, to inquire, among other things, as to the effect of vaccination in reducing the prevalence of, and mortality from, smallpox, reported, after several years of investigation: "We think that it diminishes the liability to be attacked by the disease; that it modifies the character of the disease and renders it less fatal,—of a milder and less severe type; that the protection it affords against attacks of the disease is greatest during the years immediately succeeding the operation of vaccination."

protecting a community against smallpox, finds strong support in the experience of this and other countries, no court, much less a jury, is justified in disregarding the action of the legislature simply because in its or their opinion that particular method was—perhaps, or possibly—not the best either for children or adults.

[36] Did the offers of proof made by the defendant present a case which entitled him, while remaining in Cambridge, to *claim exemption from the operation of the statute and of the regulation adopted by the board of health? We have already said that his rejected offers, in the main, only set forth the theory of those who had no faith in vaccination as a means of preventing the spread of smallpox, or who thought that vaccination, without benefiting the public, put in peril the health of the person vaccinated. But there were some offers which it is contended embodied distinct facts that might properly have been considered. Let us see how this is.

The defendant offered to prove that vaccination “quite often” caused serious and permanent injury to the health of the person vaccinated; that the operation “occasionally” resulted in death; that it was “impossible” to tell “in any particular case” what the results of vaccination would be, or whether it would injure the health or result in death; that “quite often” one’s blood is in a certain condition of impurity when it is not prudent or safe to vaccinate him; that there is no practical test by which to determine “with any degree of certainty” whether one’s blood is in such condition of impurity as to render vaccination necessarily unsafe or dangerous; that vaccine matter is “quite often” impure and dangerous to be used, but whether impure or not cannot be ascertained by any known practical test; that the defendant refused to submit to vaccination for the reason that he had, “when a child,” been caused great and extreme suffering for a long period by a disease produced by vaccination; and that he had witnessed a similar result of vaccination, not only in the case of his son, but in the cases of others.

These offers, in effect, invited the court and jury to go over the whole ground gone over by the legislature when it enacted the statute in question. The legislature assumed that some children, by reason of their condition at the time, might not be fit subjects of vaccination; and it is suggested—and we will not say without reason—that such is the case with some adults. But the defendant did not offer to prove that, by reason of his then condition, he was in fact [37] not a fit subject of vaccination *at the time he was informed of the requirement of the

regulation adopted by the board of health. It is entirely consistent with his offer of proof that, after reaching full age, he had become, so far as medical skill could discover, and when informed of the regulation of the board of health was, a fit subject of vaccination, and that the vaccine matter to be used in his case was such as any medical practitioner of good standing would regard as proper to be used. The matured opinions of medical men everywhere, and the experience of mankind, as all must know, negative the suggestion that it is not possible in any case to determine whether vaccination is safe. Was defendant exempted from the operation of the statute simply because of his dread of the same evil results experienced by him when a child, and which he had observed in the cases of his son and other children? Could he reasonably claim such an exemption because “quite often,” or “occasionally,” injury had resulted from vaccination, or because it was impossible, in the opinion of some, by any practical test, to determine with absolute certainty whether a particular person could be safely vaccinated?

It seems to the court that an affirmative answer to these questions would practically strip the legislative department of its function to care for the public health and the public safety when endangered by epidemics of disease. Such an answer would mean that compulsory vaccination could not, in any conceivable case, be legally enforced in a community, even at the command of the legislature, however widespread the epidemic of smallpox, and however deep and universal was the belief of the community and of its medical advisers that a system of general vaccination was vital to the safety of all.

We are not prepared to hold that a minority, residing or remaining in any city or town where smallpox is prevalent, and enjoying the general protection afforded by an organized local government, may thus defy the will of its constituted authorities, acting in good faith for all, under the legislative sanction of the state. If such be the privilege of a minority, *then a like privilege [38] would belong to each individual of the community, and the spectacle would be presented of the welfare and safety of an entire population being subordinated to the notions of a single individual who chooses to remain a part of that population. We are unwilling to hold it to be an element in the liberty secured by the Constitution of the United States that one person, or a minority of persons, residing in any community and enjoying the benefits of its local government, should have the power thus to dominate the majority when supported in their action by

the authority of the state. While this court should guard with firmness every right appertaining to life, liberty, or property as secured to the individual by the supreme law of the land, it is of the last importance that it should not invade the domain of local authority except when it is plainly necessary to do so in order to enforce that law. The safety and the health of the people of Massachusetts are, in the first instance, for that commonwealth to guard and protect. They are matters that do not ordinarily concern the national government. So far as they can be reached by any government, they depend, primarily, upon such action as the state, in its wisdom, may take; and we do not perceive that this legislation has invaded any right secured by the Federal Constitution.

Before closing this opinion we deem it appropriate, in order to prevent misapprehension as to our views, to observe—perhaps to repeat a thought already sufficiently expressed, namely—that the police power of a state, whether exercised directly by the legislature, or by a local body acting under its authority, may be exerted in such circumstances, or by regulations so arbitrary and oppressive in particular cases, as to justify the interference of the courts to prevent wrong and oppression. Extreme cases can be readily suggested. Ordinarily such cases are not safe guides in the administration of the law. It is easy, for instance, to suppose the case of an adult who is embraced by the mere words of the act, but yet to subject whom to vaccination in a particular condition of his health *or body would be cruel and inhuman in the last degree. We are not to be understood as holding that the statute was intended to be applied to such a case, or, if it was so intended, that the judiciary would not be competent to interfere and protect the health and life of the individual concerned. “All laws,” this court has said, “should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter.” *United States v. Kirby*, 7 Wall. 482, 19 L. ed. 278; *Lau Ow Bew v. United States*, 144 U. S. 47, 58, 36 L. ed. 340, 344, 12 Sup. Ct. Rep. 517. Until otherwise informed by the highest court of Massachusetts, we are not inclined to hold that the statute establishes the absolute rule that an adult must be vaccinated if it be apparent or can be shown with reasonable certainty that he is not at the time a fit subject of vaccination, or that vaccination, by reason of his then condition, would seriously

[39]

impair his health, or probably cause his death. No such case is here presented. It is the cause of an adult who, for aught that appears, was himself in perfect health and a fit subject of vaccination, and yet, while remaining in the community, refused to obey the statute and the regulation adopted in execution of its provisions for the protection of the public health and the public safety, confessedly endangered by the presence of a dangerous disease.

We now decide only that the statute covers the present case, and that nothing clearly appears that would justify this court in holding it to be unconstitutional and inoperative in its application to the plaintiff in error.

The judgment of the court below must be affirmed.

It is so ordered.

Mr. Justice **Brewer** and Mr. Justice **Peckham** dissent.

*CHARLES H. UTERMEHLE, *Plff. in Err.*, [40]
v.

MAMIE E. NORMENT *et al.*

(See S. C. Reporter's ed. 40-60.)

Estoppel—by receiving benefits—ignorance of law.

1. A party taking the benefit of a provision in his favor under a will is estopped to assert the invalidity of that instrument.
2. Ignorance of the rule of law that a party taking the benefit of a provision in his favor under a will is estopped to assert the invalidity of that instrument, although coupled with ignorance of any evidence on which a contest could be based, will not prevent the application of such rule, in the absence of fraud, imposition, or misrepresentation, where the original situation cannot be restored, and there has been extreme negligence in attempting to discover the facts.

[No. 63.]

Argued November 28, 29, 1904. Decided February 20, 1905.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a decree of the Supreme Court of that District, sitting as a court of probate, admitting a will to probate as a will of real estate which had previously been admitted to probate as a will of per-

NOTE.—On estoppel by receiving benefits—see notes to *Katz v. Bedford*, 1 L. R. A. 827; *Tarkington v. Purvis*, 9 L. R. A. 609; and *Michigan ex rel. Atty. Gen. v. Flint & P. M. R. Co.* 38 L. ed. U. S. 478.

sonalty, with the concurrence and consent of all the parties. *Affirmed.*

See same case below, 22 App. D. C. 31.

Statement by Mr. Justice Peckham:

The plaintiff in error seeks by this writ to review the judgment of the court of appeals of the District of Columbia (22 App. D. C. 31), affirming the decree of the supreme court of that District, sitting as a court of probate, admitting the will of George W. Utermehle to probate as a will of real estate, by virtue of the jurisdiction conferred upon the court by the act of Congress of June 8, 1898. 30 Stat. at L. 434, chap. 394. The same will had been admitted to probate in the District in the year 1889 as a will of personalty (which was all the jurisdiction at that time possessed by the court), with the concurrence and consent of the plaintiff in error. The facts upon which the case hinges are in substance the following:

George W. Utermehle, the testator, died in the city of Washington on the 16th day of April, 1889, leaving a large amount of real and personal property, the real estate amounting, as is said, to about a million dollars, and the personalty to between six hundred thousand and a million of dollars. He left a will, bearing date December 7, [41] 1887, which *appeared on its face to have been duly executed for the conveyance of real estate. The testator left him surviving his widow, two daughters,—Mrs. Taylor and Mrs. Norment,—and the plaintiff in error, his grandson, the son of his deceased son, as his sole heirs at law and next of kin. The widow was named executrix of the will, and she propounded the same for probate April 26, 1889. It was duly admitted to probate, on that day, on the petition of the widow, as executrix, with the written consent of the daughters and the plaintiff in error. The executrix gave a bond in the sum of \$20,000 for the payment of all just debts and claims against the deceased, and for the payment of the legacies bequeathed by the will, and letters were issued to her. She duly administered upon the estate, paid the funeral expenses and other charges, and the legacies mentioned in the will, including that to the plaintiff in error. She filed no inventory, but made a statement of account on the 14th day of May, 1890. The personal property, except such as was otherwise disposed of under the will, and in payment of debts and legacies, she retained for herself, as sole and absolute owner, in accordance with the terms of the will. Of this amount it is said that she thereafter disposed of a large part in charities. By the will of George W. Utermehle, he bequeathed to each of his three nieces,

residing in Germany, the sum of \$3,000; he devised to his grandson, the plaintiff in error, the property known as the Young Law Building, in Washington; he also bequeathed to him the interest due or to become due on a note for \$750, secured on a lot in Washington, and also the principal of the same; he bequeathed to his wife, Sarah Utermehle, all the rest of his personal property, of every kind, to be taken by her in lieu of dower, and to be disposed of by her by deed, will, or otherwise, as she pleased; he devised to her his then present residence and the property adjoining, being square 765 in the city of Washington; he then bequeathed all the rest and residue of his real estate, wherever situated, and all the real estate of which he might die seised and possessed, other than *that already devised, [42] to his two daughters, Mamie Norment and Rosa Taylor, as tenants in common, share and share alike; he appointed his wife sole executrix of his will, and revoked all other wills theretofore made by him; he suggested that, as he had no debts, and his personal estate was to go to his wife, a very moderate bond should be required of her as executrix.

After the death of his grandfather, the plaintiff was present at his late residence and heard this will read.

Immediately after the reading of the will he left the house, but Mrs. Taylor, one of his aunts, as he was leaving, asked him to come over the next day, which he did. He testified on this trial that he arrived at the house and went into the dining room, and Mrs. Taylor, Mrs. Norment, and his grandmother were there. Mrs. Taylor did the talking, and started the conversation by stating to the plaintiff in error that the will had virtually cut him off, and that if it had not been for her and the Doctor (her husband) the plaintiff in error would not have been left the property called the Young Law Building; but that they had had his grandfather paint it up and put it in repair, so that when it came into his possession it would not be any expense to him to put it in condition at the time. She further said that his grandmother was left all the personal property, which amounted to almost, if not quite as much, as that which they (his aunts) would receive under the will, and that when his grandmother died she proposed to make him right,—to make him equal with them by equalizing his share; that his grandmother wanted to know what the mortgage on his farm was, as she understood that there was a mortgage; that she wanted to pay it off; that she wanted to start him off without any debts on him. His grandmother was sitting there at the time, but said nothing. He was

asked what the mortgage was on his farm. He told them \$11,500. The only remarks made were those between Mrs. Taylor (his aunt) and himself, and the only statement he made was what the mortgage on the farm [43] was. He also testified on the trial *below that he believed what was then promised him, as to what his grandmother would do when she made her will; that he had no doubt whatever that she would fulfil her promise. His grandmother told him at that interview she would give him a check for the mortgage in a few days, and he then went home. Subsequently, and on the 26th day of April, 1889, he signed the consent to the probate of the will. He did it in reliance, as he said, upon the promise above mentioned.

From the time of the probate of his grandfather's will up to the time of the death of his grandmother, he did nothing to attack the will of his grandfather, but relied upon the promise made by or on the part of his grandmother, the day after the funeral. After the probate of his grandfather's will he received from his grandmother, as the executrix, the legacy spoken of therein, and gave receipt therefor; he also took possession of the real estate given him by the will, called Young's Law Building, and received the rents therefor for nearly two years, and (on March 24, 1891) sold it for \$20,000, and kept the proceeds. The sisters took the real estate devised to them by the will. They commenced an action of partition, and the real estate was partitioned between them, and each thereafter treated the real estate set off to her under the partition as her own absolute property. Some of it they conveyed and disposed of so that it passed beyond their control. They assumed and supposed that the real estate given to them in the will was their own, as the plaintiff in error had consented to the probate of the will, and had made no objections whatever since that time to its validity, or questioned it in any way.

On the 13th of March, 1893, the grandmother died, leaving a will dated July 5, 1889, less than three months after the promise alleged to have been made by her, or in her behalf, to the plaintiff in error immediately after the funeral of his grandfather. The will of the grandmother was admitted to probate, by the consent of all the parties [44] interested, on the *17th day of March, 1893. The two daughters were executrices under the will, but, on objection being made by the plaintiff in error to their receiving commissions, they waived their right to them, and performed the services without pay. By the terms of this will the two aunts and the plaintiff in error were made to share equally in the estate of the grandmother, 197 U. S.

which turned out to amount to something over \$200,000, the grandmother having, during her lifetime, as is stated, disposed of a large amount of the personal property bequeathed to her under the will of her husband, in charities. When the terms of the will of the grandmother were read to the plaintiff in error he testified on the trial below that he then said, "So far as I am concerned I have got the worst of and I have got to stand it. I never made but one mistake in my life, and that was when I held still once before, and now I have to stand still."

He received under the will of his grandmother \$84,256.87, being the same share as was received by each of his aunts. He received, under the will of his grandfather and that of his grandmother a total of between \$140,000 and \$150,000. After the death of his grandmother he took no steps showing an intention to contest the will of either, until May 19, 1900, which was ten years after the settlement of the estate of his grandfather, and nearly seven years after the settlement of the estate of his grandmother. On the date named he addressed two letters of the same tenor, one to Mrs. Taylor and the other to Mrs. Norment, in which he states that he had been under a misapprehension and was ignorant regarding his rights at the time his grandfather died, and that misrepresentations had been made to him from those interested, touching his rights and interest in his grandfather's estate, and he therefore notified them that he denied the validity of the paper writing alleged to be the last will and testament of his grandfather, which had been admitted to probate as a will of personal property, and stated that he contended that the alleged will had never been operative in connection with the real property, *and that his claim to the building and [45] ground known as Young's Law Building was merely a one-third interest in the property as tenant in common with the other heirs at law of his deceased grandfather; he also stated that he held himself ready to account, upon demand, to his two aunts for the one-third interest to which each was entitled in that real estate, as two of the heirs at law of his grandfather, in both the property and the rents and profits from the same, from his grandfather's death; that he held himself as ready, upon demand, to make proper settlement with both of his aunts for the \$750 note, with the accrued interest thereon, which had been all paid, and was pretended to have been bequeathed to him under the will of his grandfather. Plaintiff in error testified that he did not receive any answer to either letter, nor any communication from either of his aunts, and soon thereafter he

instituted a suit in ejectment, and on June 9, 1900, filed a *caveat* in the probate court against the validity of the will, as a will of personalty. The plaintiff in error there charged that the will was procured by the fraud, undue influence, and duress of Mrs. Taylor and her husband, and that the testator had no testamentary capacity when the paper was signed by him. Mrs. Taylor and Mrs. Norment answered this *caveat*, and at the same time filed a petition asking for probate of the will of their father, of December 7, 1887, as a will of real estate, under the act of Congress of June 8, 1898, above mentioned. To this petition the plaintiff in error made answer.

Pending proceedings in the probate court on this *caveat* of the plaintiff in error, and the petition for the probate of the will as one of real estate, Mrs. Taylor, one of the aunts, died, January 22, 1901, leaving a will by which she devised all of her estate and property to her husband, subject to an annuity to her son, and nominated her husband as executor. This will was duly admitted to probate on the 18th day of March, 1901, and letters testamentary were issued to Dr. Taylor (the husband). Thereupon [46] he filed his petition in these *proceedings, wherein he stated that the property devised and bequeathed to him by his wife was in fact to be held in trust by him for the benefit of his son and his children, with the reservation of certain rights and powers for himself, and he asked that the parties named by him be made parties to the present proceedings in place of Mrs. Taylor, and they were accordingly made such.

The court then determined that issues should be formulated between the parties, to be tried in the probate court with a jury, under the act of June 8, 1898, and there were six issues thus drawn: The first was in regard to the question whether the plaintiff in error was estopped to deny the validity of his grandfather's will as a will of personal property; the second, whether he was estopped to deny its validity as one disposing of real property; third, was a question as to the testamentary capacity of the grandfather; the fourth, whether there was undue influence; fifth, whether there was fraud in obtaining the will from the grandfather; and sixth, whether there was duress.

It was stipulated that the question of the application of the statute of limitations, which was raised by the *caveats* and petitions, and all other questions, should be reserved for future determination by the court. Charles H. Utermehle was made plaintiff for the purpose of the trial, and all the other parties were made defendants. On March 17, 1902, a jury was impaneled and

the trial commenced. The plaintiff proceeded to give his testimony, addressed to the question of estoppel and to an explanation of his delay in asserting his alleged rights. When the counsel for plaintiff in error announced their testimony on the question of estoppel closed, they were about to proceed with their testimony on the other issues, but counsel for the defendants objected, and asked the court to direct a verdict against the plaintiff on the issue of estoppel, and against the plaintiff upon all the other issues. After consideration the court instructed the jury to render a verdict against the plaintiff on each and all the issues, and a verdict *was thus rendered and recorded. Thereupon an order or decree was rendered affirming the decree of April 26, 1889, admitting the grandfather's will to probate as and for a will of personalty, and also admitting it now to probate as and for a will of real estate, under the act of Congress of 1898. The court of appeals having affirmed this decree, the case has come to us by writ of error on the part of the plaintiff.

Messrs. Wilton J. Lambert and D. W. Baker argued the cause and filed a brief for plaintiff in error:

Can the appellees invoke the doctrine of estoppel in their behalf when one of them is a devisee under the will, and the others claim from a devisee, both of whom are charged with exercising undue influence or fraud in the making of the will, and in making false and fraudulent misrepresentations to prevent the plaintiff in error from investigating the facts surrounding the making of the will, this last fraud being merely ancillary to the principal fraud charged?

Neblett v. Macfarland, 92 U. S. 103, 23 L. ed. 471.

If the caveator was ignorant of the facts surrounding the making of the alleged will at the time that he acted under it, his action, while ignorant, in no way estops him from attacking its validity.

Fisher v. Boyce, 81 Md. 46, 31 Atl. 707; *Miller's Estate*, 159 Pa. 562, 28 Atl. 441; *Medill v. Snyder*, 61 Kan. 15, 78 Am. St. Rep. 306, 58 Pac. 962; *Lee v. Templeton*, 73 Ind. 317; *Fletcher v. Holmes*, 25 Ind. 469; *Andrews v. Lyons*, 11 Allen, 350; *Brant v. Virginia Coal & I. Co.* 93 U. S. 335, 23 L. ed. 929; *Henshaw v. Bissell*, 18 Wall. 271, 21 L. ed. 840; *Farmers' & M. Bank v. Farwell*, 7 C. C. A. 391, 19 U. S. App. 262, 58 Fed. 633; *Halloran v. Halloran*, 137 Ill. 112, 27 N. E. 82; *Clinton v. Haddam*, 50 Conn. 84; *Taylor v. Cussen*, 90 Va. 43, 17 S. E. 721; *Cumberland Coal & I. Co. v. Sherman*, 20 Md. 117.

In this case the caveator could, under the

law, file his caveat or bring his action of ejectment at any time within twenty years from the death of George W. Utermehle.

Barbour v. Moore, 4 App. D. C. 535; *McGee v. Welch*, 18 App. D. C. 177.

Where a person claims title to real property the doctrine of laches can never be invoked if proceedings are taken within the statutory period.

Acquiescences and waivers are questions of fact.

Pence v. Langdon, 99 U. S. 578, 25 L. ed. 420.

If the caveator acted in ignorance of his legal rights, or was wanting in knowledge of the rule which compelled him to elect, his acts under such circumstances did not constitute an estoppel.

Henshaw v. Bissell, 18 Wall. 271, 21 L. ed. 840; *Watson v. Watson*, 128 Mass. 152. See also *Spread v. Morgan*, 11 H. L. Cas. 588; *Wheeler v. Smith*, 9 How. 55, 13 L. ed. 44; *Spurlock v. Brown*, 91 Tenn. 261, 18 S. W. 868; *Williams v. Williams*, 63 Md. 371.

Mr. A. S. Worthington argued the cause, and, with *Mr. T. Percy Woodward*, filed a brief for defendants in error:

The caveator is to be charged, not only with what he actually knew in regard to the physical and mental condition of his grandfather and the alleged undue influence, coercion, misrepresentation, and fraud, but with the knowledge he could have acquired by the use of reasonable diligence,—especially as to matters concerning which what he did know would have led a man of ordinary prudence to make further inquiry.

Upton v. Tribilcock, 91 U. S. 55, 23 L. ed. 203; *Grymes v. Sanders*, 93 U. S. 55, 62, 23 L. ed. 798, 801; *Wollensak v. Reiher*, 115 U. S. 99, 29 L. ed. 351, 5 Sup. Ct. Rep. 1137; *Leather Mfrs. Nat. Bank v. Morgan*, 117 U. S. 96, 108, 112, 122, 29 L. ed. 811, 816, 817, 821, 6 Sup. Ct. Rep. 657; *Foster v. Mansfield, C. & L. M. R. Co.* 146 U. S. 88-102, 36 L. ed. 899-904, 13 Sup. Ct. Rep. 28; *Johnston v. Standard Min. Co.* 148 U. S. 360, 37 L. ed. 480, 13 Sup. Ct. Rep. 585; *Johnson v. Atlantic, G. & W. I. Transit Co.* 156 U. S. 618, 39 L. ed. 556, 15 Sup. Ct. Rep. 520; *McLean v. Clapp*, 141 U. S. 429, 35 L. ed. 804, 12 Sup. Ct. Rep. 29; *Wood v. Carpenter*, 101 U. S. 135-143, 25 L. ed. 807-809; *Felix v. Patrick*, 145 U. S. 317, 331, 36 L. ed. 719, 726, 12 Sup. Ct. Rep. 862.

Under the circumstances of this case the mere lapse of time has raised an insurmountable obstacle to an attack by the caveator upon his grandfather's will.

Hammond v. Hopkins, 143 U. S. 224-274, 36 L. ed. 134-153, 12 Sup. Ct. Rep. 418; *Galliher v. Cadwell*, 145 U. S. 368, 372, 376, 36 L. ed. 738, 740, 741, 12 Sup. Ct. Rep. 873; *Simmons v. Burlington, C. R. & N. R.* 197 U. S.

Co. 159 U. S. 291, 40 L. ed. 154, 16 Sup. Ct. Rep. 1; *Fulton v. Moore*, 25 Pa. 468; *Bradford v. Kent*, 43 Pa. 474; *Baxter v. Bowyer*, 19 Ohio St. 490; *Wilson v. Wilson*, 145 Ind. 662, 44 N. E. 665; *Drake v. Wild*, 70 Vt. 52, 39 Atl. 248; *Hovey v. Hovey*, 61 N. H. 599; *Wells v. Congregational Church*, 63 Vt. 116, 21 Atl. 270.

One who takes a benefit under a will is precluded from assailing the instrument as invalid.

Herbert v. Wren, 7 Cranch, 370, 3 L. ed. 374; *Fisher v. Boyce*, 81 Md. 46, 31 Atl. 707; *Hyde v. Baldwin*, 17 Pick. 308; *Smith v. Smith*, 14 Gray, 532; *Fry v. Morrison*, 159 Ill. 244, 42 N. E. 774; *Drake v. Wild*, 70 Vt. 52, 39 Atl. 248; *Williams v. Whittell*, 69 App. Div. 340, 74 N. Y. Supp. 820; *Branson v. Watkins*, 96 Ga. 54, 23 S. E. 204; *Van Duyne v. Van Duyne*, 14 N. J. Eq. 49; *Madison v. Larmon*, 170 Ill. 65, 62 Am. St. Rep. 356, 48 N. E. 556.

In such cases the amount received under the will compared with what the party estopped would have received otherwise is unimportant.

Cunningham's Estate, 137 Pa. 621, 21 Am. St. Rep. 901, 20 Atl. 714; *Lee v. Tower*, 124 N. Y. 370, 26 N. E. 943.

The principle of equitable estoppel is as applicable in a court of law as in a court of equity.

Dickerson v. Colgrove, 100 U. S. 578, 25 L. ed. 618; *Kirk v. Hamilton*, 102 U. S. 68, 26 L. ed. 79.

It is applied even to a case where a party sets up the unconstitutionality of an act of the legislature under which he has derived a benefit.

Ferguson v. Landram, 5 Bush, 230, 96 Am. Dec. 350; *Van Hook v. Whitlock*, 26 Wend. 43, 37 Am. Dec. 246; *Daniels v. Tearney*, 102 U. S. 415, 421, 26 L. ed. 187, 189.

It prevents a debtor from assailing a void judgment against him when in another proceeding he has had his creditor excluded because of the judgment.

Davis v. Wakelee, 156 U. S. 680, 691, 39 L. ed. 578, 585, 15 Sup. Ct. Rep. 555.

Even the rules of evidence will be suspended as against one who in another controversy has escaped liability by misstating them.

Mexican Nat. R. Co. v. Davidson, 157 U. S. 201, 39 L. ed. 672, 15 Sup. Ct. Rep. 563; *Michels v. Olmstead*, 157 U. S. 198, 39 L. ed. 671, 15 Sup. Ct. Rep. 580.

An intention to deceive any particular person is not necessary. It is not even essential that there should be any intention to deceive anybody.

Horn v. Cole, 51 N. H. 287, 12 Am. Rep. 111; *Leather Mfrs. Nat. Bank v. Morgan*, 117 U. S. 96, 112, 122, 29 L. ed. 811, 817, 821, 6 Sup. Ct. Rep. 657; *O'Donnell v. Clin-*

ton, 145 Mass. 462, 14 N. E. 747; 11 Am. & Eng. Enc. Law, 2d ed. p. 431.

This case is governed by the law relating to equitable estoppel, not by the practice or procedure of courts of equity relating to "election."

11 Am. & Eng. Enc. Law, 2d ed. p. 59; 1 Pom. Eq. Jur. § 395; *Parkey v. Ramsey*, 111 Tenn. 302, 76 S. W. 812.

If, relying upon the implied assertion of the validity of the will by the receipt of the legacy, the executor or some other party in interest has changed his position so that he cannot be put *in statu quo*, then the doctrine of equitable estoppel may be invoked for his protection.

Watson v. Watson, 128 Mass. 152.

A closer analogy than the equitable rule as to "election" is found in the case of a vendor who, on discovering that he has been defrauded, may disaffirm the sale and bring replevin or ejectment to get back his property, or may affirm the sale by seeking to recover its value. In such a case a decision once made and acted on is binding, whether the other party has changed his position or not.

Robb v. Vos, 155 U. S. 13, 43, 39 L. ed. 52; 63, 15 Sup. Ct. Rep. 4; *Thompson v. Howard*, 31 Mich. 309; *Smith v. Gilmore*, 7 App. D. C. 192.

Ignorance of the law of equitable estoppel is no excuse.

Hunt v. Rousmanier, 8 Wheat. 215, 5 L. ed. 599; *Hunt v. Rhodes*, 1 Pet. 1, 7 L. ed. 27; *Bank of United States v. Daniel*, 12 Pet. 32, 55-58, 9 L. ed. 989, 998, 999; 3 Rose's Notes, p. 702; *United States v. Rodson*, 10 Wall. 395, 19 L. ed. 937; *Milwaukee & M. R. Co. v. Soutter*, 13 Wall. 517-524, 20 L. ed. 543-545; *Upton v. Tribilcock*, 91 U. S. 45-50, 23 L. ed. 203-205; *Lamborn v. Dickinson County*, 97 U. S. 181-185, 24 L. ed. 926-928; *United States v. Ames*, 99 U. S. 35, 23 L. ed. 295; *Laver v. Dennett*, 109 U. S. 90, 27 L. ed. 867, 3 Sup. Ct. Rep. 73; *Allen v. Galloway*, 30 Fed. 466; *Rankin v. Mortimore*, 7 Watts, 372; *Light v. Light*, 21 Pa. 407; *Cox v. Rogers*, 77 Pa. 160; *Whitwell v. Winslow*, 134 Mass. 343; *Alabama & V. R. Co. v. Jones*, 55 Am. St. Rep. 494, note, 73 Miss. 110, 19 So. 105; *Storrs v. Barker*, 6 Johns. Ch. 166, 10 Am. Dec. 316.

[52] *Mr. Justice **Peckham**, after making the foregoing statement, delivered the opinion of the court:

It is true that the plaintiff in error has received out of the estates of his grandfather and grandmother only between the sum of \$140,000 and \$150,000, while an equal division of the estate of his grandfather, between himself and his aunts, would have given him a much larger sum. What

was the reason, if any, for this discrimination, the record does not show.

When the will of his grandfather was read the plaintiff in error was perfectly aware of its contents. He was a young man, nearly twenty-four years of age, married, and there is no proof that he was not of ordinary intelligence and capacity. There is no pretense in the evidence that there was any fraud or misrepresentation connected with obtaining his consent to the probate of the will, without opposition or contest on his part. By his own statement he understood distinctly from one of his aunts, after the reading of the will, that it substantially cut him off; that he would receive under the will a devise of the Young Law Building, worth about \$20,000, and a bequest of the note of \$750 and accrued interest, amounting to not quite \$3,000, and that that was all that was given him under the will. He knew it when the will was read. There is not a particle of evidence that he did not know that, if there had been fraud or undue influence or duress in obtaining the alleged will from his grandfather, or if the latter was without testamentary capacity, such will would be void. The trial court, indeed, observed that he admitted he knew what his legal rights were at the time of the death of his grandfather, if there were no will. He was ignorant only of any evidence on which to base a contest against the proof of the will. He says he did not know at that time that fraud or undue influence or duress had been exercised, in order to obtain the will, nor did he know that his grandfather lacked testamentary capacity to execute a will, but there is no evidence whatever *that [53] any means were used or representation made to prevent him from ascertaining what the facts really were. The reason for his not contesting was, as he said, his reliance on the promise alleged to have been made by or on behalf of his grandmother to make him equal by her own will. On account of this promise he did not contest the will. By reason of his consent, his aunts, the other heirs at law of his grandfather, proceeded to make partition of the real estate given to them by the will, and to use, convey, and dispose of it as if it were absolutely their own property. His grandmother received the personal property bequeathed to her by the will, and disposed of large amounts of it prior to her death by gifts to charity and otherwise. It would be impossible to place the other heirs in the same position that they were in at the time of the death of the grandfather. The two aunts, if that will had not been proved, would have received their share of the personalty instead of almost the whole of it going to the mother. Under the will, how-

ever, the mother took the personalty and spent or disposed of large portions of it, so that she died possessed of only about \$200,000, and the two aunts and the plaintiff in error have received an equal share of that sum. The aunts would have received a much larger share of the personalty had it not been for the will of their father. As is stated by the court of appeals in the opinion delivered in this case:

"It is impossible to tell from the record before us whether they [the aunts of the plaintiff in error] fared any better with the will than they would have fared without it; but it is very evident that, by the bequest of the entire personalty by the will to their mother, they lost a valuable interest to which they cannot now be restored. It is impossible to restore the original situation, and the attempt to do so would be wantonly to question titles that have long since accrued, including the very title which the caveator has himself disposed of to the Young Law Building."

Of the witnesses to the grandfather's will, [54] two are dead *and the third paralyzed. From the date of the probate of the grandfather's will in April, 1889, down to the 19th of May, 1900, the plaintiff in error took no steps towards a contest. On that date he wrote the letters to his aunts, above referred to, and therein he says that misrepresentations were made to him as to his rights and interest in the estate. We find a total absence of all proof as to any such misrepresentations, either as to his rights or his interest in the estate of his grandfather. The trial court also found that the plaintiff in error had not exhibited even reasonable diligence to learn any facts as to the will of his grandfather, and that his alleged ignorance of the law was the only excuse which had the semblance of sufficiency.

We have, therefore, his consent given in April, 1889, to the probate of the will of his grandfather; his taking the legacy provided for under that will; his taking possession of the real estate devised to him by that will; his receipts of its rents and profits, and his subsequent sale thereof for \$20,000, and the retention of that sum for his own purposes; his consent to the probate of his grandmother's will, although it clearly does not fulfil the promise he alleges was made on her behalf after the death and funeral of his grandfather; no movement is made on his part or sign of discontent given for about seven years thereafter, and then he writes letters and files his *caveat* and proceeds, as already stated. We have the total lack of diligence in the attempt even to ascertain facts. After his grandmother's death he says that he was still ignorant of the facts which he alleges he has since

discovered of the existence of fraud in obtaining the will from his grandfather, and of the latter's lack of testamentary capacity, and the existence of duress and undue influence under which the will was obtained; and he also avers that he was ignorant of the law at the time that he consented to the probate of his grandfather's will, that he could not take a devise or bequest under that will, and at the same time seek to prevent its probate, or to set it aside as an invalid instrument. The trial court found that right after *the death of his grand-[55] mother he had the advice of counsel, and if he had been ignorant of any rights he would have been informed of the same.

The plaintiff in error asserts that he gave consent to the probate of his grandfather's will because of the promise of his grandmother to rectify, by her will, the injustice resulting from the will of his grandfather, and when he found that the promise was broken, on reading the will of his grandmother, after her decease, he then waited seven years before proceeding to attack the will of his grandfather, admitted to probate in 1889. The court of appeals doubted the existence of the promise, and said it was probably only a promise that he should share equally in his grandmother's estate, which his grandmother fully performed. He says that after the death of his grandmother he was very ill for six weeks, and that for two years he was not in good health, and that he remained ignorant of the fraud and undue influence and duress and mental incapacity of his grandfather until a short time before the filing of the *caveat* or the writing of the letters. He does not contend that, if these facts existed, he did not know that, if proved, they would avoid the will.

He insists, however, that the law pertaining to the taking of the legacy or devise under a will, which prevents the assertion of the invalidity of the same will, ought not to bind him, because he was ignorant that such was the law; in other words, the law should not cover his case because he was ignorant that it was the law.

We know of no case where mere ignorance of the law, standing alone, constitutes any excuse or defense against its enforcement. It would be impossible to administer the law if ignorance of its provisions were a defense thereto. There are cases, undoubtedly, where ignorance of the law, united with fraudulent conduct on the part of others, or mistakes of fact relating thereto, will be regarded as a defense, but there must be some element, other than a mere mistake of law, which will afford an excuse. In addition, there ought to be no negligence *in attempt-[56] ing to discover the facts. The ignorance of the plaintiff in error as to his alleged rights,

it would seem, was an ignorance of the existence of alleged facts regarding the procurement of the will of his grandfather; but he does not pretend that, had he known of their existence, he was ignorant of their effect as a ground for refusing probate of the alleged will. The ignorance of evidence to substantiate what he knew were his rights is a very different thing from ignorance of the rights themselves, as is stated so clearly by the court of appeals; and so it rests in this case that the only obstacle to the enforcement of the rule of estoppel rests in the alleged ignorance of the plaintiff in error that such a rule existed. Although his action in consenting to the probate of the will of his grandfather was not the result of fraud or misrepresentation, and the other parties to this litigation cannot be placed back in the position they occupied when the will was admitted to probate, and this condition is the result of the action of the plaintiff in error in consenting to the probate of the will, yet he now contends, notwithstanding all this, that he must be permitted, after the lapse of eleven years, to attempt to defeat the will of his grandfather because he did not know the law applicable to the case in hand. This is a totally inadmissible proposition.

It has been held from the earliest days, in both the Federal and state courts, that a mistake of law, pure and simple, without the addition of any circumstances of fraud or misrepresentation, constitutes no basis for relief at law or in equity, and forms no excuse in favor of the party asserting that he made such mistake. *Hunt v. Rousmaniere* (*Hunt v. Rhodes*) 1 Pet. 1-15, 7 L. ed. 27-33; *Bank of United States v. Daniel*, 12 Pet. 32-55, 9 L. ed. 989-999; *United States v. Hodson*, 10 Wall. 395-409, 19 L. ed. 937-940; *Lamborn v. Dickinson County*, 97 U. S. 181-185, 24 L. ed. 926-928; *Snell v. Atlantic F. & M. Ins. Co.* 98 U. S. 85-92, 25 L. ed. 52-55; *Allen v. Galloway*, 30 Fed. 466, where Hammond, J., in reviewing the decisions of this court, says: "Whatever rule may prevail elsewhere, there can be in the equity courts of the United States no relief from a mistake of law." *Drake v. Wild*, 70 Vt. 52-59, 39 Atl. 248; in that case the [57] court said (p. 59, Atl. p. 251): "That ignorance of the law does not excuse a wrong done or a right withheld. That relief from liabilities under the law, arising from a known state of facts, will be denied. But to these general rules there are exceptions, as where there is a mistake of law caused by fraud, imposition, or misrepresentation. We think it will be found that, in most of the cases cited in these notes and in *Pomeroy*, the party seeking relief was led into error by the action of the other party to a trans-

action, as in contracts and releases." *Light v. Light*, 21 Pa. 407-412; *Storrs v. Barker*, 6 Johns. Ch. 166, 10 Am. Dec. 316; *Whitwell v. Winslow*, 134 Mass. 343-345; *Alabama & V. R. Co. v. Jones*, 73 Miss. 110, 55 Am. St. Rep. 488, note, 19 So. 105.

Exceptional cases where relief has been given have been, as stated, where there was fraud or imposition upon the individual by the person seeking to avail himself of the contract of the other party. In this case there was, as we have said, neither fraud nor imposition, nor misrepresentation; plaintiff in error was not advised that, although he took under the will, he could attack it. It is a simple, bald case of an alleged mistake or misapprehension, on the part of plaintiff, of what the law was under certain circumstances, with no representation or persuasion on the part of others to cause him to act upon such mistaken assumption.

As to what is the law relating to a party taking the benefit of a provision in his favor under a will, there is really no foundation to dispute the proposition that he thereby is precluded from, at the same time, attacking the validity of the very instrument under which he received the benefit.

In *Hyde v. Baldwin*, 17 Pick. 303, 308, it was held that one who accepted the beneficial interest under a will was thereby barred from setting up any claim which would defeat the full operation of the will. *Drake v. Wild*, 70 Vt. 52, 39 Atl. 248, holds the same doctrine. In that case a party was held to be estopped from asserting her title to a trust fund disposed of by the will, because she had accepted the provisions of the will in her own favor. In *Branson v. Watkins*, 96 Ga. 55, 23 S. E. 204, it *was held that one [58] who took an estate under a will was thereby estopped from, at the same time, denying its validity as a will, or from questioning the jurisdiction of the court admitting it to probate, or the regularity of the probate proceedings. In *Smith v. Smith*, 14 Gray, 532, it was held that the acceptance of a devise estops the devisee to set up a title in opposition to the will, at law as well as in equity. In *Fry v. Morrison*, 159 Ill. 244, 42 N. E. 774, it was held that one who took a beneficial interest under a will was thereby estopped to set up any right or claim of his own, though otherwise well founded, which would bar or defeat the effect of any part of the will. And in *Madison v. Larmon*, 170 Ill. 65, 82, 62 Am. St. Rep. 356, 48 N. E. 556, it was again held that one who takes under a will cannot contest it as an heir at law of the devised property. So, in *Fisher v. Boyce*, 81 Md. 46, 53, 31 Atl. 707, the court said: "It is a maxim in a court of equity not to permit the same person to hold

under and against a will." This maxim was equally appropriate to the jurisdiction and practice of courts of law, and where one claimed under a will he must give it effect as far as he can, and he will be estopped from denying its validity and genuineness. *Waters's Appeal*, 35 Pa. 523; *Thrower v. Wood*, 53 Ga. 458.

When, in addition to the fact that he took a benefit under the will, a party has acquiesced in its validity for many years, and the opposing party in interest has acted upon such consent and acquiescence, and has so changed his position on that account that he cannot be restored to it, and where witnesses have, in the meantime, died, the reason for the rule upon which an estoppel is founded is thereby greatly strengthened.

Two cases, among others, were cited by counsel for plaintiff in error, in the court below, and are referred to in the opinion of the court of appeals, and they are also cited here for the purpose of showing his right to maintain these proceedings to set aside the will of his grandfather. They are: *Spread v. Morgan*, 11 H. L. Cas. 587, decided in 1864; *Watson v. Watson*, 128 Mass. 152, decided in 1880.

[59] *In the English case it was held that one remaining in possession of two estates, under titles not consistent with each other, thereby afforded no decisive proof of an election under which title to take. It was there held that the rule was, "that if a party being bound to elect between two properties, not being called upon so to elect, continues in the receipt of the rents and profits of both, such receipt affording no proof of preference cannot be an election to take the one and reject the other."

We think the case has no application to the one at bar, and is well distinguished in the opinion of the court of appeals in this case.

In *Watson v. Watson*, 128 Mass. 152, the general doctrine that any person taking a beneficial interest under a will thereby confirmed it, and could not set up any right or claim of his own which would defeat or in any way prevent the full operation of every part of the will, was recognized and affirmed, but it was said (page 155):

"An election made in ignorance of material facts is, of course, not binding, when no other person's rights have been affected thereby. So, if a person, though knowing the facts, has acted in misapprehension of his legal rights, and in ignorance of his obligation to make an election, no intention to elect, and consequently no election, is to be presumed."

Regarding the legatee who took a legacy under the will, the court continued (at p. 157) as follows:

"But as to Edward, the case stands differently. Immediately upon being informed of the rule of law, little more than a year after the probate of the will, and before the executor had settled any account in the probate court, or the position of any other person had been changed, he returned his legacy to the executor, and gave him notice that he elected not to take it. He cannot therefore be held to have made such an election as should deprive him of the right, under his independent title, to partition of the whole estate, not excepting the parcel claimed by the respondent."

ferently. Immediately upon being informed of the rule of law, little more than a year after the probate of the will, and before the executor had settled any account in the probate court, or the position of any other person had been changed, he returned his legacy to the executor, and gave him notice that he elected not to take it. He cannot therefore be held to have made such an election as should deprive him of the right, under his independent title, to partition of the whole estate, not excepting the parcel claimed by the respondent."

*In this case the position of other parties [60] to this litigation has most materially changed, as has already been shown (the particulars of which need not be repeated), while the plaintiff in error has been also guilty of extreme negligence even in attempting to discover what he alleges are facts. We are satisfied that the plaintiff in error is estopped from now contesting the will, and that great injustice would result from the overturning of the principle adjudged in so many cases.

We are of opinion the case has been rightly decided, and the judgment of the Court of Appeals of the District of Columbia is affirmed.

FRANK E. KEHRER, Plff. in Err.,

v.

ANDREW P. STEWART.

(See S. C. Reporter's ed. 60-70.)

Constitutional law—state taxation of local managers of foreign packing houses—infringement of commerce clause—equal protection of the laws.

1. The tax of \$200 upon resident managing agents of nonresident meat-packing houses which is imposed by Georgia act of December 21, 1900, regardless of the fact that the greater portion of the business may be interstate in its character, does not conflict with the commerce clause of the Federal Constitution, where the tax is construed by the highest state court to apply only to the business of selling to local customers from the stock of original packages shipped into the

NOTE.—On state regulation of interstate or foreign commerce—see notes to *Norfolk & W. R. Co. v. Com.* 13 L. R. A. 107; *McCanna & F. Co. v. Citizens' Trust & Surety Co.* 24 C. C. A. 13; *Ratterman v. Western U. Teleg. Co.* 32 L. ed. U. S. 229; *Harmon v. Chicago*, 37 L. ed. U. S. 216; *Cleveland, C. C. & St. L. R. Co. v. Backus*, 38 L. ed. U. S. 1041; and *Postal Teleg. Cable Co. v. Adams*, 39 L. ed. U. S. 311.

As to police power as affecting commerce—see notes to *People v. Budd*, 5 L. R. A. 559, and *State ex rel. Corwin v. Indiana & O. Oil, Gas, & Min. Co.* 6 L. R. A. 579.

On license taxes as affecting interstate commerce—see notes to *Rothermel v. Meyerle*, 9 L.

state without a previous sale or contract to sell, and kept and held for sale in the ordinary course of trade, and this domestic business is not shown to be a mere incident to the interstate business.

2. The equal protection of the laws is not denied a managing agent of a nonresident meat-packing house by the imposition, under Georgia act of December 21, 1900, of a license tax on the domestic business conducted by him, since such act applies to managing agents of both domestic and foreign houses.
3. The obligation of the contract of employment, by a nonresident meat-packing house, of a resident managing agent at a weekly wage, is not unconstitutionally impaired by the imposition upon him, under Georgia act of December 21, 1900, of a license tax of \$200 upon the domestic business carried on by him.

[No. 152.]

Argued January 24, 25, 1905. Decided February 27, 1905.

IN ERROR to the Supreme Court of the State of Georgia to review a judgment which affirmed, on a second writ of error, a judgment of the City Court of Atlanta, sustaining a demurrer to an amended petition in an action to recover back a license tax imposed on a resident managing agent of a nonresident meat-packing house. *Affirmed.*

See same case below, on first writ of error, 115 Ga. 184, 41 S. E. 680; on second writ of error, 117 Ga. 969, 44 S. E. 854.

Statement by Mr. Justice Brown:

This was an action by Kehrer against the tax collector of the county of Fulton to recover back a tax of \$200, with interest and costs, paid to Stewart under protest, such tax having been assessed against him under the general tax law of the state, of December 21, 1900, which provided that there should be assessed and collected "upon all agents of packing houses doing business in this state, \$200 in each county where said business is carried on." Petitioner charged the law to be a violation of the 14th Amendment.

Defendant demurred to the petition, and this demurrer being overruled, a writ of error was taken from the supreme court, which reversed the judgment of the court below in overruling the demurrer. 115 Ga. 184, 41 S. E. 680. Plaintiff thereupon amended his petition, insisting that the tax

denied him due process of law as well as the equal protection of the law, impaired the obligation of his contract with the firm, and was also in conflict with the commerce clause of the Constitution of the United States. The defendant demurred to the amended petition. The court sustained the demurrer and the supreme court affirmed its action. 117 Ga. 969, 44 S. E. 854.

Mr. Alexander W. Smith argued the cause and filed a brief for plaintiff in error:

The act violates the 14th Amendment.

Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *Ex parte Virginia*, 100 U. S. 339, 25 L. ed. 676; *Barbier v. Connolly*, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 151, 168, 41 L. ed. 667, 672, 17 Sup. Ct. Rep. 255.

The doctrine now sought to be applied is in no manner modified, but fully reaffirmed, in *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609, notwithstanding a Kansas statute imposing attorneys' fees was there upheld, while the Texas statute imposing attorneys' fees was, in the *Ellis Case*, declared unconstitutional. The Kansas statute was upheld because it involved a police regulation, while the Texas statute merely imposes a penalty. There is no pretense that the act in the case at bar is anything more than a revenue law. Its caption so declares it, and the court below so treats it.

Linton v. Childs, 105 Ga. 567, 32 S. E. 617; *Re Yot Sang*, 75 Fed. 984; *Fraser v. McConway & T. Co.* 82 Fed. 257; *Randolph v. Builders' & P. Supply Co.* 106 Ala. 501, 17 So. 721; *New York L. Ins. Co. v. Smith* (Tex. Civ. App.) 41 S. W. 680; *St. Louis, I. M. & S. R. Co. v. Williams*, 49 Ark. 492, 5 S. W. 883; *Denver & R. G. R. Co. v. Outcalt*, 2 Colo. App. 395, 31 Pac. 177; *Atchison & N. R. Co. v. Baty*, 6 Neb. 37, 29 Am. Rep. 356; *O'Connell v. Menominee Bay Shore Lumber Co.* 113 Mich. 124, 71 N. W. 449; *Janesville v. Carpenter*, 77 Wis. 288, 8 L.

R. A. 366, and *American Fertilizing Co. v. Board of Agriculture*, 11 L. R. A. 179.

On importations in original packages—see notes to *Re Wilson*, 12 L. R. A. 624; *State ex rel. Cochran v. Winters*, 10 L. R. A. 616, and *Pittsburg & S. Coal Co. v. Bates*, 39 L. ed. U. S. 539.

As to the validity of class legislation—see *State v. Goodwill*, 6 L. R. A. 621, and note, and *State v. Loomis*, 21 L. R. A. 789, and note.

As to constitutional equality of privileges, im-

munities, and protection—see *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* 14 L. R. A. 579, and note.

As to what laws are void as impairing obligation of contracts—see notes to *Franklin County Grammar School v. Bailey*, 10 L. R. A. 405; *Fletcher v. Peck*, 3 L. ed. U. S. 162; *McCanna & F. Co. v. Citizens' Trust & Surety Co.* 24 C. C. A. 20, and *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co.* 35 C. C. A. 12.

R. A. 808, 20 Am. St. Rep. 123, 46 N. W. 128; *State ex rel. Garrabad v. Dering* (Re Garrabad) 84 Wis. 588, 19 L. R. A. 858, 36 Am. St. Rep. 948, 54 N. W. 1104; *Pearson v. Portland*, 69 Me. 278, 31 Am. Rep. 276; *Burrows v. Brooks*, 113 Mich. 307, 71 N. W. 460; *Middleton v. Middleton*, 54 N. J. Eq. 692, 36 L. R. A. 221, 55 Am. St. Rep. 602, 35 Atl. 1065, 37 Atl. 1106; *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 25 Am. St. Rep. 863, 10 S. E. 285; *Kuhn v. Detroit*, 70 Mich. 538, 38 N. W. 470; *State v. Hinman*, 65 N. H. 105, 23 Am. St. Rep. 22, 18 Atl. 194; *State v. Pennoyer*, 65 N. H. 116, 5 L. R. A. 709, 18 Atl. 878.

The act is a burden upon, and a regulation of, interstate commerce.

Crutcher v. Kentucky, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; *Allcn v. Pullman's Palace Car Co.* 191 U. S. 172, 183, 48 L. ed. 134, 140, 24 Sup. Ct. Rep. 39; *Leloup v. Mobile*, 127 U. S. 640, 647, 32 L. ed. 311, 314, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; *Asher v. Texas*, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1; *Western U. Teleg. Co. v. Alabama Bd. of Assessment* (*Western U. Teleg. Co. v. Seay*) 132 U. S. 477, 33 L. ed. 410, 2 Inters. Com. Rep. 726, 10 Sup. Ct. Rep. 161; *Lyng v. Michigan*, 135 U. S. 166, 34 L. ed. 153, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725; *McCall v. California*, 136 U. S. 110, 34 L. ed. 393, 10 Sup. Ct. Rep. 881; *Pollock v. Farmers' Loan & T. Co.* 157 U. S. 582, 39 L. ed. 819, 15 Sup. Ct. Rep. 673; *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 234, 41 L. ed. 700, 17 Sup. Ct. Rep. 305; *Stockard v. Morgan*, 185 U. S. 34, 46 L. ed. 793, 22 Sup. Ct. Rep. 576; *Atlantic & P. Teleg. Co. v. Philadelphia*, 190 U. S. 162, 47 L. ed. 999, 23 Sup. Ct. Rep. 817.

The statute herein falls within the cases where statutes upon this subject have been held void, because the statute prohibited the doing of any business in the state whatever unless upon the payment of the fee or tax.

Osborne v. Florida, 164 U. S. 650, 41 L. ed. 586, 17 Sup. Ct. Rep. 214.

In *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876, a distinction is very clearly drawn between cases upholding a tax as not regulating interstate commerce, where it is imposed merely on the property employed in the business, and cases where the tax is laid upon the right to do business at all. In the latter class of cases such taxes are held to impose a direct burden on the commerce itself, and of course the regulations as to procurement of license, etc., amount to regulations of such commerce.

If the tax under discussion was levied directly upon all packing houses doing busi-

ness in Georgia, and all such packing houses were required to take out licenses, the question would be very different.

Pullman Co. v. Adams, 189 U. S. 420, 47 L. ed. 877, 23 Sup. Ct. Rep. 494.

The *Leloup Case* is in no manner modified, and the opinion under review is to no extent supported, by *Postal Teleg. Cable Co. v. Charleston*, 153 U. S. 692, 38 L. ed. 871, 4 Inters. Com. Rep. 637, 14 Sup. Ct. Rep. 1094.

The distinction lies in the language of the legislation attacked. The ordinance there complained of by its express terms limited its operation to "business done exclusively within the city of Charleston."

So in *Western U. Teleg. Co. v. Alabama Bd. of Assessment* (*Western U. Teleg. Co. v. Seay*) 132 U. S. 472, 33 L. ed. 409, 2 Inters. Com. Rep. 726, 10 Sup. Ct. Rep. 161, the tax contested was imposed by the express letter of the law exclusively upon the business done by the company in the state of Alabama.

Ratterman v. Western U. Teleg. Co. 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127, was decided on the same date as the *Leloup Case*. Both decisions were unanimous. It is hardly to be supposed there was any conflict between them in the minds of this court at the time they were decided. There is no conflict between them in fact or in principle.

Mr. John C. Hart argued the cause and filed a brief for defendant in error:

This act does not deny to any person the equal protection of the laws, for all persons of the class designated and described by the occupation in which they are engaged are subject to the same specific tax. The agent of the domestic packing house is liable to the tax, as is the agent of the foreign packing house. The object of the 14th Amendment to the Federal Constitution was to preclude the several states from discriminating against citizens of other states.

Cooley, Taxn. p. 99; 1 *Desty*, Taxn. p. 223; *Slaughter House Cases*, 16 Wall. 36, 21 L. ed. 394.

The specific tax levied upon persons engaged in the conduct of a particular business is in no sense obnoxious to the 14th Amendment.

Williams v. Fears, 110 Ga. 584, 50 L. R. A. 685, 35 S. E. 699.

The Constitution imposes no restriction on the states in the levy of taxes other than that there shall be no discrimination against citizens of other states.

Davidson v. New Orleans, 96 U. S. 105, 24 L. ed. 620; *Giozza v. Tiernan*, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721; *Hagar v. Reclamation Dist. No. 108*, 111

U. S. 709, 28 L. ed. 572, 4 Sup. Ct. Rep. 663.

Due process of law, within the meaning of the 14th Amendment, is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government.

Giozza v. Tiernan, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721.

The shipping of dressed meats into the state of Georgia in pursuance of orders heretofore received from its citizens would be interstate commerce, and a tax upon that business, or upon the agent who distributed the goods so ordered, would be unconstitutional as an illegal interference with interstate commerce, and would fall within the case of *Caldwell v. North Carolina*, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229.

The supreme court of Georgia recognizes that it is not within the power of the state to levy and collect a tax out of one who, as the representative of a principal residing in another state, takes orders, and receives the goods in Georgia, and distributes them among the customers from whom he obtains such orders. Such business would be interstate commerce, and neither the agent, nor goods, would be liable to the tax.

Stone v. State, 117 Ga. 292, 43 S. E. 740.

The tax is here levied and collected because the plaintiff in error is engaged in a domestic business in that the goods he offers for sale (though shipped from outside of the state and into the state of Georgia) were here stored and offered for sale in open market, thereby becoming in character a domestic business. The Constitution of the United States protects such goods only to the extent of preventing state legislation which imposes on them, because of their origin, burdens which are not imposed upon goods the product of the state imposing such burdens.

Kehrer v. Stewart, 117 Ga. 969, 44 S. E. 854.

Mr. Justice **Brown** delivered the opinion of the court:

This case arose upon the following state of facts:

Nelson Morris & Co., citizens of Illinois, were engaged, in the city of Chicago, in the business of packing meats for sale and consumption, and also had a place of business in Atlanta, Georgia, where they sold their products at wholesale, having in their employ several clerks and helpers, one of whom was the petitioner, who was employed as chief clerk and manager at a salary of \$25 per week. The firm did not have anywhere within the state of Georgia any packing house for slaughtering, dressing, curing, packing, or manufacturing the products of

any animals for food or commercial use, but took orders, which were transmitted and filled at Chicago, the meats sent* to Atlanta, [65] and there distributed in pursuance of such orders. Certain meats were also shipped from Chicago to Atlanta without a previous sale or contract to sell. These were stored in the Atlanta house of the firm in the original packages, and were kept and held for sale, in the ordinary course of trade, as domestic business. They were offered for sale to such customers as might require them, and until sold were stored and preserved and remained the property of the firm.

1. It was admitted by the supreme court of Georgia, in its opinion, and by both parties hereto, that a tax upon the seller of goods is a tax upon the goods themselves (*Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347), and that a tax upon goods sold in another state, delivered to a common carrier, and consigned to the purchaser in the state of Georgia, was an illegal interference with interstate commerce. *Caldwell v. North Carolina*, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; *Norfolk & W. R. Co. v. Sims*, 191 U. S. 441, 48 L. ed. 254, 24 Sup. Ct. Rep. 151; *Stone v. State*, 117 Ga. 292, 43 S. E. 740. It was therefore held that the tax, so far as applied to meats sold in Chicago, and shipped to the petitioner in Georgia for distribution, could not be supported; but that so far as the petitioner was engaged in the business of selling directly to customers in Atlanta, he was engaged in carrying on an independent business as a wholesale dealer, and was liable to the tax.

This decision was correct. In carrying on the domestic business, petitioner was indistinguishable from the ordinary butcher, who slaughters cattle and sells their carcasses, and in principle it made no difference that the cattle were slaughtered in Chicago and their carcasses sent to Atlanta for sale and consumption in the ordinary course of trade. Upon arrival there they became a part of the taxable property of the state. It made no difference whence they came and to whom they were ultimately sold, or whether the domestic and interstate business were carried on in the same or different buildings. In this particular the case is covered by that of *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091, wherein it was held that coal mined *in Pennsylvania [66] and sent by water to New Orleans, to be sold in open market there on account of the owners in Pennsylvania, became intermingled with the general property of the state, and liable to taxation under its laws, although it might have been after arrival sold from the vessel on which the

transportation was made, without being landed, and for the purpose of being taken out of the country on a vessel bound to a foreign port. The same principle was applied in *Emert v. Missouri*, 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367, in which a license tax upon peddlers of goods, which made no distinction between residents and products of the state and of those of other states, was sustained. To the same effect is *Howe Mach. Co. v. Gage*, 100 U. S. 676, 25 L. ed. 754.

The case is readily distinguishable from that of *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851, wherein a state law requiring a license from agencies of foreign express companies was held to be a regulation of interstate commerce, so far as applied to a corporation of another state engaged in interstate business, although as incidental thereto it did some local business by carrying goods from one point to another in the state of Kentucky. The court observed that while the local business was probably quite as much for the accommodation of the people of the state as for the advantage of the company, this did not obviate the objection to the tax; that the regulations as to license and capital stock were imposed as conditions of the company's carrying on the business of interstate commerce, which was manifestly the principal object of its organization. "These regulations are clearly a burden and a restriction upon that commerce. Whether intended as such or not, they operate as such. But taxes or license fees in good faith imposed exclusively on express business carried on wholly within the state would be open to no such objection."

The same doctrine was applied to telegraph companies in *Leloup v. Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380, wherein a general license tax upon the telegraph company was held to affect its entire business, interstate as well as domestic or internal, and was unconstitutional. This case, however, must be [67] read *in connection with the *Postal Teleg. Cable Co. v. Charleston*, 153 U. S. 692, 38 L. ed. 871, 4 Inters. Com. Rep. 637, 14 Sup. Ct. Rep. 1094, wherein we held that a license tax upon a telegraph company on business done exclusively within the state, and not including any business done to or from points without the state, and not including any business done for the government of the United States, was an exercise of the police power, and not an interference with interstate commerce. In line with this case is 197 U. S.

that of *Ratterman v. Western U. Teleg. Co.* 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127, in which a percentage tax assessed upon receipts of telegraph companies partly derived from interstate commerce and partly from commerce within the state, and which were capable of separation, but were returned and assessed in gross, and without separation or apportionment, was held invalid in proportion to the extent that such receipts were derived from interstate commerce, but valid as applied to receipts from messages within the state. To the same effect is *Western U. Teleg. Co. v. Alabama Bd. of Assessment (Western U. Teleg. Co. v. Seay)*, 132 U. S. 472, 33 L. ed. 409, 2 Inters. Com. Rep. 726, 10 Sup. Ct. Rep. 161.

So, if the stock of a transportation company be taxed by taking as a basis of assessment such proportion of its capital stock as the number of miles of railroad over which its cars are run within the state bear to the whole number of miles over which its cars are run throughout the United States, such assessment does not impinge upon the power of Congress. *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876. The case is still simpler if the tax be imposed in terms upon the domestic commerce, seeing that the corporation is free to abandon the business taxed if it sees fit. *Pullman Co. v. Adams*, 189 U. S. 420, 47 L. ed. 877, 23 Sup. Ct. Rep. 494; *Allen v. Pullman's Palace Car Co.* 191 U. S. 171, 48 L. ed. 134, 24 Sup. Ct. Rep. 39.

The only difficulty in this case arises from the fact that the tax is laid not in terms upon the domestic business, nor upon the gross receipts or profits which might be apportioned between interstate and domestic business, but is a gross sum imposed upon the managing agent of packing houses, regardless of the fact that the greater portion of the business may *be interstate in its char-[68]acter. This contingency, however, is met by the case of *Osborne v. Florida*, 164 U. S. 650, 41 L. ed. 586, 17 Sup. Ct. Rep. 214, wherein a license tax imposed upon express companies doing business in Florida had been construed by the supreme court of that state as applying solely to business of the company done within the state, and not to its interstate business. Accepting this construction of the state statute as in reality part of the statute itself, we held that it did not in any way violate the Federal Constitution. The statute was sustained, notwithstanding the fact that 95 per cent of

the business was interstate in its character, and only 5 per cent consisted of carrying goods and freight between points within the state of Florida. *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851, was distinguished as one which prohibited the agent of a foreign express company from carrying on business at all in that state without first obtaining a license from the state. Said the court: "It has never been held, however, that when the business of the company which is wholly within the state is but [not] a mere incident to its interstate business, such fact would furnish any obstacle to the valid taxation by the state of the business of the company which is entirely local. So long as the regulation as to the license or taxation does not refer to, and is not imposed upon, the business of the company which is interstate, there is no interference with that commerce by the state statute."

So, in the case under consideration, it was expressly held by the supreme court of Georgia that that part of the Nelson Morris & Company's business which consisted in shipping goods to Atlanta to fill orders previously received, the goods being delivered in accordance with such orders, was interstate commerce, not subject to taxation within the state, and that, so far as applied to that business, the tax was void. Accepting this construction of the supreme court, we think the act, so far as applied to domestic business, is valid. The record does not show what proportion of such business is interstate and what proportion is domestic, al-

[69] though it is conceded *that most of the business is interstate in its character. If the amount of domestic business were purely nominal, as, for instance, if the consignee of a shipment made in Chicago, upon an order filled there, refused the goods shipped, and the only way of disposing of them was by sales at Atlanta, this might be held to be strictly incidental to an interstate business, and in reality a part of it, as we held in *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; but if the agent carried on a definite, though a minor, part of his business in the state by the sales of meat there, he would not escape the payment of the tax, since the greater or less magnitude of the business cuts no figure in the imposition of the tax. There could be no doubt whatever that, if the agent carried on his interstate and domestic business in two distinct establishments, one would be subject and the other would not be subject

to the tax, and in our view it makes no difference that the two branches of business are carried on in the same establishment. The burden of proof was clearly upon the plaintiff to show that the domestic business was a mere incident to the interstate business.

2. The act in question does not deny to the petitioner the equal protection of the laws, as the tax is imposed alike upon the managing agent both of domestic and of foreign houses. In its first opinion in this case the supreme court held that the tax was a vocation or occupation tax, and that it was not designed to apply to every agent or employee of the company, but only to the managing or superintending agent, who is the *alter ego* of the principal by whom he is employed. There is no discrimination in favor of the agents of domestic houses, and, while we may suspect that the act was primarily intended to apply to agents of *ultra* state houses, there is no discrimination upon the face of the act, and none, so far as the record shows, upon its practical administration. As we have frequently held, the state has the right to classify occupations, and to impose different taxes upon different occupations. Such has been constantly the practice of Congress under the internal revenue laws. *Cook v. Marshall County*, 196 U. S. 261, 275, *ante*, 471, 476, 25 Sup. Ct. Rep. 233. *What the necessity is for such tax, and up-[70] on what occupations it shall be imposed, as well as the amount of the imposition, are exclusively within the control of the state legislature. So long as there is no discrimination against citizens of other states, the amount and necessity of the tax are not open to criticism here.

3. The argument that the tax impairs the obligation of a contract between the petitioner and Nelson Morris & Company is hardly worthy of serious consideration. The power of taxation overrides any agreement of an employee to serve for a specific sum. His contract remains entirely undisturbed. There was no stipulation for an employment for a definite period; and if there were, it is inconceivable that the state should lose this right of taxation by the fact that the party taxed had entered into an engagement with his employer for a definite period. The tax is an incident to the business, and probably might, under the terms of their contract, be charged up against the employer as one of the necessary expenses of carrying it on.

The judgment of the Supreme Court of Georgia is affirmed.

SAN FRANCISCO NATIONAL BANK,
Appt.,
v.
 WASHINGTON DODGE, as Assessor of the
 City and County of San Francisco.

(See S. C. Reporter's ed. 70-115.)

State taxation of national bank stock—discrimination.

1. The adoption of a different method for taxing state banks and other moneyed corporations from that adopted for the taxation of national banks does not necessarily conflict with U. S. Rev. Stat. § 5219 (U. S. Comp. Stat. 1901, p. 3502), authorizing state taxation of shares of stock in national banks, but exacting that the tax, when levied, shall be at no greater rate than that imposed on other moneyed corporations.
2. A discrimination against national banks, and in favor of state banks and other moneyed corporations, forbidden by U. S. Rev. Stat. § 5219 (U. S. Comp. Stat. 1901, p. 3502), results from the taxation of shares of stock of national banks, under Cal. Pol. Code, §§ 3608-3610, at their market value, while the construction given by the highest state court to the provisions for the taxation of the "property" of state banks and other moneyed corporations does not require, although property is defined by Cal. Const. art. 13, § 1, as including "franchises," that the assessing officers shall include in the assessment all the intangible elements of value which form part of the market and selling value of shares of stock.

[No. 44.]

Argued November 7, 1904. Decided February 27, 1905.

APPEAL from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which affirmed a decree of the Circuit Court for the Northern District of California, dismissing a suit to restrain the enforcement of taxes on shares of stock of a national bank. Decrees of both courts below *reversed* and the cause remanded to the Circuit Court for further proceedings.

The facts are stated in the opinion.

Mr. **William S. Wood** argued the cause, and, with Messrs. *E. S. Pillsbury, Alfred Sutro,* and *Lloyd & Wood*, filed a brief for appellant:

All subjects over which the sovereign power of a state extends are objects of state taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation.

NOTE.—On state taxation of national banks—see note to *McHenry v. Downer*, 45 L. R. A. 737.

M'Culloch v. Maryland, 4 Wheat. 316-429, 4 L. ed. 579-607.

It matters not how or by whom the exempt property may be held, the exemption is equally obligatory. The exemption must be allowed in its entirety.

Income Tax Cases (Pollock v. Farmers' Loan & T. Co.) 157 U. S. 429, 581-592, 646, 652, 39 L. ed. 759, 819-823, 842, 844, 15 Sup. Ct. Rep. 673.

National banks are not subject to state taxation. The franchise to be a national bank is not subject to state taxation.

Owensboro Nat. Bank v. Owensboro, 173 U. S. 671, 43 L. ed. 853, 19 Sup. Ct. Rep. 537; *First Nat. Bank v. Louisville*, 174 U. S. 438, 439, 43 L. ed. 1038, 1039, 19 Sup. Ct. Rep. 876.

The authority to tax shareholders is upon the express limitations declared by Congress.

Owensboro Nat. Bank v. Owensboro, 173 U. S. 668, 43 L. ed. 852, 19 Sup. Ct. Rep. 537; *First Nat. Bank v. San Francisco*, 129 Cal. 97, 61 Pac. 778.

Whenever state legislation assumes to tax shareholders of national banks at a greater rate than other moneyed capital in the hands of individual citizens of such state, such legislation is unconstitutional and void.

New York v. Weaver, 100 U. S. 539, 25 L. ed. 705; *Pelton v. Commercial Nat. Bank*, 101 U. S. 146, 25 L. ed. 902; *Evansville Nat. Bank v. Britton*, 105 U. S. 322, 26 L. ed. 1053; *McHenry v. Downer*, 116 Cal. 25, 45 L. R. A. 737, 47 Pac. 779; *Miller v. Heilbron*, 58 Cal. 133.

The Political Code discriminates between shareholders in national-bank associations and stockholders in state corporations:

1. The stock of the one is subject to state taxation; the stock of the other is not.

2. The statutory rule as to the value of stock is made applicable to state corporations, and declared inapplicable to national-banking associations.

3. The corporate property alone of state corporations is assessable, while, of course, there is neither provision nor authority for assessing the corporate property of national-banking associations.

First Nat. Bank v. San Francisco, 129 Cal. 96, 61 Pac. 778.

That shares of stock and corporate property essentially differ in value is the settled doctrine of the Federal courts. And that the difference in thus assessing the shareholders in national-bank associations largely discriminates against them, must be obvious.

Albany County v. Stanley, 105 U. S. 311, 26 L. ed. 1049; *Evansville Nat. Bank v. Britton*, 105 U. S. 324, 26 L. ed. 1054.

The rule applicable to the property of

the stockholder in a state corporation or in a state bank is not the equivalent of the rule made applicable to stockholders in national-banking associations.

Miller v. Heilbron, 58 Cal. 133; *McHenry v. Downer*, 116 Cal. 20, 45 L. R. A. 737, 47 Pac. 779.

The objection held good in *Miller v. Heilbron* and *McHenry v. Downer* still remains, and is equally fatal to the attempt to tax the shares of stock in national banks. Stock is not now, any more than it was then, a solvent credit.

Dutton v. Citizens' Nat. Bank, 53 Kan. 440, 36 Pac. 719; *First Nat. Bank v. Ayers*, 160 U. S. 660-664, 40 L. ed. 573, 574, 16 Sup. Ct. Rep. 412.

In assessing the property of the corporation it must be held exempt from assessment and taxation upon all its Federal securities, whereas in assessing its stock to the shareholders no such exemption is allowed.

Owensboro Nat. Bank v. Owensboro, 173 U. S. 664, 667, 43 L. ed. 850, 852; *Whitbeck v. Mercantile Nat. Bank*, 127 U. S. 199, 32 L. ed. 120, 8 Sup. Ct. Rep. 1121; *Palmer v. McMahon*, 133 U. S. 660, 33 L. ed. 772, 10 Sup. Ct. Rep. 324.

Mr. William S. Wood also filed a separate brief for appellant:

The assets of the state banks may consist in whole or in part of nontaxable things; and, by reason of that fact, the equality would and could not be preserved when national-bank shares continued to be assessed at their value without regard to the character of the property in which the capital of the bank might be invested.

Van Allen v. Assessors (Churchill v. Utica) 3 Wall. 573, 18 L. ed. 229.

A share of national-bank stock is to be treated as a distinct, independent interest or property, to be valued for tax purposes at its market value, without reference to the question where, or in what manner or nature of property, the capital stock may be invested.

Van Allen v. Assessors (Churchill v. Utica) 3 Wall. 584, 18 L. ed. 234; *Commercial Nat. Bank v. Chambers*, 182 U. S. 561, 45 L. ed. 1229, 21 Sup. Ct. Rep. 863.

A tax upon the money of individuals invested in the form of shares of stock in national banks would diminish their value as an investment, and drive the capital so invested from this employment, if, at the same time, similar investments and similar employments under the authority of state laws were exempt from an equal burden.

Aberdeen Bank v. Chehalis County (First Nat. Bank v. Chehalis County) 166 U. S. 440, 41 L. ed. 1069, 17 Sup. Ct. Rep. 629.

In *Whitbeck v. Mercantile Nat. Bank*, 127 U. S. 193, 32 L. ed. 118, 8 Sup. Ct. Rep.

1121, a difference in valuation between 60 and 65 per cent valuation was held to be sufficient to establish a discrimination.

The market value of property means the price at which it is bought and sold in the open market; that is to say, its "salable value."

Cummings v. Merchants' Nat. Bank, 101 U. S. 162, 25 L. ed. 906; *Cluquot's Champagne (125 Baskets of Champagne v. United States)* 3 Wall. 125, 18 L. ed. 116.

Elements other than the assets enter into and aid materially in creating the market value of the shares of a corporation.

Com. v. Hamilton Mfg. Co. 12 Allen, 302; *People ex rel. Manhattan R. Co. v. Barker*, 28 Misc. 13, 59 N. Y. Supp. 926; *Pullman's Palace Car Co. v. Central Transp. Co.* 171 U. S. 154, 155, 43 L. ed. 115, 18 Sup. Ct. Rep. 808; *Adams Exp. Co. v. Ohio State Auditor*, 166 U. S. 221, 41 L. ed. 977, 17 Sup. Ct. Rep. 604.

If it be conceded that appellant's shares were properly valued, that would not save the assessment when it appears that the state banks were undervalued.

Railroad & Teleph. Cos. v. Board of Equalizers, 85 Fed. 312.

From every standpoint of consideration, and from every point of view, the record shows a plain, unmistakable case of discrimination against the shareholders of the appellant bank, from which it is entitled to seek relief from the courts.

Louisville Trust Co. v. Stone, 46 C. C. A. 299, 107 Fed. 305; *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153, 25 L. ed. 903; *Louisville & N. R. Co. v. Coulter*, 131 Fed. 282; *Taylor v. Louisville & N. R. Co.* 31 C. C. A. 537, 60 U. S. App. 166, 88 Fed. 373; *Whitbeck v. Mercantile Nat. Bank*, 127 U. S. 193, 195, 32 L. ed. 118, 119, 8 Sup. Ct. Rep. 1121.

Mr. E. S. Pillsbury also filed a separate brief for appellant.

Mr. William Irwin Brobeck argued the cause, and, with *Mr. Percy V. Long*, filed a brief for appellee:

While it is important that no national bank should be the object of unjust discrimination at the instance of the state, it is equally essential that no state bank should be so subjected.

Davenport Nat. Bank v. Davenport Bd. of Equalization, 123 U. S. 84, 31 L. ed. 96, 8 Sup. Ct. Rep. 73; *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. ed. 895, 7 Sup. Ct. Rep. 826.

While the right of every citizen to resist an unjust or excessive tax must be cheerfully conceded, the practical workings of an intricate system of taxation do not admit of that nicety of adjustment which will relieve

all individual hardship or produce absolute uniformity of assessment.

Stanley v. Albany County, 121 U. S. 550, 30 L. ed. 1003, 7 Sup. Ct. Rep. 1234.

Unless restrained by provisions of the Federal Constitution, the power of the state as to the mode, form, and extent of taxation is unlimited, where the subjects to which it applies are within the jurisdiction.

State Tax on Foreign-Held Bonds (Cleveland, P. & A. R. Co. v. Pennsylvania) 15 Wall. 300, 21 L. ed. 179; *Kirtland v. Hotchkiss*, 100 U. S. 491, 25 L. ed. 558; *Mackay v. San Francisco*, 113 Cal. 392, 45 Pac. 696.

It is only under a state of facts which discloses a preconceived understanding on the part of the assessor, or as a result of operations of the state statute, to discriminate against the shares of national banks, that the courts will declare an assessment void on that ground.

Stanley v. Albany County, 121 U. S. 550, 30 L. ed. 1003, 7 Sup. Ct. Rep. 1234; *German Nat. Bank v. Kimball*, 103 U. S. 732, 26 L. ed. 469; *Albuquerque Nat. Bank v. Perea*, 147 U. S. 87, 37 L. ed. 91, 13 Sup. Ct. Rep. 194; *Albany County v. Stanley*, 105 U. S. 305, 26 L. ed. 1044.

Only competing "moneyed capital" is required to be assessed at no less a rate than shares of stock of national banks.

National Bank v. Baltimore, 40 C. C. A. 254, 100 Fed. 29; *Mercantile Nat. Bank v. New York*, 121 U. S. 154-157, 30 L. ed. 895-902, 7 Sup. Ct. Rep. 826; *Evansville Nat. Bank v. Britton*, 105 U. S. 322, 26 L. ed. 1053; *First Nat. Bank v. Chehalis County*, 166 U. S. 440, 41 L. ed. 1069, 17 Sup. Ct. Rep. 629.

The appellant has deducted from the properties of the banks, which are legally elements in the estimation and determination of the value of its shares, the United States bonds held by such banks, although it was early declared by the United States Supreme Court that it was competent to include such bonds in the estimation of the value of the shares.

Van Allen v. Assessors (Churchill v. Utica) 3 Wall. 573, 18 L. ed. 229; *Bradley v. Illinois*, 4 Wall. 459, 18 L. ed. 433; *New York v. Tax & A. Comrs.* 4 Wall. 244, 18 L. ed. 344.

The question is whether the Constitution and laws of the state of California, on their face, discriminate against national-bank shares in their assessment and the assessment of other competitive moneyed capital.

Davenport Nat. Bank v. Davenport Bd. of Equalization, 123 U. S. 83, 31 L. ed. 94, 8 Sup. Ct. Rep. 73.

If appellant can be heard to complain of a provision in the law favorable to its shareholders, and of which the appellee alleges

his intention or giving it the full benefit, and its contention that this beneficial provision of the statute is void in so far as it denies such deduction, where the shareholders are entitled to it, is sustained, it by no means follows that the assessor is without power to make such assessment, or that the assessment, when made, would be anything more than voidable; on the contrary, it would not be either void or voidable until a showing was made and sustained that the shareholders were indebted, in unsecured debts, to bona fide residents of the state.

Albany County v. Stanley, 105 U. S. 305-311, 26 L. ed. 1044-1049; *Palmer v. McMahon*, 133 U. S. 667, 33 L. ed. 775, 10 Sup. Ct. Rep. 354.

The method of assessment required by act of Congress has been followed by an assessment of the shares of stock without permitting a deduction from such shares of unsecured debts. To allow such deduction to the shareholder would be to allow a double deduction from such credits,—once for the unsecured debts of the bank, and second, for the unsecured debts of the shareholders.

First Nat. Bank v. Chapman, 173 U. S. 211, 43 L. ed. 671, 19 Sup. Ct. Rep. 407; *Van Allen v. Assessors*, 3 Wall. 573, 18 L. ed. 229; *Bressler v. Wayne County*, 32 Ncb. 834, 13 L. R. A. 614, 49 N. W. 787; *Chapman v. First Nat. Bank*, 56 Ohio St. 310, 47 N. E. 54.

The shareholder is entitled to a part only of the net assets, or assets remaining after the payment of debts.

Plimpton v. Bigelow, 93 N. Y. 599; *Field v. Pierce*, 102 Mass. 261; *Jones v. Davis*, 35 Ohio St. 477; *Parker v. Sun Ins. Co.* 42 La. Ann. 1172, 8 So. 618; *Farrington v. Tennessee*, 95 U. S. 687, 24 L. ed. 560; *People v. National Bank*, 123 Cal. 60, 45 L. R. A. 747, 69 Am. St. Rep. 32, 55 Pac. 685.

Under the California system of taxation of corporations, the full market value of stock of such corporations is assessed by an assessment of their entire property, including their franchise. Where such property is situated in another state, and is not subject to the taxing jurisdiction of the state, the same end is attained by an assessment of the stock.

Stanford v. San Francisco, 131 Cal. 34, 63 Pac. 145; *San José Gas Co. v. January*, 57 Cal. 614; *Spring Valley Waterworks v. Schottler*, 62 Cal. 100; *Ottawa Glass Co. v. McCaleb*, 81 Ill. 556; *People ex rel. Burke v. Badlam*, 57 Cal. 594; *Bank of California v. San Francisco*, 142 Cal. 276, 64 L. R. A. 918, 100 Am. St. Rep. 130, 75 Pac. 832.

The question is not whether an assessment of the property of a national bank is the equivalent, in fact and law, of the assessment of the shares of stock of such bank

in the hands of its shareholders. The Supreme Court of the United States has held that it is not equivalent.

Owensboro Nat. Bank v. Owensboro, 173 U. S. 664, 43 L. ed. 850, 19 Sup. Ct. Rep. 537.

So, also, has the supreme court of the state of California.

First Nat. Bank v. San Francisco, 129 Cal. 94, 61 Pac. 778.

The real question is whether, under the California system, the assessment and taxation of all the property of California corporations is equivalent to the assessment and taxation of the shares of stock of California corporations.

As an interpretation of the revenue laws of a state by its own courts is binding upon a Federal court, we are concerned here only with the views of the supreme court of California upon this point. It may be said, however, that the supreme court of that state is not alone in the views expressed, very eminent authority in sister states having taken the same view.

Rice County v. Citizens' Nat. Bank, 23 Minn. 280; *Frederick Co. v. Farmers' & M. Nat. Bank*, 48 Md. 117; *Lackawanna County v. First Nat. Bank*, 94 Pa. 221; *Rosenberg v. Weekes*, 67 Tex. 578, 4 S. W. 899; *Gordon v. Baltimore*, 5 Gill, 231; *State, Fish, Prosecutor, v. Branin*, 23 N. J. L. 484; *Johnson v. Com.* 7 Dana, 342; *The Tax Cases*, 12 Gill & J. 117; *Smith v. Burley*, 9 N. H. 423; *Williams v. Weaver*, 75 N. Y. 31; *New Haven v. City Bank*, 31 Conn. 106.

In passing upon that question the supreme court of California has held in so many terms that such equivalency exists,—that it exists to such an extent as to leave an assessment of both the corporate property and the shares open to the objection that the same property is thereby taxed twice.

People ex rel. Burke v. Badlam, 57 Cal. 601; *San Francisco v. Anderson*, 103 Cal. 70, 42 Am. St. Rep. 98, 36 Pac. 1034; *Germania Trust Co. v. San Francisco*, 128 Cal. 595, 61 Pac. 178; *People v. National Bank*, 123 Cal. 53, 45 L. R. A. 747, 69 Am. St. Rep. 32, 55 Pac. 685; *Spring Valley Waterworks v. Schottler*, 62 Cal. 69; *San Francisco v. Fry*, 63 Cal. 470; *Bank of California v. San Francisco*, 142 Cal. 276, 64 L. R. A. 918, 100 Am. St. Rep. 130, 75 Pac. 832. See also *San Francisco v. Mackey*, 21 Fed. 539.

The taxation of all the property of a state bank may be the same as the taxation of the stock of such bank.

Davenport Nat. Bank v. Davenport Bd. of Equalization, 123 U. S. 85, 31 L. ed. 96, 8 Sup. Ct. Rep. 73; *Mercantile Nat. Bank v. New York*, 121 U. S. 138–160, 30 L. ed. 895–903, 7 Sup. Ct. Rep. 826; *Palmer v. Mc-*

Mahon, 133 U. S. 660, 33 L. ed. 772, 10 Sup. Ct. Rep. 324; *National Bank v. Boston*, 125 U. S. 60, 31 L. ed. 689, 8 Sup. Ct. Rep. 772.

The revenue laws of the state require the assessment of all property "at its full cash value" without discrimination. They require the assessment of the franchises of local banking corporations at a value ascertained in such a manner as will make the aggregate value of the property and franchise of such corporations equivalent to the aggregate market value of their shares of stock.

Bank of California v. San Francisco, 142 Cal. 276, 64 L. R. A. 918, 100 Am. St. Rep. 130, 75 Pac. 832; *People ex rel. Burke v. Badlam*, 57 Cal. 594.

If these laws are impartially administered no discrimination can result against national-banking associations through the direct taxation of their shares.

Stanley v. Albany County, 121 U. S. 550, 30 L. ed. 1003, 7 Sup. Ct. Rep. 1234; *German Nat. Bank v. Kimball*, 103 U. S. 732, 26 L. ed. 469; *Albany County v. Stanley*, 105 U. S. 305, 26 L. ed. 1044; *Albuquerque Nat. Bank v. Perea*, 147 U. S. 87, 37 L. ed. 91, 13 Sup. Ct. Rep. 194.

No discrimination was intended, or is countenanced, by the statute of California.

Nevada Nat. Bank v. Dodge, 56 C. C. A. 145, 119 Fed. 57; *Cincinnati S. R. Co. v. Guenther*, 19 Fed. 395; *Cummings v. Merchants' Nat. Bank*, 101 U. S. 157, 25 L. ed. 904.

In *Hepburn v. School Directors*, 23 Wall. 480, 23 L. ed. 112, it is held that the exemption of all mortgages, judgments, recognizances, and moneys owing upon articles of agreement for sale of real estate from taxation, to prevent a double burden by the taxation both of the property and the secured debt, was a justifiable exemption, and did not discriminate against shareholders of national-bank stock.

Mr. Justice **White** delivered the opinion of the court:

The appellant bank sued to restrain the enforcement of state, county, and city taxes, levied for the year 1900, upon shares of stock of the bank. Adequate averments were made to show equitable jurisdiction. *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153, 157, 25 L. ed. 903, 904; *Hills v. National Albany Exch. Bank*, 105 U. S. 319, 26 L. ed. 1052; *Lander v. Mercantile Nat. Bank*, 186 U. S. 458, 46 L. ed. 1247, 22 Sup. Ct. Rep. 908. The taxes were alleged to be in conflict with the law of the United States. Rev. Stat. § 5219, U. S. Comp. Stat. 1901, p. 3502.

The case was submitted upon the pleadings and an agreed statement of facts. **A**

decree of dismissal was affirmed by the circuit court of appeals for the ninth circuit. That court deemed that the cause was controlled by the reasoning of an opinion delivered in deciding a previous case (*Nevada Nat. Bank v. Dodge*), the opinion in which case is reported in 50 C. C. A. 145, 119 Fed. 57.

Before considering the contentions relied on we quote the text of the Constitution of California directly relating to the subject in hand, and briefly advert to the legislation of that state which preceded the act under which the assailed tax was levied.

Section 1 of article 13 of the Constitution of California provides:

"All property in the state, not exempt under the laws of the United States, shall [76] be taxed in proportion to its value, *to be ascertained as provided by law. The word 'property,' as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership. . . . The legislature may provide, except in the case of credits secured by mortgage or trust deed, for a reduction from credits of debts due to bona fide residents of this state."

Carrying out the command to provide for the ascertainment of the value of property to be taxed, it was enacted (Pol. Code, § 3627) that all taxable property shall be assessed "at its full cash value," and (Pol. Code, § 3617) that "the terms 'value' and 'full cash value' mean the amount at which the property would be taken in payment of a just debt due from a solvent debtor."

Prior to 1881 shares of stock of all corporations were taxed, and § 3640 of the Political Code commanded that the market value of the stock of a corporation should be taken as the value of the shares for assessment. Where the shares of stock were taxed no tax was levied upon the corporate property. This was because the supreme court of California had decided that to tax both the stock and the corporate property would be double taxation. *Burke v. Badlam*, 57 Cal. 594.

In the year 1881 the general system of taxing shares of stock was abandoned, and a rule was put in force taxing the corporate property. Section 3608 of the Political Code, which embodied this change, was as follows:

"Shares of stock in corporations possess no intrinsic value over and above the actual value of the property of the corporation, which they stand for and represent, and the assessment and taxation of such shares and also of the corporate property would be double taxation. Therefore, all [77] 197 U. S.

property belonging to corporations shall be assessed and taxed, but no assessment shall be made of shares of stock; nor shall any holder thereof be taxed therefor."

*The act of 1899, under which the tax in [77] this case was levied, amended the section just quoted, by providing that all property belonging to corporations shall be assessed and taxed, "save and except the property of national banking associations, not assessable by Federal statute;" and by adding to the provision commanding that no assessment shall be made of shares of stock in any corporation the following words: "Save and except in national banking associations, whose property, other than real estate, is exempt from assessment by Federal statute." To carry out the change made by the provision just referred to two sections were added to the Political Code, viz., 3609 and 3610. Section 3608, as amended by the act of 1899, and the two new sections resulting from that act, are in the margin.†

*The first contention is that the law of [78] 1899 is on its face in conflict with § 5219 of the Revised Statutes, because it taxes shares of stock in national banks, and does not tax such shares in state banks and other state moneyed corporations. As it is patent that the state banks and corporations are taxed on their property, the proposition reduces itself to this: That the states may not pursue the method permitted by the act of Congress of taxing shares of stock in national banks, unless the same method is employed as to the stock of state banks and other state moneyed corporations.

In *Davenport Nat. Bank v. Board of Equalization*, 123 U. S. 83, 31 L. ed. 94, 8 Sup. Ct. Rep. 73, it was decided that the provision of § 5219 of the Revised Statutes

†3608. Shares of stock in corporations possess no intrinsic value over and above the actual value of the property of the corporation which they stand for and represent; and the assessment and taxation of such shares, and also all the corporate property, would be double taxation. Therefore, all property belonging to corporations (save and except the property of national banking associations, not assessable by Federal statute) shall be assessed and taxed. But no assessment shall be made of shares and stocks in any corporation (save and except in national banking associations, whose property, other than real estate, is exempt from assessment by Federal statute).

3609. The stockholders in every national banking association doing business in this state, and having its principal place of business located in this state, shall be assessed and taxed on the value of their shares of stock therein; and said shares shall be valued and assessed as is other property for taxation, and shall be included in the valuation of the personal property of such stockholders in the assessment of the taxes at the place, city, town, and county where such national banking association is located, and not elsewhere, whether the said

[U. S. Comp. Stat. 1901, p. 3502], authorizing the taxation of shares of stock in national banks, but exacting that the tax when levied should be at no greater rate than that imposed on other moneyed capital, did not require the states, in taxing their own corporations, "to conform to the system of taxing national banks upon the shares of their stock in the hands of their owners."

True it is in the *Davenport Case* it was also decided that the prohibition in the act of Congress of a higher rate of taxation of shares of stock in national banks than on other moneyed capital operated to avoid any [79] method of assessment or taxation, "the usual or probable effect of which would be to discriminate in favor of state banks and against national banks. True, also, is it that in the same case it was held that, even where no such discrimination seemingly arose on the face of the statute, nevertheless, if from the record it appeared that the system created by the state in its practical execution produced an actual and material discrimination against national banks, it would be the duty of the court to hold the state statute to be in conflict with the act of Congress, and therefore void.

As, then, no conflict necessarily arises between the act of Congress and the state law, solely because the latter provides one method for taxation of state banks and other moneyed corporations and another method for national banks, it follows that the contention, that the state law, for that reason, is repugnant to the act of Congress, is without merit. And this brings us to consider the contention of the appellant, which we think was embraced in the pleadings, which was expressly covered by the stipulated facts, the overruling of which was assigned as error in the circuit court of appeals and in this court, and was elaborately discussed by both parties in the argument at bar, viz., that, irrespective of the face of

the state law, that law is void because of a discrimination against national banks, within the principles settled in the *Davenport Case*.

To determine this latter contention requires an analysis of the two systems which the law of California enforces, in order that the two may be accurately compared.

Under the law the shares of national banks must be valued at their "full cash value," which the statute defines to mean the amount at which they "would be taken for a just debt due from a solvent debtor." These words are but synonymous with the requirement that, in assessing shares of stock, their market value must be the criterion. This is the case, for, eliminating exceptional and extraordinary conditions, giving an abnormal value for the moment to stock, it is apparent that *the general mar-[80] ket value of stock is its true cash and selling value. That such is the meaning of the words in the legislation of California is indisputable, in view of the provision of § 3640 of the Political Code, which made market value the rule for assessing shares of stock during the period when the taxation of shares of stock generally prevailed, and that such requirement was mandatory was in effect held by the supreme court of California. *Miller v. Heilbron*, 58 Cal. 133, 138.

What, then, was embraced in the assessment of the shares of stock at their full cash or selling or market value? It embraced, not only the book value of all the assets of the corporations, but the good will, the dividend-earning power, the ability with which the corporate affairs were managed, the confidence reposed in the capacity and permanency of tenure of the officers, and all those other indirect and intangible increments of value which enter into the estimate of the worth of stock, and help to fix the market value or selling price of the shares. Considering this subject in *Adams*

stockholders reside in said place, city, town, or county, or not; but in the assessment of such shares each stockholder shall be allowed all the deductions permitted by law to the holders of moneyed capital in the form of solvent credits, in the same manner as such deductions are allowed by the provisions of paragraph 6 of § 3629 of the Political Code of the state of California. In making such assessment to each stockholder there shall be deducted from the value of his shares of stock such sum as is in the same proportion to such value as the total value of its real estate and property exempt by law from taxation bears to the whole value of all the shares of capital stock in said national bank. And nothing herein shall be construed to exempt the real estate of such national bank from taxation. And the assessment and taxation of such shares of stock in said national banking associations shall not be at a greater rate than is made or assessed upon

other moneyed capital in the hands of individual citizens of this state.

3610. The assessor charged by law with the assessment of said shares shall, within ten days after he has made such assessment, give written notice to each national banking association of such assessment of the shares of its respective shareholders; and no personal or other notice to such shareholder of such assessment shall be necessary for the purpose of this act. And, in case the tax on any such stock is unsecured by real estate owned by the holder of such stock, then the bank in which said stock is held shall become liable therefor; and the assessor shall collect the same from said bank, which may then charge the amount of the tax so collected to the account of the stockholder owning such stock, and shall have a lien, prior to all other liens, on his said stock, and the dividends and earnings thereof, for the reimbursement to it of such taxes so paid.

Exp. Co. v. Ohio State Auditor, 166 U. S. 211, 41 L. ed. 974, 17 Sup. Ct. Rep. 604, the court said:

"The capital stock of a corporation, and the shares of a joint-stock association, represent, not only tangible property, but also the intangible, including therein all corporate franchises, and all contracts, privileges, and good will of the concern."

And in *Pullman's Palace Car Co. v. Central Transp. Co.* 171 U. S. 138, 43 L. ed. 108, 18 Sup. Ct. Rep. 808, this was reiterated. The court, after observing that, while the franchise was one of the things entering into the computation of market value of shares of stock, said (p. 154, L. ed. p. 115, Sup. Ct. Rep. p. 815):

"The probable prospective capacity for earnings also enters largely into market value, and future possible earnings again depend to a great extent upon the skill with which the affairs of the company may be managed. These considerations, while they may enhance the value of the shares in the market, yet do not in fact increase the value of the actual property itself. They are mat-
[81] ters of opinion upon which *persons selling and buying the stock may have different views."

That this doctrine is the rule in California is clearly shown by *Bank of California v. San Francisco*, 142 Cal. 276, 64 L. R. A. 918, 100 Am. St. Rep. 130, 75 Pac. 832, for in that case the court, speaking of such elements of value as "dividend or profit-earning power, or good will," said (p. 289, L. R. A. p. 924, Am. St. Rep. p. 141, Pac. p. 838):

"In this connection, it will be observed that these elements, so far as they may enter into the value of shares of stock, would be included in an assessment of such shares to the stockholders."

The state banks and other corporations are assessed on their property. Conceding that every species of property is assessed which is specifically enumerated as taxable in the state Constitution, it does not follow that the assessment of property as such includes good will, dividend earning power, confidence in the ability of the management, and all those other intangible elements which necessarily enter into the cash or selling value of shares of stock. As said in the passage already quoted from the *Pullman Case*, 171 U. S. 138, 43 L. ed. 108, 18 Sup. Ct. Rep. 808, such elements "may enhance the value of the shares [of stock] in the market, yet [they] do not in fact increase the value of the actual property itself. They are matters of opinion upon which persons selling and buying the stock may have different views." In the argument at bar no law of the state was referred

to requiring that the assessing officers, in valuing the property of a corporation, should assess as property its good will, its dividend-earning power, the confidence reposed in its officers, etc. From this analysis it results that in the one case, that of national banks, not only the value of all the tangible property, but also the value of all the intangible elements above referred to, is assessed and taxed, whilst in the other case, that of state banks and other moneyed corporations, their property is taxed, but the intangible elements of value which we have indicated are not assessed and taxed; the consequence being to give rise to the discrimination against national banks *and in [82] favor of state banks and other moneyed corporations forbidden by the act of Congress.

In the argument at bar this conclusion, it is insisted, is avoided, because, whilst under the text of the state statutes it may be that all the elements of value which are included in the assessment of shares of stock are not *eo nomine* assessed against state banks and other moneyed corporations as property, they are, nevertheless, assessed against such corporations under the denomination of "franchise," the duty of the assessing officer to do so being imperative, as the result of the interpretation given to the taxing law by the supreme court of the state. The proposition is thus stated in the argument of counsel:

"Under the California system, all the property of California corporations is assessed, including their franchises. It is frequently the case that the market value of the stock of the corporation is greatly in excess of the value of its property, other than its franchise. This fact was called to the attention of the state court, which recognized the force of this suggestion, and held, the Constitution and laws of the state require the assessment and taxation of the franchise of the corporation, and that its value, for the purpose of such assessment and taxation, was properly ascertained by deducting from the market value of its stock the value of its corporate property and assessing the remainder as franchise."

It may be conceded that, if the statutes have been interpreted by the supreme court of the state as thus asserted, and that, as so interpreted, they have been applied by the assessing officers, there would be an end to the discrimination which we have seen arises from the consideration of the result of the statutes when not so interpreted.

The question then is, Do the decisions of the supreme court of California, as contended, place the positive duty on the assessor of including in an assessment of the franchises of state corporations all the elements

of value which form part of the market or selling value of shares of stock?

- [83] *Three cases are cited to sustain the proposition, viz., *San José Gas Co. v. January*, 57 Cal. 614; *Spring Valley Waterworks v. Schottler*, 62 Cal. 69; and *Bank of California v. San Francisco*, 142 Cal. 276, 64 L. R. A. 918, 100 Am. St. Rep. 130, 75 Pac. 832.

Before coming to consider the last case cited, which is the one principally relied upon, we dispose of the two others by saying that they do not support the proposition. The first simply decided that where a part of a tax was asserted to be illegal, and a part was admitted to be valid, the duty existed to pay the confessedly legal part to justify relief concerning the portion claimed to be illegal. The second case but decided that the franchises of corporations were taxable as property, and, where a corporation enjoyed other franchises than the right to exist as a corporation, and the board of equalization, in assessing such franchises, had treated them as equivalent in value to the selling value of the capital stock, the courts had no power to interfere with the discretion lodged in the assessing officers. In the last-cited and latest-decided case, *Bank of California v. San Francisco*, the controversy was this: The Bank of California was assessed on its property. The difference between the value of such property and the cash or selling or market value of the shares of stock of the corporation was \$2,943,096.92. The franchise, instead of being assessed for this amount, was valued only at \$750,000. This valuation was resisted by the bank, upon the ground that it was so large that it must have included good will, dividend-earning capacity, etc., which, it was asserted, could not under the law be embraced in an assessment of franchises. The court elaborately reasoned (there being two dissenting judges) that, in view of the power of the assessors to value property, it "could not say" that the assessing officers had transcended their authority in making the valuation complained of. Speaking of the duty of the assessing officers, it was said (p. 288, L. R. A. p. 923, Am. St. Rep. p. 141, Pac. p. 837):

- "The duty of making the valuation was cast upon the assessor. The method of arriving at the valuation, the process *by which his mind reached the conclusion [in cases where, as here, it is not pretended that he acted fraudulently or dishonestly], is matter committed to his determination." . . . This appears to be determinative of the contention here made. . . . (p. 289, L. R. A. p. 924, Am. St. Rep. p. 141, Pac. p. 838.) Whether or not the whole difference between the aggregate market value of the shares of stock and the value of the

tangible property,—viz., \$2,943,096.92,—was the value of the franchise, the assessor certainly had the right to take the value of the shares into consideration in determining the value of the franchise; and, were we at liberty to review the judgment of the assessor and of the board of equalization upon those matters, we could not say that an assessment of \$750,000 thereon is unjust, or that it includes such elements as dividend or profit-earning power, or good will, which, it is claimed, should not be taken into consideration in determining the value of the property of the corporation."

After pointing out that these elements entered into the assessment of shares of stock at their market value, it was observed (p. 289, L. R. A. p. 924, Am. St. Rep. p. 741, Pac. p. 838):

"It is clear that, if the laws of the state properly express the intention that everything that gives value to the shares of a corporation shall be assessed as property of the corporation, the true value of those shares is a most important element in determining the value of such property."

In other words, the court simply declared that if the law of the state properly expressed the purpose to tax everything of value, the assessor had a discretion to consider what was the selling value of shares of stock in fixing the value of the franchise. Instead of supporting the contention that the law obliged the assessor to attribute to the franchise the value of those intangible elements which it was conceded were embraced in the assessment of shares of stock, the reasoning of the opinion is to the contrary. As the cash, selling, or market value of the stock in the case before the court was conceded to have been nearly \$3,000,000 greater than the *tangible property assessed [85] to the corporation, and the assessor had valued the franchise, not at that sum, but at only \$750,000, it is patent that, if the law of California had been what it is now asserted the court held it to be, that the claim that there was an overvaluation of the franchise would have been so frivolous as to require only a statement of the law to decide against the claim of overvaluation.

But the court made no such statement. On the contrary, it stated its inability to judicially declare that an assessment was extravagant and grossly unjust which was more than \$2,000,000 lower than it should have been if the law imposed the obligation on the assessor of valuing the franchise by the difference between the value of the tangible property assessed and the cash or selling value of the shares of stock. This inability to give relief was placed solely upon the discretion which the law lodged in the assessor. But this interpretation of the stat-

ute serves only to further demonstrate the discrimination which has been previously pointed out. This result is made clear by comparing the discretion lodged in the assessor in valuing the franchise of state banks or other moneyed corporations with the duty resting on him as to the valuation of shares of national banks. The wide difference between the *discretion* on the one hand and the *duty* on the other will be additionally demonstrated by a consideration of the discrimination against national banks which has arisen in the practical execution of the statutes.

In the agreed statement of facts it was admitted that there are in the state of California 178 commercial (or state) banks, possessing a vast amount of capital, 18 of which were located in San Francisco. And, to quote from the statement, "that the manner in which franchises of commercial banks and trust companies were assessed for said fiscal year ending June 30, 1901, by the assessor of the city and county of San Francisco, is illustrated by the case of the Bank of California, a banking corporation organized under the laws of the state of California." The *assessment in question, which it is thus declared in the statement of facts is illustrative of the other assessments against state banks, was the one which was involved in the controversy decided in the *Bank of California Case, supra*. It is then recited in the agreed statement that the total property resources of the Bank of California, correcting a misprint in the record, were \$5,156,903.08; and that the market or selling value of its capital stock was \$8,100,000, a difference of \$2,943,096.92; and that, deducting from the resources of the bank certain exemptions, the bank was assessed for property at \$2,311,774. To this last-mentioned sum was added for franchise tax, not the difference between the value of the property and the selling value of the stock, which, as stated, was nearly \$3,000,000, but only \$750,000. It is insisted in argument that this statement shows but a single case of undervaluation of a state bank by the assessors, and therefore does not justify the conclusion that, in the exercise of their discretion, the assessors had generally, as to state banks and corporations, valued the franchises at less than the difference between the value of the property taxed and the market or selling value of the stock. But this contention disregards the fact that, by the agreed statement, it was expressly admitted that the assessment in question was illustrative of the assessments upon the other state banks and moneyed corporations. In view of the issues in the cause, as to which the facts were agreed, to say that the assessment in question only

illustrated the case of the Bank of California would require us to disregard the agreed statement.

Finally, it is contended that, even if the state banks and other state moneyed corporations were assessed as illustrated by the valuation placed on the Bank of California, the complainant national bank has no reason to complain because the assessment put upon its shares of stock was relatively no higher than that put upon the Bank of California, and therefore no discrimination was occasioned. This is predicated upon the fact that the value per share affixed to the stock of *the complainant national bank was not [87] higher, having sole reference to the value of the stock as shown by the book value of the assets, and, considering allowable deductions, than was the assessment put upon the Bank of California, considering, alone, the same elements. But there is no proof whatever that the stock of the complainant bank had a market or selling value higher than the value affixed to it by the assessor; and the items which were made the basis of the assessment against the stock are declared in the agreed statement to be the entire assets of the bank, and in the argument at bar on behalf of the assessor the value of the shares of stock of the bank in excess of their book value is assumed to have been only nominal. The proposition, therefore, comes to this,—although the complainant national bank was assessed at the full value of its stock, there was no discrimination in favor of the state bank, albeit there was a difference in excess of \$2,000,000 between the value put upon the property and franchise of the state bank and the sum which should have been levied against it, if all the elements had been assessed which enter into the value of shares of stock. And, thus analyzed, the contention is again reducible to this proposition,—that, where property of one person worth a given amount is assessed for its full value, no discrimination in favor of another results when the latter is assessed for a sum greatly below the value of the property assessed.

What has just been said disposes, also, of the contention that, if the national bank had been assessed under the state law by the rule applied to state banks, it would have had affixed to its property a slightly higher valuation than was given as the value of the shares of its capital stock. Without stopping to point out the error in the calculation by which this result is supposed to be demonstrated, it suffices to say that the contention would have merit only in the event that the property and franchise of all state banks had no higher value than the book value of the shares of stock. The fallacy underlying the whole contention cannot better be made clear than by *the mere reiteration of the [88]

statement that, under the facts as agreed, it is obvious that the shares of stock of the national bank were assessed for all they were worth under the rule of market or selling value, whilst the state bank was only assessed for \$750,000 above the book value of the stock, although the cash, selling, or market value would have required an assessment of nearly \$3,000,000.

Many contentions were argued at bar involving the assertion that the state law was invalid because of deductions of debts or exempt property which, it was asserted, the law allows to state banks and other moneyed corporations on an assessment of their property, and does not allow holders of shares of stock in national banks. Most of these contentions are, in effect, disposed of by the consideration which we have given to the proposition that the state law was void simply because it established different methods of taxation as to the two classes of corporations. In so far as the contentions referred to are not, in effect, disposed of by our conclusions on that subject, we content ourselves with saying that we think all such propositions were rightly decided by the court below to be without merit, for the reasons expressed in the opinion delivered by that court in the *Nevada Bank Case*, to which the court referred, and upon which it placed its rulings. We decide this case solely upon the record before us. Our conclusion, therefore, does not deny the power of the state of California to assess shares of stock in national banks, provided only the method adopted does not produce the discrimination prohibited by the act of Congress. From this, of course, it would follow that, if the statutes of California, either from their text or as construed by the highest court of that state, compelled the assessing officers in the valuation of the property of state banks and other state moneyed corporations to include all those elements of value which are embraced in the assessment of shares of stock in national banks so that there would be an equality of taxation as re-

[89]spects national banks, *the discrimination which we find to exist under the present state of the law of California would disappear.

The decree of the Circuit Court of Appeals is reversed; the decree of the Circuit Court is also reversed, and the cause is remanded to the Circuit Court for further proceedings in conformity with this opinion.

Mr. Justice **Brewer**, with whom the CHIEF JUSTICE, Mr. Justice **Brown**, and Justice **Peckham** concur, dissenting:

I am unable to concur in the foregoing opinion, and, believing that a grievous wrong is done to the state of California, will

state the reasons for my dissent. Section 5219; Rev. Stat. (U. S. Comp. Stat. 1901, p. 3502), prescribes the conditions and limitations of state taxation of national banks. In reference to it, we said in *Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664, 669, 43 L. ed. 850, 852, 19 Sup. Ct. Rep. 537, 539:

"This section, then, of the Revised Statutes is the measure of the power of a state to tax national banks, their property, or their franchises. By its unambiguous provisions, the power is confined to a taxation of the shares of stock in the names of the shareholders, and to an assessment of the real estate of the bank."

By the section two restrictions, and two only, are placed on the power of the state to tax the shares of stock: "That the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by nonresidents of any state shall be taxed in the city or town where the bank is located, and not elsewhere."

No uniform rule is prescribed by Congress as to the mode of assessment or the manner in which the state shall impose its burden of taxation on the shares of stock in national banks. Each state is left to determine that according to its own judgment. All that is demanded is that in fact neither the rate of tax nor the assessment shall discriminate against national banks, and that the property subject to taxation shall not be *bur- [90]dened in excess of the burdens cast upon other moneyed capital. *Davenport Nat. Bank v. Board of Equalization*, 123 U. S. 83, 31 L. ed. 94, 8 Sup. Ct. Rep. 73.

The mandate of § 1 of the Constitution of California is:

"All property in the state, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law. The word 'property,' as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership."

Thus, the Constitution requires the taxation of all property and a taxation in proportion to its value, and defines property as including everything capable of private ownership. Certainly, if the mandate of the Constitution is expressed in the statutes the shares of stock in national banks will be subjected to the same rate of taxation as all other property in the state, including therein moneyed capital. It must, therefore, be held that the legislation respecting the taxation of national bank shares is in defiance

of the state Constitution before it can be adjudged in conflict with the equality provision of § 5219, Rev. Stat. Or, in other words, that the legislature of California disregarded the requirements of their own Constitution in order to subject to taxation property protected by Federal laws.

The legislation of California in this regard is found in § 3608 of the Political Code, as amended in 1899, and two additional sections enacted in that year, numbered 3609 and 3610:

“3608. Shares of stock in corporations possess no intrinsic value over and above the actual value of the property of the corporation which they stand for and represent; and the assessment and taxation of such shares, and also all the corporate property, would be double taxation. Therefore, all property belonging to corporations, save and except the property of national banking associations not assessable by Federal statute, shall be assessed and taxed. But [91] no assessment shall *be made of shares of stock in any corporation, save and except in national banking associations, whose property, other than real estate, is exempt from assessment by Federal statute.

“3609. The stockholders in every national banking association doing business in this state, and having its principal place of business located in this state, shall be assessed and taxed on the value of their shares of stock therein; and said shares shall be valued and assessed as is other property for taxation; and shall be included in the valuation of the personal property of such stockholders in the assessment of the taxes at the place, city, town, and county where such national banking association is located, and not elsewhere, whether the said stockholders reside in said place, city, town, or county, or not; but, in the assessment of such shares, each stockholder shall be allowed all the deductions permitted by law to the holders of moneyed capital in the form of solvent credits, in the same manner as such deductions are allowed by the provision of paragraph 6 of § 3629 of the Political Code of the state of California. In making such assessment to each stockholder, there shall be deducted from the value of his shares of stock such sum as is in the same proportion to such value as the total value of its real estate and property exempt by law from taxation bears to the whole value of all the shares of capital stock in said national bank. And nothing herein shall be construed to exempt the real estate of such national bank from taxation. And the assessment and taxation of such shares of stock in said national banking associations shall not be at a greater rate than is made or

assessed upon other moneyed capital in the hands of individual citizens of this state.

“3610. The assessor charged by law with the assessment of said shares shall, within ten days after he has made such assessment, give written notice to each national banking association of such assessment of the shares of its respective shareholders; and no personal or other notice to such shareholders of such assessment shall be necessary for the purpose of this *act. And, in case the tax on [92] any such stock is unsecured by real estate owned by the holder of such stock, then the bank in which said stock is held shall become liable therefor; and the assessor shall collect the same from said bank, which may then charge the amount of the tax so collected to the account of the stockholder owning such stock, and shall have a lien, prior to all other liens, on his said stock, and the dividends and earnings thereof, for the reimbursement to it of such taxes so paid.”

The rule of valuation is prescribed by the 5th subdivision of § 3617 of the Political Code, which provides that “the terms ‘value’ and ‘full cash value’ mean the amount at which the property would be taken in payment of a just debt due from a solvent debtor.” It is true that prior to 1881 market value was made the rule of valuation, but the section prescribing that rule was, so far as it applied to national bank shares, adjudged void by the supreme court of the state (*Miller v. Heilbron*, 58 Cal. 133), and wholly repealed by the legislature (Stat. 1881, p. 59), and in lieu of that the present rule of valuation established. But, the rule of valuation is not so material, and, doubtless, an established market value would be the amount at which property would be taken in payment of a just debt due from a solvent debtor. The main thing is that the same rule of valuation shall be applied to the assessment and taxation of national bank shares as of other moneyed capital. And the express declaration of § 3609 is that the shares in national banks “shall be valued and assessed as is other property for taxation.”

From the sections quoted it appears that the method of reaching the property of state corporations for purposes of taxation is by treating the corporation as owner of all, and casting the burden of taxation directly upon it, while, on the other hand, in obedience to the requirements of the Federal statute, taxation in respect to national banks is limited to an assessment and taxation of the shares of stock. But there is no discrimination if the same property is reached by each *method, and by each subjected to the same [93] rule of valuation. By § 3608 all the property of state corporations must be assessed and taxed, and the word “property” is de-

fined by the Constitution to include, not merely tangible assets, but also "franchises, and all other matters and things, real, personal, and mixed, capable of private ownership." Everything, therefore, which is a part of the property of a state corporation is subject to assessment and taxation. No other or larger burden is cast upon shares of national banks, and surely there can be no discrimination when the entire property in the one instance is taxed as a whole to the corporation and in the other instance subdivided and taxed to the stockholder. The whole is neither less nor more than all its parts. But it is said there is no specific command to include in the property of a state corporation the good will, dividend-earning power, and the like, and that they are necessarily included in the selling value of the stock of any corporation. It is true, these items are not in terms mentioned, but neither are desks and furniture. The language is general, so general that it includes everything, not excepting good will, dividend-earning power, and the like, for they are "capable of private ownership." They belong to the corporation. There is no good will in a share of stock over and above the good will which belongs to the corporation, and, if the corporation sells and conveys all that it possesses: "capable of private ownership," it sells and conveys its good will, and there is nothing left of good will or anything else belonging to the stockholders. This is so plain that he who runs may read. It is hardly necessary in a matter so clear to refer to the decisions of the supreme court of California, and yet they are direct upon the proposition. Thus in *Burke v. Badlam*, 57 Cal. 594, the court said (pp. 601, 602):

"Now, what is the stock of a corporation but its property, consisting of its franchise and such other property as the corporation may own? Of what else does its stock consist? If all this is taken away, what re-
[94] mains? Obviously nothing. *When, therefore, all of the property of the corporation is assessed,—its franchise and all of its other property of every character,—then all of the stock of the corporation is assessed, and the mandate of the Constitution is complied with. This property is held by the corporation in trust for the stockholders, who are the beneficial owners of it in certain proportions called shares, and which are usually evidenced by certificates of stock. The share of each stockholder is undoubtedly property, but it is an interest in the very property held by the corporation. It is his right to a proportionate share of the dividends and other property of the corporation,—nothing more. When the property of the corporation is assessed to it, and

680

the tax thereon paid, who but the stockholders pay it? It is true that it is paid from the treasury of the corporation before the money therein is divided, but it is substantially the same thing as if paid from the pockets of the individual stockholders. To assess all of the corporate property of the corporation, and also to assess to each of the stockholders the number of shares held by him, would, it is manifest, be assessing the same property twice, once in the aggregate to the corporation, the trustee of all the stockholders, and again separately to the individual stockholders, in proportion to the number of shares held by each. As well might it be contended that the property of a partnership should be assessed to the firm, and, in addition, that the interest of each partner in the firm property should be assessed to him individually. If I have an interest in partnership property, my interest therein is property. It is the right I have to share in the profits and property of the firm, in proportion to the interest I own. But my property rights are confined to the property held by the firm, just as the property rights of the stockholder in the corporation are confined to the property held by the corporation. In the case of a partnership, take away all the property of the firm, and I have no longer any property as a partner. In the case of the corporation, take away all of its property, which, it must be remembered, includes its franchise, and the shareholder no longer *has any property. The[95] cases are parallel. If in the one case it is competent to assess to the corporation all of the property held by it, and to the individual stockholders the respective interest owned by each therein, so must it be competent to assess to every partnership the property held by the firm, and to each individual partner his interest therein. It is clear to our minds that in the one case the partner, and in the other the stockholder, would be compelled to pay twice on the same property, which is neither required nor permitted by the Constitution. In the case of corporations to which we have referred the legislature has declared that all of the property held by such corporations shall be assessed to them. It has not attempted to exempt any property from taxation not exempted by the Constitution itself, and, of course, could not do it if it had. It has only said that the property shall be assessed to the corporation, and shall not be again assessed for the same tax. This it had the right to say." (Italics in this and succeeding quotations are mine.)

It will be seen from this quotation that the court places partnerships on the same basis as corporations. If the partnership sells out its property, including its good will

and its profit-earning power, which are part of its property under the constitutional definition of property, there is nothing left to the separate partners. The whole thing has passed to the purchaser, and in the same way when a corporation makes a sale. And to hold that the good will and profit-earning power must be specifically mentioned is to hold that the constitutional definition of property is insufficient; that good will and profit-earning power are not "capable of private ownership," or do not belong to the corporation. *Burke v. Badlam* was reaffirmed in *Bank of California v. San Francisco*, 142 Cal. 276, 64 L. R. A. 918, 100 Am. St. Rep. 130, 75 Pac. 832, decided since the decision of this case by the court of appeals. This case is very instructive. It was an action brought by the plaintiff, a state bank, to have an assessment of its franchise declared illegal and void, and to recover the amount paid by it under protest as taxes [96] thereon. The contention of the *plaintiff was that it did not own or possess any franchise whatever; that the only franchise in any way connected with it was the corporate franchise, the franchise of being a corporation, which was the property of the stockholders and not assessable or taxable to the corporation. It appears from the opinion that the assessor found that the aggregate value of the tangible property of the bank was \$5,156,903.08, that the market value of all the shares of the capital stock was \$8,100,000, and the difference between the two was by him ascertained and determined to be the value of the franchise of the bank. The state was not challenging the assessment, and, of course, no inquiry was made as to the propriety of an increase in the valuation.

In reply to the contention of the plaintiff, the court uses this language:

"It was said by the Supreme Court of the United States, in *Society for Savings v. Coite*, 6 Wall. 594, 606, 18 L. ed. 897: 'Corporate franchises are legal entities vested in the corporation itself as soon as it is *in esse*. They are not mere naked powers granted to the corporation, but powers coupled with an interest which vest in the corporation, upon the possession of its franchises, and, whatever may be thought of the corporators, it cannot be denied that the corporation itself has a legal interest in such franchises.'

"If this corporate franchise is assessable as property, then, that it must be assessed to the corporation instead of the members or stockholders is clearly settled in this state by the decision in *Burke v. Badlam*, 57 Cal. 594, where it was held that a stockholder could not be assessed upon his certificate of stock, inasmuch as his shares were

simply an interest in the very property held by the corporation, and the assessment of all the property of the corporation covered everything represented by the certificate. See also Pol. Code, § 3608."

Again, referring to *Burke v. Badlam*, 57 Cal. 594, the court said (p. 285, L. R. A. p. 922, Am. St. Rep. p. 138, Pac. p. 836):

"This case necessarily involved the question as to the constitutionality *of § 3608 of [97] the Political Code, prohibiting the assessment of shares of stock to the holders thereof. Such shares being undoubtedly property, unless they were otherwise assessed, the section was clearly unconstitutional, in view of the provision of the Constitution requiring all property to be taxed. According to the decision of the court they were under the law to be otherwise assessed—i. e., everything represented by the certificate was to be assessed to the corporation."

And again, on p. 289, L. R. A. p. 924, Am. St. Rep. p. 141, Pac. p. 838:

"Whether or not the whole difference between the aggregate market value of the shares of stock and the value of the tangible property—viz., \$2,943,096.92—was the value of the franchise, the assessor certainly had the right to take the value of the shares into consideration in determining the value of the franchise; and, were we at liberty to review the judgment of the assessor and the board of equalization upon those matters, we could not say that an assessment of \$750,000 thereon is unjust, or that it includes such elements as dividend or profit-earning power, or good will, which, it is claimed, should not be taken into consideration in determining the value of the property of the corporation. In this connection, it will be observed that these elements, so far as they may enter into the value of shares of stock, would be included in an assessment of such shares to the stockholders, a method of assessment which the state is at liberty to adopt,—in fact, bound to adopt,—unless such shares are otherwise covered by the assessment of the property of the corporation.

"It is clear that, if the laws of this state properly express the intention that everything that gives value to the shares of a corporation shall be assessed as property of the corporation, the true value of those shares is a most important element in determining the value of such property."

I have made these extensive quotations from the opinions of the supreme court of California, for in cases like this we follow the construction placed by the highest court of the state upon its statutes. Obviously, that court construes them as including within the corporate property the aggregate value *of all the shares of stock, and that, [98]

while they forbid the assessment and taxation of shares of stock in a state corporation, they require that all the value represented by those shares of stock be assessed and taxed against the corporation; so that, when you ascertain the value of a single share of stock, and multiply that by the number of shares in the corporation, you have the value of the corporate property subject to taxation.

After declaring that the prohibition of the assessment and taxation of shares was clearly unconstitutional, unless they were otherwise assessed, it added, referring to the case of *Burks v. Badlam*, "according to the decision of the court they were under the law to be otherwise assessed,—i. e., everything represented by the certificates was to be assessed to the corporation." Now, if, as claimed, the shares represent, not merely the tangible property, but the franchise, the dividend-earning power, then, as stated, "everything represented by the certificates was to be assessed to the corporation." And this language is followed by the declaration, referring to dividends, profit-earning power, good will, etc.: "In this connection it will be observed that these elements, so far as they may enter into the value of shares of stock, would be included in an assessment of such shares to the stockholders, a method of assessment which the state is at liberty to adopt,—in fact bound to adopt,—unless such shares are otherwise covered by the assessment of the property of the corporation." Reference is made to the use of the word "if" in the last paragraph of the quotation, as though that implied a doubt as to the meaning of the state statutes. But surely that cannot be, in view of the prior declaration in the same opinion, that "everything represented by the certificates was to be assessed to the corporation." The paragraph is to be read as though it said that provided the laws of the state properly express the intention, as we have already held that they do, then the true value of the shares is an important element in determining the value of the corporate property. The same word "if" is used at the commencement of the second paragraph of the [99] quotation "if this corporate franchise is assessable as property," in like manner, for the word "franchises" is found in the constitutional definition of property, the paragraph preceding "if" declares that "the corporation itself has a legal interest in such franchises," and the very paragraph says that "the assessment of all the property of the corporation covered everything represented by the certificate." Certainly it seems to me there is no justification in torturing this word "if" as overthrowing all

the clear declarations of the court, as well as implying a destruction of the plain letter of the statutes.

But great reliance is placed upon the admission, in the agreed statement of facts, "that the manner in which franchises of commercial banks and trust companies were assessed for said fiscal year ending June 30, 1901, by the assessor of the city and county of San Francisco, is illustrated by the case of the Bank of California, a banking corporation organized under the laws of the state of California." In the assessment of that bank the assessor did not add to the value of the tangible property the difference between that value and the market value of the capital stock, but a sum very much less. A tabular statement is also annexed, showing the financial condition during the year of the 178 state banks of California. It might be sufficient to say that the stipulation is satisfied by a conclusion that the assessor, in assessing state banks, generally added to the value of the tangible property something on account of the franchise,—we are not compelled to infer that to the valuation of the tangible property of each bank he added \$750,000, or even that he failed to add the full difference between the value of that property and that of the stock. Indeed, it does not appear from the tabular statement that the market value of the shares in a single state bank in California exceeded the value of its tangible property. So that, so far as that evidence goes, the only case in which there was any franchise value to be added was that of the Bank of California. But more significant is this: It appears from the *agreed statement that the assess- [100] ment complained of in this case was made in the following way:

"The defendant, in making his assessment, fixed the value of the shares for taxation at \$104.35 each, and arrived at that valuation in the following manner: He added to the capital stock of the bank, \$500,000, its undivided profits amounting to \$77,260, deducted the face value of United States bonds held by it, \$50,000, and the value of its furniture, \$5,500, leaving \$521,760 as the total assessable value, and dividing that by the number of shares made the assessable value of each share the sum above stated."

In other words, the only assessment against the plaintiff's shares was based upon the value of the tangible property. Not a dollar was added to the valuation on account of franchise, good will, or dividend-earning power, or anything of that kind. Or, to put it in another form, the assessment of the state bank added to the value of the tangible property something for the value of the franchise, the assessment of the plaintiff stopped with the tangible property,

and yet it is held that there was an actual unjust discrimination against the plaintiff. And how is this conclusion reached? By assuming that the shares in the plaintiff bank had no value above the value of the tangible property. But this is a mere assumption. A more rational guess would be that the shares of stock in a bank whose undivided profits were over 15 per cent of its capital had a value much above the par value of its stock or the value of its tangible property. And can it be that the whole system of the legislation of a state in respect to the taxation of national banks can be stricken down upon an unfounded assumption that the shares of a given national bank were worth no more than its tangible property? If the complaint was of an actual discrimination it was a part of the plaintiff's duty to prove it, and show that its shares had no value above that of the tangible property, and would not "be taken in payment of a just debt due from a solvent debtor" at a larger sum. The most elementary rule of judicial proceedings *is that a party, to make out his cause of action, must prove, not assume, the existence of all essential facts.

But I need not rest upon the omission of proof. There is no allegation of any discrimination based upon such difference of valuation. The eleventh and twelfth paragraphs of the complaint state the wrongs on account of which relief is sought. In order that there may be no misunderstanding of the full scope of the causes of action alleged I quote these paragraphs entire:

"Eleventh.—That the said assessment and taxation, so as aforesaid threatened to be made and levied by the respondent upon the shares of the capital stock of your orator, will be in violation of, and repugnant to, the provisions of §§ 5219 and 1977 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, pp. 1259, 3502), in that the said assessment and taxation will be at a greater rate than is or will be assessed upon other moneyed capital in the hands of individual citizens of the said state of California. And in that behalf your orator shows that, under and by virtue of the laws of the said state of California, all shares of stock in corporations organized under the laws of the said state and amounting to more than the sum of two hundred million dollars (\$200,000,000), and especially in corporations organized under the laws of the said state for the purpose of banking, all shares of stock thereof amounting to more than the sum of thirty-five million dollars (\$35,000,000), are expressly exempt from assessment and taxation, and the same are not subject thereto, and that the respondent has not assessed, and will not assess, for

the said fiscal year ending June 30th, 1901, and does not intend to assess, to the holders of shares in corporations, organized under the laws of the said state of California, the value of the same, or to collect from such shareholders any taxes on said shares or the value thereof.

"And your orator further shows that the said pretended assessment and taxation so as aforesaid threatened to be made and levied by the respondent upon the shares of the capital stock of your orator will be in violation of, and repugnant to, *the provisions of said § 5219 of the Revised Statutes of the United States, in that the said taxation will be at a greater rate than will be assessed upon any other moneyed capital in the hands of individual citizens in the state of California. And, in that behalf, your orator further shows that, in assessing and taxing the said shares of the capital stock of your orator, no deduction will, or can legally, be made from the valuation of said shares, or any of them, of debts unsecured by deed of trust, mortgage, or other lien on real or personal property due or owing by the stockholders of your orator, or by any of them, to bona fide residents of the state of California; and that, in assessing and taxing other moneyed capital in the form of solvent credits unsecured by deed of trust, mortgage, or other lien on real or personal property, due, or owing to, or in the hands of, individual citizens in said state of California, the respondent does and will make a deduction from said credits, under and by the Constitution and laws of the state of California, of the debts unsecured by trust deed, mortgage, or other lien on real or personal property as may be owing by such individual citizens, or by any of them, to bona fide residents of the state of California, and that said threatened assessment and taxation of the shares of your orator is, and will be, unjust, unlawful, and illegal, and will discriminate against and upon such shares, and against and upon the persons owning and holding the same, and will compel them to sustain and bear more than their just share and burden of the taxes of the said state of California. And in this behalf your orator further avers that it is informed and believes, and upon such information and belief states, the fact to be, that the amount of moneyed capital in the city and county of San Francisco in said state of California on the first Monday of March, 1900, to wit, on March 5th, 1900, at noon of said day, invested by banks and bankers, having their principal place of business in said city and county, and residents therein, in unsecured solvent credits, and from which, under the Constitution and laws of said state, unsecured debts can be deducted, *was the sum[103]

of \$14,074,561; and on the day and year last aforesaid the amount of moneyed capital in the state of California, other than in the said city and county of San Francisco, invested by banks and bankers in unsecured solvent credits, and from which, under the Constitution and laws of said state, unsecured debts can be deducted, was the sum of \$7,589,302; that on the day and year last aforesaid said banks and bankers at said city and county of San Francisco had debts unsecured by trust deed, mortgage, or other lien on real or personal property owing by such banks and bankers in said city and county, amounting to the sum of \$36,710,062; and that on said day last aforesaid the amount of debts unsecured by trust deed, mortgage, or other lien on real or personal property owing by said banks and bankers in the state of California, other than in the said city and county of San Francisco, was the sum of \$32,400,304; that the amount of moneyed capital invested in such solvent credits by such banks and bankers on the day and year last aforesaid, in said city and county of San Francisco and in said state of California, as compared with the amount of moneyed capital invested in the shares of the capital stock of your orator, is so large and substantial that the assessment and taxation of the shares of the capital stock of your orator without deducting therefrom, and without being able to deduct therefrom, debts unsecured by trust deed, mortgage, or other lien on real or personal property, as may have been owing by the respective holders of the shares of the capital stock of your orator on the day and year last aforesaid, will be an illegal and unjust discrimination against the owners and holders of the shares of the capital stock of your orator, and will make the taxation of said shares of stock at a greater rate than is imposed upon other moneyed capital in the hands of individual citizens in the state of California, and particularly in the city and county of San Francisco in said state. And in this behalf your orator further avers that the said solvent credits so held as aforesaid by banks and bankers in the said city and county of

[104] San Francisco and in the said state of California are moneyed capital in the hands of individual citizens of the state of California, which enter into competition for business with your orator.

"Twelfth.—That, in the making of the said assessment of the said shares of the capital stock of your orator, the respondent will not proceed in the manner directed by the said act of March 14th, 1899, in this: That the said respondent, as hereinbefore set out, will ascertain and determine the value of each of the shares of the capital

stock of your orator to be the sum of \$115,452, and will deduct therefrom the sum of \$11.10 per share as the proportionate amount per share of the value of the United States bonds held by your orator to secure its circulation, and of its furniture, and will, as hereinbefore set out, assess to the stockholders the sum of \$104.36 per share as the value of each share of said capital stock by the said respondent claimed to be subject to assessment and taxation under the provisions of said act of March 14th, 1899, and that the respondent will wholly fail and refuse to make any other or further deductions from such ascertained value of said shares, in order to determine the assessable value thereof; whereas, by the provisions of said § 3609 of the Political Code of the state of California, under and in pursuance whereof the respondent has threatened and intends to make the said assessment, and will proceed to demand, and will attempt to collect, the taxes aforesaid, he was and is required to deduct from the value of each share of the capital stock of your orator such sum as is in the same proportion to such value as the total value of the real estate and property of your orator exempt by law from taxation bears to the whole value of all the shares of the capital stock of your orator. That on the first Monday of March, 1900, to wit, on March 5th, 1900, at twelve o'clock M. of said day, your orator had not, and thence hitherto has not had, nor has it now, any real estate, and, as in paragraph 'eighth' hereof averred, all of the property of your orator consisted on said day and at said time, and has *thence [105] hitherto consisted, and does now consist, of its bonds, money on hand, credits, furniture, and other personal property, and on said day and at said time the same constituted and were, and thence hitherto have been, and now are, the assets of your orator, and were and are used and employed by it in the conduct and carrying on its business as a national banking association under and by virtue of the provisions of the act of the Congress of the United States known as the national banking act, and were and are exempt by law from assessment and taxation. That, if deduction of all the property of your orator exempt from assessment and taxation as last aforesaid were made to each stockholder in assessing said stock, there would remain nothing of value subject to assessment and taxation; and that the pretended assessment and taxation of said shares at said value of \$104.36 per share would be based wholly upon supposed and fictitious property, and upon property exempt by the Constitution and laws of the United States from assessment and taxation."

The first of these paragraphs alleges a violation of the Federal statute in the taxation of plaintiff's shares of stock, because under and by virtue of the laws of California all shares of stock in state corporations are exempt from assessment and taxation, and the assessor does not intend to assess to the holders the value of those shares. But, as repeatedly held, a mere difference in the methods of state and national bank taxation is not repugnant to the act of Congress. The balance of the paragraph is substantially a charge of a discrimination by reason of a failure to deduct debts. But that, it is conceded in the opinion of the court, may be put one side,—a concession undoubtedly compelled by the facts as agreed upon, for an opportunity was given to each stockholder in the plaintiff bank to have any debts deducted, and no one of them sought to avail of this privilege.

The other paragraph charges a discrimination and that the assessor ascertained the value of the shares of the capital stock of the plaintiff at the sum of \$115,452 and deducted therefrom *the sum of \$11.00 per share as the proportionate share of the value of United States bonds held by the bank; that he refused to make any further deductions, although the various items of property held by the bank, consisting of bonds, moneys, credits, etc., "were and are used and employed by it in the conduct and carrying on its business as a national banking association, under and by virtue of the provisions of the act of Congress of the United States known as the national bank act, and were and are exempt by law from taxation." The complaint here is that the tangible property of the national bank is wholly exempt from taxation because used for the purpose of carrying on the banking business, and, as the only assessment of plaintiff's shares was based upon the value of the tangible property, the entire assessment was void. Now it is not pretended in the opinion of the court, nor can it be successfully claimed in view of prior decisions of this court, that shares of stock in a national bank are subject to taxation to only the extent of the excess of their value above that of the tangible property of the corporation, and yet that is the burden of plaintiff's complaint. I have made this extensive quotation because it is apparent therefrom that the matter which, in the judgment of the court, is sufficient to overthrow the law of California in respect to the taxation of national banks, was not charged or complained of by the plaintiff. If the plaintiff neither alleges nor proves any discrimination in the matter of valuation I cannot understand why this court should assume that there was one, and thereupon upset the tax.

197 U. S.

Further, there is no reference in the opinion of the court of appeals to any discrimination in fact.

Still further, counsel for plaintiff in error evidently fail to perceive any actual discrimination, as appears by this quotation from their brief:

"The questions involved in the appeal are:

"(1) That the act of 1899, providing for the assessment and taxation of shares of the capital stock of national banks, *is repugnant to the provisions of § 5219 of the Revised Statutes of the United States:

"(a) Because shares of stock in the commercial banks of the state are not taxed, and are exempt;

"(b) Because, by reason of the failure to tax shares in the commercial banks of the state, the shares of national banks are subjected to an adverse discrimination, and taxed at a higher rate than such commercial bank shares;

"(c) Because the provisions § 3609, are wholly void, in that it is thereby undertaken to provide that a stockholder may deduct from the value of his shares the amount of his debts due to bona fide residents of the state.

"(2) That, under the express provision of the Political Code, §§ 3608 and 3609, the whole property of the appellant included in the assessment was exempt from taxation."

The only reference to discrimination is the alleged legal one, "by reason of the failure to tax shares in the commercial banks of the state." If the failure to tax shares in the commercial banks of the state does not of itself work a discrimination, as is practically conceded in the opinion of the court, then the whole basis of plaintiff's complaint fails.

Summing the matter up, the Constitution declares that "all property . . . shall be taxed in proportion to its value," and defines "property" as including "franchises, and all other matters and things, real, personal, and mixed, capable of private ownership." Franchises, dividend-earning, profit-earning power, are capable of private ownership. Indeed, the opinion of the court is based on the contention that they are assessed to the holder of shares in national banks, and not assessed upon the state banks. Section 3608 provides that "all property belonging to corporations (save and except the property of national banking associations, not assessable by Federal statute) shall be assessed and taxed." Section 3609, that the shares in national banking associations "shall be valued and assessed as is other property for taxation." The *supreme court of the state holds that a stockholder in a state bank "could not be assessed upon his certificate of stock, inasmuch as his

shares were simply an interest in the very property held by the corporation, and the assessment of all the property of the corporation covered everything represented by the certificate." [142 Cal. 282, 64 L. R. A. 920, 100 Am. St. Rep. 135, 75 Pac. 835.] There is neither allegation nor evidence that there was any overvaluation of the plaintiff's shares of stock. The complaint is that there was a discrimination by reason of the failure to deduct from the value of the shares the entire value of the bank's tangible property, because "used and employed by it in the conduct and carrying on its business as a national banking association." And yet, in the face of the plain words of the Constitution and statutes, the clear language of the supreme court of California, and the absence of allegation or proof of actual discrimination, this court, by its opinion, strikes down the whole system of California for the taxation of shares of national banks.

But beyond and aside from the matters which I have considered, and conceding, for the purposes of the following suggestion, that the law of California providing for the taxation of shares of stock in national banks is invalid, still I insist that the decree of the court of appeals ought to be affirmed. This is an equitable suit brought in the United States court, where the distinction between law and equity is constantly enforced. Upon the theory of the opinion, the tax upon the shares of stock in the plaintiff bank was illegal. The statute of California imposing that tax was void. Now, there are two propositions which have entered into the jurisprudence of this court so thoroughly that they may be regarded as settled law: First, that equity will not interfere where there is a plain, adequate, and complete remedy at law; and, second, that injunction will not issue to restrain the collection of a tax simply on the ground of its illegality. The first is not only the rule of the court of chancery in England, but it is the command of the Federal statute. Section 723, Rev. Stat. [U. S. Comp. Stat. 1901, p. 583], reads: "Suits in equity shall not be sustained in either of the courts of the *United States in any case where a plain, adequate, and complete remedy may be had at law."

This defense was pleaded by the defendant in his answer, the sixteenth paragraph of which reads as follows:

"And respondent further submits to this honorable court that complainant has a full, complete, speedy, and adequate remedy at law against respondent for all causes of action, or causes of actions, stated or attempted to be stated in complainant's bill of complaint on file in this action; and he here

claims the same benefit of the objection as if he had not demurred to the relief so sought."

Even if it had not been formally pleaded, the matter is one which this court of its own motion would consider and determine. As said in *Wright v. Ellison*, 1 Wall. 16, 22, 17 L. ed. 555, 557:

"But this is a suit in equity. The rules of equity are as fixed as those of law, and this court can no more depart from the former than the latter. Unless the complainant has shown a right to relief in equity, however clear his rights at law, he can have no redress in this proceeding. In such cases the adverse party has a constitutional right to a trial by jury. The objection is one which, though not raised by the pleadings nor suggested by counsel, this court is bound to recognize and enforce."

It is unnecessary to cite the many cases in this court in which this rule has been recognized, the latest being *Scottish Union & Nat. Ins. Co. v. Bowland*, the opinion in which has just been filed (196 U. S. 611, ante, 619, 25 Sup. Ct. Rep. 345), though reference may be made to the discussion by Mr. Justice Field in *Whitehead v. Shattuck*, 138 U. S. 146, 34 L. ed. 873, 11 Sup. Ct. Rep. 276, and in *Scott v. Neely*, 140 U. S. 106, 35 L. ed. 358, 11 Sup. Ct. Rep. 712, and by Mr. Justice Brown in *Wehrman v. Conklin*, 155 U. S. 314, 39 L. ed. 167, 15 Sup. Ct. Rep. 120. Now, in California there is a perfectly adequate legal remedy for cases of this nature. Section 3819 of the Political Code provides that "the owner of any property, . . . who may claim that the assessment is void in whole or in part, may pay the same to the tax collector under protest, which protest shall be in writing, and shall specify whether the whole *assessment is [110] claimed to be void, or, if a part only, what portion, and in either case the grounds upon which such claim is founded; and when so paid under protest the payment shall in no case be regarded as voluntary payment, and such owner may at any time within six months after such payment bring an action against the county in the superior court, to recover back the tax so paid under protest." Such a remedy has, in a case of the taxation of national bank shares, been held by this court adequate and complete, and sufficient to exclude the interposition of a court of equity. In *Dows v. Chicago*, 11 Wall. 108, 20 L. ed. 65, which was a bill filed by the owner of shares of the capital stock of the Union National Bank of Chicago, to restrain the collection of a tax levied by that city upon his shares, we said (p. 112, L. ed. p. 67):

"The equitable powers of the court can only be invoked by the presentation of a case of equitable cognizance. There can be no such case, at least in the Federal courts,

where there is a plain and adequate remedy at law. And, except where the special circumstances which we have mentioned exist, the party of whom an illegal tax is collected has ordinarily ample remedy, either by action against the officer making the collection or the body to whom the tax is paid. Here such remedy existed. If the tax was illegal, the plaintiff protesting against its enforcement might have had his action, after it was paid, against the officer or the city to recover back the money, or he might have prosecuted either for his damages. No irreparable injury would have followed to him from its collection. Nor would he have been compelled to resort to a multiplicity of suits to determine his rights. His entire claim might have been embraced in a single action."

And this case was reaffirmed by the unanimous opinion of this court in the late case of *Pittsburgh, C. C. & St. L. R. Co. v. Board of Public Works*, 172 U. S. 32, 43 L. ed. 354, 19 Sup. Ct. Rep. 90, in which the quotation I have just made is also quoted.

The second proposition to which I have referred has also been often decided. Out of [111] the many decisions I refer to only *two or three. *Dows v. Chicago*, 11 Wall. 108, 20 L. ed. 65, in which is this language (p. 109, L. ed. p. 66) :

"Assuming the tax to be illegal and void, we do not think any ground is presented by the bill justifying the interposition of a court of equity to enjoin its collection. The illegality of the tax and the threatened sale of the shares for its payment constitute of themselves alone no ground for such interposition. There must be some special circumstances attending a threatened injury of this kind, distinguishing it from a common trespass, and bringing the case under some recognized head of equity jurisdiction before the preventive remedy of injunction can be invoked."

State Railroad Tax Cases (Taylor v. Secor), 92 U. S. 575, 23 L. ed. 663, in which is this (p. 614, L. ed. 673) :

"We do not propose to lay down in these cases any absolute limitation of the powers of a court of equity in restraining the collection of illegal taxes; but we may say that, in addition to illegality, hardship, or irregularity, the case must be brought within some of the recognized foundations of equitable jurisdiction, and that mere errors or excess in valuation, or hardship or injustice of the law, or any grievance which can be remedied by a suit at law, either before or after payment of taxes, will not justify a court of equity to interpose by injunction to stay collection of a tax."

And in *Pittsburgh, C. C. & St. L. R. Co. v. Board of Public Works*, 172 U. S. 32, 43 197 U. S.

L. ed. 354, 19 Sup. Ct. Rep. 90, in which the rule is thus stated (p. 37, L. ed. p. 356, Sup. Ct. Rep. p. 92) :

"The collection of taxes assessed under the authority of a state is not to be restrained by writ of injunction from a court of the United States, unless it clearly appears, not only that the tax is illegal, but that the owner of the property taxed has no adequate remedy by the ordinary processes of law, and that there are special circumstances bringing the case under some recognized head of equity jurisdiction."

But it may be said that in the following cases this court has laid down an apparently different rule in respect to the taxation of national bank shares. *New York v. Weaver*, 100 U. S. 539, 25 L. ed. 705; **Pelton v. Commercial Nat. Bank*, 101 U. S. 143, 25 L. ed. 901; *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153, 25 L. ed. 903; *Hill v. National Albany Exch. Bank*, 105 U. S. 319, 26 L. ed. 1052; *Evansville Nat. Bank v. Britton*, 105 U. S. 322, 26 L. ed. 1053; *Lander v. Mercantile Nat. Bank*, 186 U. S. 458, 46 L. ed. 1247, 22 Sup. Ct. Rep. 908. The first was a writ of error to the court of appeals of the state of New York, and, the mode of attack upon the law having been recognized by that court as proper, the question was not discussed here. In *Cummings v. Merchants' Nat. Bank*, *Pelton v. Commercial Nat. Bank* being decided on its authority, the right to an injunction was asserted. The case came from the circuit court of the United States for the northern district of Ohio, in which district the bank was located. In delivering the opinion of the court Mr. Justice Miller said on page 157:

"But the statute of the state expressly declares that suits may be brought to enjoin the illegal levy of taxes and assessments or the collection of them. Section 5848 of the Revised Statutes of Ohio, 1880, vol. 53, Laws of Ohio, 178, §§ 1, 2. And though we have repeatedly decided in this court that the statute of a state cannot control the mode of procedure in equity cases in Federal courts, nor deprive them of their separate equity jurisdiction, we have also held that, where a statute of a state created a new right or provided a new remedy, the Federal courts will enforce that right, either on the common-law or equity side of its docket, as the nature of the new right or new remedy requires. *Van Norden v. Morton*, 99 U. S. 378, 25 L. ed. 453. Here there can be no doubt that the remedy by injunction against an illegal tax, expressly granted by the statute, is to be enforced, and can only be appropriately enforced on the equity side of the court.

"The statute also answers another objec-

tion made to the relief sought in this suit, namely, that equity will not enjoin the collection of a tax except under some of the well-known heads of equity jurisdiction, among which is not a mere overvaluation, or the illegality of the tax, or in any case where there is an adequate remedy at law. The statute of Ohio expressly provides for an injunction against the collection of a tax illegally *assessed, as well as for an action to recover back such tax when paid, showing clearly an intention to authorize both remedies in such cases.

"Independently of this statute, however, we are of opinion that when a rule or system of valuation is adopted by those whose duty it is to make the assessment, which is designed to operate unequally and to violate a fundamental principle of the Constitution, and when this rule is applied, not solely to one individual, but to a large class of individuals or corporations, that equity may properly interfere to restrain the operation of this unconstitutional exercise of power."

Two reasons are here stated to justify the exception to the ordinary rule in respect to injunctive relief. First, a state statute, and, second, a design on the part of the state authorities to discriminate. There is no statute of California making such special provision in reference to injunctions, and that reason for a departure from the general rule may be put one side. The other implies an intent on the part of the legislature or assessing officials to discriminate. It does not mean simply that there has resulted a discrimination, but that one was intended. It is well known that in the early days of the national banking law there was a strong prejudice against it in different portions of the Union, and adverse legislation in the way of burdensome taxation was not uncommon, and it was because of that fact that the court permitted the exercise of the strong powers of equity. That I am right in this, and that there has never been an intent to apply a different rule to a national bank from that which has been in force in respect to other property, is made clear by the language of Mr. Justice Miller in a subsequent case, *German Nat. Bank v. Kimball*, 103 U. S. 732, 735, 26 L. ed. 469, 470. Delivering the opinion of the court, he says:

"An apparent exception to the universality of the rule is admitted in *People v. Weaver*, 100 U. S. 539, 25 L. ed. 705; *Pelton v. Commercial Nat. Bank*, 101 U. S. 143, 25 L. ed. 901, and *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153, 25 L. ed. 903. It is held in these cases that when the inequality

[114] of valuation is the result of a statute of the state designed to discriminate injuriously against any class of persons or

688

any species of property, a court of equity will give appropriate relief; and also where, though the law itself is unobjectionable, the officers who are appointed to make assessments combine together and establish a rule or principle of valuation, the necessary result of which is to tax one species of property higher than others, and higher than the average rate, the court will also give relief. But the bill before us alleges no such agreement or common action of assessors, and no general rule or discriminating rate adopted by a single assessor, but relies on the numerous instances of partial and unequal valuations which establish no rule on the subject."

This ruling was somewhat like the action of the court in *Stanley v. Schwalby*, 162 U. S. 255, 40 L. ed. 960, 16 Sup. Ct. Rep. 754. That was a case coming from a state court. Ordinarily when the judgment is reversed the order is to remand the case for further proceedings not inconsistent with our opinion, but, in view of action theretofore taken by the state court in the case, we felt constrained to direct the very judgment which should be entered.

In *Lander v. Mercantile Nat. Bank*, 186 U. S. 458, 46 L. ed. 1247, 22 Sup. Ct. Rep. 908, a decree dismissing the bill filed by the bank was affirmed. It is true in the opinion the merits of the bill were discussed, and nothing said about the right to maintain a suit in equity. Evidently the matter passed without consideration, and not unnaturally so, as the bill on its merits was dismissed.

In the case before us, whatever may be the effect of the statute in creating or opening the door to discrimination, no one can read it and say that there was an intent on the part of the legislature of California to discriminate injuriously against national banks. The statute is positive in its language that national bank shares shall be taxed and assessed as is other property, and there was beyond doubt an attempt on the part of the California legislature to cast only an equal burden of taxation on such shares. Of course, there ought not to be imputed to this court an intention to favor national *bank property in the matter [115] of taxation, and to lay down a rule for its benefit which is denied to all other property. So, were I wrong in my construction of the state statute, beyond any peradventure the decree of the circuit court of appeals ought to be affirmed and the bank remitted to its legal remedy.

I am authorized to say that the CHIEF JUSTICE, Mr. Justice **Brown**, and Mr. Justice **Peckham** concur in this dissent.

197 U. S.

NATIONAL COTTON OIL COMPANY *et al.*, *Plffs. in Err.*,
v.

STATE OF TEXAS.

(See S. C. Reporter's ed. 115-133.)

Constitutional law—validity of Texas anti-trust laws—due process of law—equal protection of the laws—conclusiveness of state court's construction of state statutes.

1. The property of a foreign corporation engaged in manufacturing products of cotton seed is not taken without due process of law by the Texas anti-trust laws, under which its license to do business in that state is forfeited for violating those laws by entering into an agreement to regulate or fix the price of cotton seed.
2. The construction given by the state courts to Tex. act of May 25, 1899, as removing the discriminatory features of prior anti-trust laws, is conclusive on the Federal Supreme Court in determining, on writ of error to the state court, whether such statute denies the equal protection of the laws.
3. A foreign corporation whose license to do business in Texas is sought to be forfeited by a suit brought under the anti-trust laws of that state cannot claim to be denied the equal protection of the laws, where the discriminatory features of the prior anti-trust laws have been removed by Tex. act of May 25, 1899, although they may still remain in the Revised Statutes of the state and in the Penal Code, under which certain excepted classes are exempted from indictment and punishment, while the corporation may be subject to both.

[No. 37.]

Argued November 1, 2, 1904. Decided February 27, 1905.

IN ERROR to the Court of Civil Appeals in and for the Third Supreme Judicial District of the State of Texas to review a judgment which affirmed a judgment of the District Court of Travis County, in that State, forfeiting the license of a foreign corporation to do business in that State, because of its violation of the anti-trust laws. *Affirmed.*

See same case below, 72 S. W. 615.

Statement by Mr. Justice **McKenna**:

This suit was brought under the anti-trust acts of the state of Texas, to forfeit the license of the National Cotton Oil Com-

pany to do business in the state of Texas, for violating those acts. The defense is that they are repugnant to the 14th Amendment of the Constitution of the United States.

The suit was instituted by the attorney general of the state and the district attorney of the twenty-sixth judicial district, and the petition alleged the following facts: The National Cotton Oil Company and the Southern Cotton Oil Company are New Jersey corporations, doing and transacting business in the state of Texas by reason of a permit issued to them respectively on the 2d day of May, 1900, and the 3d day of June, 1897.

The Taylor Cotton Oil Works is a Texas corporation doing business in the state under a charter granted August 25, 1898. The said foreign corporations, from the date of their respective permits and the Taylor Cotton Oil Works from the date of its charter have been and are "engaged in the business of the manufacture and sale of cotton-seed oil, cotton-seed meal, and the other by-products of cotton seed; that the business in which each and all of such corporations were engaged necessitated the purchase of cotton seed from which the products which they manufactured and sold were made, and that said cotton seed was an article and commodity of merchandise."

Each of them on or about the 1st of November, 1901, and on every day prior and subsequently thereto, has been engaged in the business of buying cotton seed in the various counties of the state, and on the 1st of November, 1901, the National Cotton Oil Company made and entered into a combination with each of the other companies, and they with it, and each *of them with va-[117]rious other persons, firms, and corporations, whose names are to the defendant in error unknown, and the said corporations "became members of and parties to a pool, trust, agreement, confederation, and understanding with each of the other of said corporations, firms, and persons, whereby they did each for itself and with each other and all together agree to regulate and fix, and did regulate and fix, the price at which they would buy cotton seed; that they especially regulated and fixed the price of cotton seed throughout the state of Texas at \$14.00 per ton, and agreed amongst and with each other that they would not give more than said \$14.00 per ton for cotton seed in any of the towns and communities of the state of Texas." Whereby, "and by maintaining the agreement to regulate and fix the price of cotton seed aforesaid, the defendant (the National Cotton Oil Company) was guilty of a violation of the laws of the state of Texas," and

NOTE.—On illegal trusts under modern anti-trust laws—see note to *Whitwell v. Continental Tobacco Co.* 64 L. R. A. 689.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to *Missouri ex rel. Hill v. Dockery*, 63 L. R. A. 571.

in consequence has forfeited its permit to transact business in the state.

The cancelation and forfeiture of the permit was prayed, and that the oil company be enjoined from transacting business in the state. A demurrer was filed to the petition for insufficiency in law to entitle the state to any relief, and alleged against each of the anti-trust acts of the state and the provisions of the Penal Code based thereon, that they violated § 1, article 14 of the Amendments to the Constitution of the United States, in that the act of March 30, 1889, and the Code provisions based thereon, deprived the company of the equal protection of the laws, because it was provided by § 13 of said act and article 988 of the Penal Code that the said statutes "shall not apply to agricultural products or live stock while in the hands of the producer or raiser." And that the act of April 30, 1895, and certain sections of the Revised Statutes of Texas and of the Penal Code were likewise discriminatory because of the same exceptions, and the further exception that said statutes should not be held to "be understood or considered to prevent the organization of [118] laborers for the *purpose of maintaining any standard of wages;" and the act of May 25, 1899, because it was cumulative and a mere supplement to the others, and carried, therefore, the same unconstitutional discriminations.

All of the acts and Code provisions are charged with depriving the oil company of its property without due process of law and in violation of the 14th Amendment, in that the penalties are excessive and their provisions so vague and uncertain that the company is denied a resort to the tribunals of the country to defend its rights, except on the condition that, if not successful, it shall subject its property to confiscation and forfeit its right to do business in the state.

It is also urged as a ground of demurrer that the act of 1895 violated a provision of the Constitution of the state which prohibited a bill to contain more than one subject.

The demurrer was overruled. The company declined to answer further, and judgment was entered forfeiting the license or permit of the company, and enjoining the company from transacting any business in the state, "except such business as may be and constitute interstate commerce." The judgment was affirmed by the court of civil appeals. A rehearing was denied and a writ of error from the supreme court refused. This writ of error was then granted.

Messrs. William V. Rowe and R. S. Lovett argued the cause, and, with Messrs. 690

Ralph Oakley and James A. Baker, filed a brief for plaintiffs in error:

Taking all the statutes together, it is entirely clear that the act of 1899 is a mere addition to the previous acts, and a part of them. The acts being clearly *in pari materia*, they must, of course, be read together, and treated as parts of one system.

Potter's Dwarrr. Stat. p. 189; *Alexander v. Alexandria*, 5 Cranch, 1, 3 L. ed. 19; *Doe ex dem. Patterson v. Winn*, 11 Wheat. 380, 385, 6 L. ed. 500, 501; *Ryan v. Carter*, 93 U. S. 78, 84, 23 L. ed. 807, 809; *Pearce v. Atwood*, 13 Mass. 324; *Queen v. Tonbridge*, L. R. 13 Q. B. Div. 339; *Sutherland*, Stat. Constr. § 288.

This rule was recognized in Texas from the very first, and has been applied many times by the supreme court of that state.

Cain v. State, 20 Tex. 355; *Shelby v. Johnson*, Dallam (Tex.) 597; *Bryan v. Sundberg*, 5 Tex. 418; *Selman v. Wolfe*, 27 Tex. 68; *Hanrick v. Hanrick*, 54 Tex. 101.

Where the question is merely one of the construction of a state statute, which does not necessarily involve a Federal question, the determination of the state court is conclusive upon this court.

Osborne v. Florida, 164 U. S. 650, 656, 41 L. ed. 586, 588, 17 Sup. Ct. Rep. 212.

But it is equally well settled that this court is not bound by state-court decisions construing state statutes, or otherwise, where a Federal question is involved, as, for instance:

1. Where Federal citizenship is claimed.

Boyd v. Nebraska, 143 U. S. 135, 36 L. ed. 103, 12 Sup. Ct. Rep. 375.

2. Where the question involved relates to the rights of a Federal corporation, or a national highway or post road.

Roberts v. Northern P. R. Co. 158 U. S. 1, 39 L. ed. 873, 15 Sup. Ct. Rep. 756.

3. Where a state statute is alleged to create a contract, the obligation of which, it is claimed, has been impaired.

Ohio L. Ins. & T. Co. v. Debolt, 16 How. 416, 14 L. ed. 997. See also *Bridge Proprietors v. Hoboken Land & Improv. Co.* 1 Wall. 116, 145, 17 L. ed. 571, 576; *Wright v. Nagle*, 101 U. S. 791, 25 L. ed. 921; *Douglas v. Kentucky*, 168 U. S. 488, 501, 42 L. ed. 553, 557, 18 Sup. Ct. Rep. 199; *Bacon v. Texas*, 163 U. S. 207, 41 L. ed. 132, 16 Sup. Ct. Rep. 1023; *Louisville Gas Co. v. Citizens' Gaslight Co.* 115 U. S. 683, 29 L. ed. 510, 6 Sup. Ct. Rep. 265; *McGahey v. Virginia*, 135 U. S. 662, 34 L. ed. 304, 10 Sup. Ct. Rep. 972; *Mobile & O. R. Co. v. Tennessee*, 153 U. S. 486, 38 L. ed. 793, 14 Sup. Ct. Rep. 968; *Chicago, B. & Q. R. Co. v. Nebraska*, 170 U. S. 57, 42 L. ed. 948, 18 Sup. Ct. Rep. 513; *McCullough v. Virginia*, 172 U. S. 102, 43 L. ed. 382, 19 Sup. Ct. Rep. 197 U. S.

134; *Vicksburg, S. & P. R. Co. v. Dennis*, 116 U. S. 665, 29 L. ed. 770, 6 Sup. Ct. Rep. 625; *Bryan v. Kentucky Annual Conference, M. E. Church South Bd. of Edu.* 151 U. S. 639, 38 L. ed. 297, 14 Sup. Ct. Rep. 465; *Louisville & N. R. Co. v. Palmes*, 109 U. S. 244, 27 L. ed. 922, 3 Sup. Ct. Rep. 193.

4. Similarly, when it is claimed that the state statute and its procedure are not due process of law.

Scott v. McNeal, 154 U. S. 34, 45, 38 L. ed. 896, 901, 14 Sup. Ct. Rep. 1108.

5. Where it is alleged that full faith and credit have not been given to the judgment of a sister state, and it is necessary to determine the nature of the original cause of action, and, in so doing, to construe a state statute.

Huntington v. Attrill, 146 U. S. 657, 683, 36 L. ed. 1123, 1133, 13 Sup. Ct. Rep. 224.

And, generally, wherever a right is set up under the Constitution, which, it is alleged, is violated by a state statute; and where this court differs from the state court as to the meaning and effect of the statute, or it is evident that the state-court decision will impair the efficacy of some provision of the Constitution.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 100, 43 L. ed. 909, 911, 19 Sup. Ct. Rep. 609; *Norton v. Shelby County*, 118 U. S. 425, 439, 30 L. ed. 178, 185, 6 Sup. Ct. Rep. 1121; *Gormley v. Clark*, 134 U. S. 338, 348, 33 L. ed. 909, 913, 10 Sup. Ct. Rep. 554; *Stutsman County v. Wallace*, 142 U. S. 293, 306, 35 L. ed. 1018, 1022, 12 Sup. Ct. Rep. 227; *D. M. Osborne & Co. v. Missouri P. R. Co.* 147 U. S. 248, 258, 37 L. ed. 155, 160, 13 Sup. Ct. Rep. 299.

In view of the foregoing exceptions, the occasional statement that, in considering questions of this nature, decisions involving the impairment of the obligation of contracts are made by this court the sole exception to the rule as to the conclusiveness of state-court decisions, must be deemed to be inadequate and obsolete. The suggestion originated with *Jefferson Branch Bank v. Skelly*, 1 Black, 436, 17 L. ed. 173, before the 14th Amendment was adopted. One provision of the Constitution is as sacred as another.

The anti-trust laws of Texas make it impossible for two or more persons having a common business lawfully to associate themselves in a partnership, or otherwise, and to carry on any ordinary business in an ordinary way.

2 Eddy, Combinations, §§ 904-907; Parsons, Partn. 3d ed. p. 6; 3 Kent, Com. p. 23; 1 Lindley, Partn. 4th ed. p. 3; *Queen Ins. Co. v. State*, 86 Tex. 250, 22 L. R. A. 483, 24 S. W. 391; *Texas & P. Coal Co. v. Law-*

son, 89 Tex. 394, 32 S. W. 871, 34 S. W. 919; *Matthews v. Associated Press*, 136 N. Y. 333, 32 Am. St. Rep. 741, 32 N. E. 981; *Re Grice*, 79 Fed. 627; *Houck v. Anheuser-Busch Brewing Asso.* 88 Tex. 184, 30 S. W. 869; *Welch v. Phelps & B. Wind Mill Co.* 89 Tex. 653, 36 S. W. 71; *Gates v. Hooper*, 90 Tex. 563, 39 S. W. 1079; *Texas Brewing Co. v. Templeman*, 90 Tex. 277, 38 S. W. 27; *Fuqua v. Pabst Brewing Co.* 90 Tex. 298, 35 L. R. A. 241, 38 S. W. 29, 750; *Com. v. Bavarian Brewing Co.* 112 Ky. 925, 66 S. W. 1016; *American Handle Co. v. Standard Handle Co.* (Tenn. Ch. App.) 59 S. W. 709; *Ertz v. Produce Exch. Co.* 82 Minn. 173, 51 L. R. A. 825, 83 Am. St. Rep. 419, 84 N. W. 743; *Anderson v. United States*, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50.

The courts construing such statutes have not limited themselves to contracts in restriction of trade. They have practically condemned most of the ordinary contracts which are made in the ordinary course of business.

Williams v. Montgomery, 148 N. Y. 519, 43 N. E. 57; *Brown v. Rounsavell*, 78 Ill. 589; *Newell v. Meyendorff*, 9 Mont. 254, 8 L. R. A. 440, 18 Am. St. Rep. 738, 23 Pac. 333.

The liberty of contract, which necessarily includes the right of men to associate in the conduct of their business and to unite their capital, skill, and acts, and carry on their business by making the usual and customary agreements in respect to the amount of their output or the price at which they will buy and sell, has been frequently recognized by this court as a right guaranteed by the 14th Amendment.

Allgeyer v. Louisiana, 165 U. S. 578, 589, 41 L. ed. 832, 835, 17 Sup. Ct. Rep. 427; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 762, 28 L. ed. 585, 588, 4 Sup. Ct. Rep. 652; *Bertholf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; *Forster v. Scott*, 136 N. Y. 577, 18 L. R. A. 543, 32 N. E. 976; *Purdy v. Erie R. Co.* 162 N. Y. 42, 48 L. R. A. 669, 56 N. E. 508; *Printing & Numerical Registering Co. v. Sampson*, L. R. 19 Eq. 462.

This right or constitutional liberty of contract has been jealously affirmed and constantly guarded in the different states of the Union. In addition to the cases heretofore cited, we find that in Pennsylvania the statute that manufacturers should not pay wages in orders was held unconstitutional as unduly interfering with the liberty of contract.

Godcharles v. Wigeman, 113 Pa. 431, 6 Atl. 354.

In Ohio the same decision was made with reference to a mechanics' lien law.

Palmer v. Tingle, 55 Ohio St. 423, 45 N. E. 313.

In Illinois the so-called truck store act, the coal weighing act, and other similar legislation have been held unconstitutional for the same reason.

Frorer v. People, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; *Ramsey v. People*, 142 Ill. 380, 17 L. R. A. 853, 32 N. E. 364; *Harding v. People*, 160 Ill. 459, 32 L. R. A. 445, 52 Am. St. Rep. 344, 43 N. E. 624; *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L. R. A. 340, 37 Am. St. Rep. 206, 35 N. E. 62.

And in other states similar legislation has been pronounced unconstitutional because violating this fundamental constitutional right of freedom of contract.

Kuhn v. Detroit, 70 Mich. 534, 38 N. W. 470; *John Spry Lumber Co. v. Sault Sav. Bank Loan & Trust Co.* 77 Mich. 199, 6 L. R. A. 204, 18 Am. St. Rep. 396, 43 N. W. 778; *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350; *State v. Julow*, 129 Mo. 163, 29 L. R. A. 257, 50 Am. St. Rep. 443, 31 S. W. 781; *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 25 Am. St. Rep. 863, 10 S. E. 285; *Ex parte Kuback*, 85 Cal. 274, 9 L. R. A. 482, 20 Am. St. Rep. 226, 24 Pac. 737; *Low v. Rees Printing Co.* 41 Neb. 127, 24 L. R. A. 702, 43 Am. St. Rep. 670, 59 N. W. 362; *Re Eight Hour Law*, 21 Colo. 29, 39 Pac. 328; *Com. v. Perry*, 155 Mass. 117, 14 L. R. A. 325, 31 Am. St. Rep. 533, 28 N. E. 1126; 2 Eddy, Combinations, §§ 660-673.

Aside from a proper exercise of the police power, and leaving out of view the limitations upon public-service corporations, the property rights of a trading corporation cannot be interfered with to any greater extent than can those of an individual.

Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 691, 43 L. ed. 858, 862, 19 Sup. Ct. Rep. 565; *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 695, 40 L. ed. 857, 16 Sup. Ct. Rep. 714; Freund, Pol. Power, § 715, p. 736; *Ballard v. Mississippi Cotton Oil Co.* 81 Miss. 507, 62 L. R. A. 407, 95 Am. St. Rep. 476, 34 So. 533; 2 Eddy, Combinations, §§ 660-673; *Re House Bill No. 1230*, 163 Mass. 596, 28 L. R. A. 344, 40 N. E. 713.

The legislature cannot, under the pretense of exercising its police power, prohibit harmless acts not immediately concerning the health and welfare of the people; and all such acts are subject to judicial examination and possible condemnation.

Tiedeman, Pol. Power, p. 233; 22 Am. & Eng. Enc. Law, pp. 936 *et seq.*; *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; *Colon v. Lisk*, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302.

There has always been a plain recognition of the right and freedom to form associations and unions of capital and effort.

Anderson v. United States, 171 U. S. 604, 616, 43 L. ed. 300, 306, 19 Sup. Ct. Rep. 50; *United States v. Joint Traffic Asso.* 171 U. S. 505, 567, 43 L. ed. 259, 286, 19 Sup. Ct. Rep. 25.

Combinations which restricted competition, and which prevented competition between persons combined, never were illegal by the common law of England.

Mogul S. S. Co. v. McGregor, L. R. 23 Q. B. Div. 598.

Combinations restrictive of competition have always been upheld by law, and the right to combine is to be classed among the most important and least questioned liberties of citizens.

Mitchel v. Reynolds, 1 P. Wms. 181; *United States v. Trans-Missouri Freight Asso.* 24 L. R. A. 73, 4 Inters. Com. Rep. 443, 7 C. C. A. 15, 19 U. S. App. 36, 58 Fed. 71; *Marsh v. Russell*, 66 N. Y. 288; *Phippen v. Stickney*, 3 Met. 384; *Lorillard v. Clyde*, 86 N. Y. 384; *Central Shade Roller Co. v. Cushman*, 143 Mass. 353, 9 N. E. 629; *Craft v. McConoughy*, 79 Ill. 346, 22 Am. Rep. 171; *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 60 Am. Rep. 464, 13 N. E. 419; *Matthews v. Associated Press*, 136 N. Y. 333, 32 Am. St. Rep. 741, 32 N. E. 981; *Jones v. Fell*, 5 Fla. 510; *Railroad Tax Case*, 8 Sawy. 238, 13 Fed. 722; *Leslie v. Lorillard*, 110 N. Y. 519, 1 L. R. A. 456, 18 N. E. 363.

It is not association *per se*, but only certain forms of association, which have been condemned.

Hooker v. Vandewater, 4 Denio, 349, 47 Am. Dec. 258; *People v. Fisher*, 14 Wend. 9, 28 Am. Dec. 501; *Stanton v. Allen*, 5 Denio, 434, 49 Am. Dec. 282; *Com. ex rel. Chew v. Carlisle*, Brightly (Pa.) 36; *Emery v. Ohio Candle Co.* 47 Ohio St. 320, 21 Am. St. Rep. 819, 24 N. E. 660; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173, 8 Am. Rep. 159; *India Bagging Asso. v. Kock*, 14 La. Ann. 164; *United States v. Jellico Mountain Coal & Coke Co.* 12 L. R. A. 753, 3 Inters. Com. Rep. 626, 46 Fed. 432; *Santa Clara Valley Mill & Lumber Co. v. Hayes*, 76 Cal. 387, 9 Am. St. Rep. 211, 18 Pac. 391; *Craft v. McConoughy*, 79 Ill. 346, 22 Am. Rep. 171; *Gibbs v. Consolidated Gas Co.* 130 U. S. 396, 32 L. ed. 979, 9 Sup. Ct. Rep. 553; *United States v. Trans-Missouri Freight Asso.* 24 L. R. A. 73, 4 Inters. Com. Rep. 443, 7 C. C. A. 15, 19 U. S. App. 36, 58 Fed. 58.

All that this court has ever held on this subject of restrictions of competition is limited solely to their effect upon interstate commerce in cases arising under, and requiring a construction of, the Federal anti-trust act. Having declared that Congress intended to prohibit all restraints upon that commerce, whether reasonable or unreasonable, the court has simply held, as to competition, that to destroy or restrict free competition in interstate commerce was to restrain such commerce, within the meaning of the Federal act.

Northern Securities Co. v. United States, 193 U. S. 337, 48 L. ed. 700, 24 Sup. Ct. Rep. 436.

Admitting fully the existence and broad scope of the right to property and the liberty of contract protected by the Constitution in both the 5th and 14th Amendments, the only limitation that this court has ever placed upon the right has grown out of its recognition and assertion of the paramount power of the national government, acting through Congress, to legislate on the subject of interstate commerce, and therefore to limit and restrain the private right and liberty of contract, whenever such private contracts have relation to, or immediately affect and bear upon, interstate commerce.

United States v. Joint Traffic Assn. 171 U. S. 505, 559, 566-572, 43 L. ed. 259, 283, 286-288, 19 Sup. Ct. Rep. 25; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 227-235, 44 L. ed. 136, 142-145, 20 Sup. Ct. Rep. 96; *Northern Securities Co. v. United States*, 193 U. S. 197, 351, 48 L. ed. 679, 706, 24 Sup. Ct. Rep. 436.

Speaking generally of the right and liberty of contract of corporations as well as of individuals, in their dealings with and use of their property, it is settled that there can be no direct, or other, interference with this right, or with any other vested property right, except in the proper exercise by a state of its police power, which must, in all cases, be limited to matters plainly affecting the life, health, morals, peace, good order, convenience, and general welfare of the community.

Eddy, *Combinations*, §§ 658, 676-678; 22 Am. & Eng. Enc. Law, pp. 936 *et seq.*

Mr. C. K. Bell argued the cause and filed a brief for defendant in error:

The law of 1899 contains no exemption in favor of any class, and this law has been held by the supreme court of Texas, in the case of *State v. Laredo Ice Co.* 96 Tex. 461, 73 S. W. 951, to be a valid and constitutional enactment.

Conceding that the acts of 1889 and 1895 are not constitutional to the extent of warranting the collection of penalties for a violation of their provisions, it is within the

power of the courts to forfeit the permit which authorizes a foreign corporation to transact business in the state of Texas, for committing the acts which by such statutes they are prohibited from committing under penalty of forfeiting such permit.

Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 44 L. ed. 657, 20 Sup. Ct. Rep. 518, 19 Tex. Civ. App. 1, 44 S. W. 936; *State v. Shippers Compress & Warehouse Co.* 95 Tex. 603, 69 S. W. 58.

Mr. Justice McKenna, after stating the case as above, delivered the opinion of the court:

The charges made against the statutes of Texas are that they deny the oil company the equal protection of the law, and take its property without due process of law. The answer to the first depends upon the effect of the statutes. The answer of the second involves their validity and broader considerations. We will deal with it first.

The specification in the demurrer of wherein the statutes deprive the oil company of its property without due process of law is indefinite and peculiar. It may be different from an attack on the validity of the statutes but counsel have treated it as tantamount to such attack, and we will so treat it.

Defendant in error contends that it is not open to the oil company to attack the constitutionality of the statutes, either as discriminating against it or as depriving it of property without due process of law, and cites *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 44 L. ed. 657, 20 Sup. Ct. Rep. 518. Counsel for the company contests the application of that case; and we will assume (not decide) with them that it is not determinative of their contention.

The acts of 1889 and 1895 are set out at length in *Waters-Pierce Oil Co. v. Texas*. The act of 1899, so far as the present question is concerned, is substantially the same as they. All of the acts are directed to the prohibition of combinations to restrict trade, or in any way limit competition in the production *or sale of articles, or to increase, 123 or reduce their price in order to preclude a free and unrestricted competition in them. The various ways in which these purposes can be accomplished are enumerated and forbidden. Penalties are affixed to the violation of the acts, offending domestic corporations forfeit their charters, and offending foreign corporations forfeit their privileges to do business in the state.

There was also an act passed in 1903, which repealed all laws or parts of laws in conflict with it, and expressly repealed certain provisions of the Penal Code of the state, and the acts of 1895 and 1899. The

right to recover penalties or to forfeit charters of domestic, or the permits of foreign, corporations, for acts committed before the going into effect of the statute, was reserved.

The argument, which is directed against the validity of the statutes, is drawn from extremes. It is difficult to present its elements in a concise way. Its ultimate foundation is the right of individuals and corporations as well, under the Constitution of the United States, to make contracts and combine in business enterprises; and, it is argued, to prohibit them from so doing "in the ordinary way through the making of purchases and sales and the fixing of prices, is clearly to work a deprivation of property without due process of law, and to impair the well-recognized liberty of contract, involved in the acquiring, using, and dealing with property," assured by the Federal Constitution.

To support the argument the usages and necessity of business are adduced, and partnerships and their effect are brought forward as illustrations. There are some things which counsel easily demonstrate. They easily demonstrate that some combination of "capital, skill, or acts" is necessary to any business development, and that the result must inevitably be a cessation of competition. But this does not prove that all combinations are inviolable, or that no restriction upon competition can be forbidden. To contend for these extremes is to overlook the difference in the effect of ac-

[129] tions, and to limit too *much the function and power of government. By arguing from extremes almost every exercise of government can be shown to be a deprivation of individual liberty. It is common-place to say that it is the purpose, and indeed duty, of government, to get all it can of good out of the activities of men, and limit or forbid them when they become or tend to evil. Of course, what is evil may not be always clear; but to be able to dispute the policy of a law is not to establish its invalidity. It is certainly the conception of a large body of public opinion that the control of prices through combinations tends to restraint of trade and to monopoly, and is evil. The foundations of the belief we are not called upon to discuss, nor does our purpose require us to distinguish between the kinds of combinations or the degrees of monopoly. It is enough to say that the idea of monopoly is not now confined to a grant of privileges. It is understood to include a "condition produced by the acts of mere individuals." Its dominant thought now is, to quote another, "the notion of exclusiveness or unity;" in other words, the suppression of competition by the unification of inter-

est or management, or it may be through agreement and concert of action. And the purpose is so definitely the control of prices that monopoly has been defined to be "unified tactics with regard to prices." It is the power to control prices which makes the inducement of combinations and their profit. It is such power that makes it the concern of the law to prohibit or limit them. And this concern and the policy based upon it has not only expression in the Texas statutes; it has expression in the statutes of other states and in a well-known national enactment. According to them, competition, not combination, should be the law of trade. If there is evil in this it is accepted as less than that which may result from the unification of interests, and the power such unification gives. And that legislatures may so ordain this court has decided. *United States v. E. C. Knight Co.* 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; *United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; *United States v. Joint Traffic Asso.* 171 *U. S. 505, [130] 43 L. ed. 259, 19 Sup. Ct. Rep. 25; *Northern Securities Co. v. United States*, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; *Swift & Co. v. United States*, 196 U. S. 375, ante, 518, 25 Sup. Ct. Rep. 276.

In *Smiley v. Kansas*, decided at this term, 196 U. S. 447, ante, 546, 25 Sup. Ct. Rep. 289, a statute of Kansas is passed on which is identical in effect, and even in words, in all that concerns the present controversy, with the Texas statutes. The statute was assailed as "an unwarranted attempt upon the part of the legislature to limit the rights of the individual in the matter of contracting and dealing with his fellowmen." The right which Smiley claimed was to combine with certain grain dealers, persons, companies, and corporations, who were competitors, to pool and fix the price of grain in the town of Bison, and to prevent competition in the purchase and sale of grain at that place. We followed the ruling of the supreme court of the state in holding that the combination was within the prohibition of the statute; we concurred with that court in deciding that the prohibition was a valid exercise of the police power of the state.

It follows that the statutes of Texas do not deprive the oil company of its property without due process of law.

Next, as to the effect of the statutes.

The act of May 25, 1899, omits the discriminatory provisions of the prior acts, but, it is contended that, as the latter act is declared to be cumulative of the prior acts, their discriminations are preserved and continued, and that, under the Code provi-

sions, the company may be criminally prosecuted, and that the excepted classes of the acts of 1889 and 1895 are exempt from prosecution. It is further urged, whether such discrimination results from the statutes is for us to determine independently of what views the courts of the state may entertain of them and their relations.

Upon the last contention depends the mode of approaching the other, and we will dispose of it first. We cannot assent to it. There are cases in which we determine for ourselves the meaning of a state law, but this is not one of them. The contention of the company is that the statutes of the state discriminate against it; in other words, deny [131] it the equal protection *of the law, by forbidding it from doing what they permit others to do in similar circumstances,—punish its acts and exempt from punishment the same acts when done by others. But the courts of the state are the tribunals appointed to administer the statutes and impose their penalties, and to do so they must necessarily interpret them. In other words, they are the tribunals to declare the meaning of the statutes, and if in declaring it they make the statutes discriminatory, then may the statutes become unconstitutional. *Olsen v. Smith*, 195 U. S. 332, *ante*, 224, 25 Sup. Ct. Rep. 52.

What has the supreme court of Texas said of the statutes?

The court of civil appeals in the case at bar expressed the following view:

"The trial court did not err in overruling appellant's demurrers. While it has been correctly held that certain provisions of the anti-trust statutes are unconstitutional, the supreme court, in the case of *State v. Shippers' Compress & Warehouse Co.* 95 Tex. 603, 69 S. W. 61, relying upon the case of *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 44 L. ed. 657, 20 Sup. Ct. Rep. 518, holds that so much of these statutes that authorize the canceling and forfeiture of a charter or permit to do business within the state of Texas are valid, and are not in violation of the Constitution."

The supreme court refused a writ of error, and thereby, as we understand the local rule to be, approved the views of the court of civil appeals. Subsequently the supreme court expressed itself explicitly in *State v. Shippers' Compress & Warehouse Co.* 95 Tex. 603, 69 S. W. 58, and *State v. Laredo Ice Co.* 96 Tex. 461, 73 S. W. 951.

The object in *State v. Shippers' Compress & Warehouse Co.* was to forfeit the charter of the compress company for violating the anti-trust law of 1895, in that the incorporators combined "to restrict aids to commerce." The law was attacked as unconstitutional. To the contention the court said:

"The defendant insists that the law is unconstitutional, *therefore void in whole, [132] and will not support the action to forfeit the charter. Upon the same objection we held the anti-trust law of 1889 to be constitutional, and there is no such difference between the two laws as would affect the decision of this question. We believe that our decision is correct; that the law is not in contravention of the Constitution of the state, nor of the United States. *Houck v. Anheuser-Busch Brewing Asso.* 88 Tex. 189, 30 S. W. 869."

The court then referred to *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431, and in submission to its authority held the law of 1895, so far as it came within the terms of that case, invalid, and would not support an action by the state to recover a penalty for a violation of the law; nor would it, in suits between corporations and individuals, support a defense based upon the fact that the right of action originated in violation of the anti-trust law. "But," the court remarked, "to the extent that the statute of this state is not embraced in the decision of the Supreme Court of the United States, we shall adhere to our former decision that it is constitutional and valid, and therefore enforceable by the state."

That is, the court decided the act of 1895 was valid to the extent that it authorized the state to revoke the license of a foreign corporation, and to forfeit the charter of a domestic corporation. The other provisions of the act were held invalid, and the right to make this distinction was based on *Waters-Pierce Oil Co. v. Texas*.

State v. Laredo Ice Co. was instituted to recover penalties for the violation of the anti-trust law of 1899. The ice company was a domestic corporation, and it was proceeded against for having formed a combination to regulate and fix prices. In defense, the company asserted the unconstitutionality of the act.

It is provided in § 14 of the act of 1899 that the provisions of preceding sections and the fines and penalties provided for violations of the act shall be held and construed to be cumulative of all laws now in force in the state. It was *contended, as it is con- [133] tended here, that this provision made one law of the act and the act of 1895, and that the exemptions of the latter became part of the former and made it unconstitutional. In other words, the effect was (we quote from the opinion of the court) "thereby to give exemption from prosecution under the law of 1899 to those persons who are exempted by the provisions of the law of 1895." The supreme court of Texas rejected the contention. Its reasoning was

not very direct or circumstantial, but it in effect held that the act of 1899 did not continue the provisions of the prior acts, whether constitutional or unconstitutional, merely because it was declared to be cumulative. And the court decided the law of 1899 to be constitutional, because it did not contain the discriminating features of the prior laws. Under the laws of Texas, therefore, combinations of the kind described in the various anti-trust laws, whether by agriculturalists or organized laborers or others, are forbidden and penalized, and the oil company is not discriminated against.

But it may be said that, if the inequalities of prior anti-trust acts have been removed by the act of 1899, they still remain in the Revised Statutes of the state and in the Penal Code, and by those statutes and that Code the excepted classes are exempted from indictment and punishment, while the oil company is subject to both. We need not consider the statutes referred to or consider how far this discrimination can exist, in view of the decision of the supreme court of the state in *State v. Laredo Ice Co.* Granting it can exist, the case at bar is not a criminal prosecution. It involves only the anti-trust laws and their prohibitions, and penalties. And in them, we have seen, by the effect of the act of 1899 there is no inequality of operation. It is the effect of that decision also that the laws of the state against combinations and trusts are formed into a harmonious system, of which the criminal provisions in other statutes and the Code are a part, and that their provisions can be adjusted and reconciled so as to have constitutional operation.

Judgment affirmed.

[134]*SOUTHERN COTTON OIL COMPANY *et al.*, *Plffs. in Err.*,

v.

STATE OF TEXAS.

(See S. C. Reporter's ed. 134, 135.)

Constitutional law—validity of Texas anti-trust laws—due process of law—equal protection of the laws—conclusiveness of state court's construction of state statutes.

This case is governed by the decision in *National Cotton Oil Co. v. Texas*, *ante*, 689.

[No. 38.]

Argued November 1, 2, 1904. Decided February 27, 1905.

IN ERROR to the Court of Civil Appeals in and for the Third Supreme Judicial

696

District of the State of Texas to review a judgment which affirmed a judgment of the District Court of Travis County, in that State, forfeiting the license of a foreign corporation to do business in that State, because of its violation of the anti-trust laws. *Affirmed.*

See same case below, 72 S. W. 1135.

The facts are stated in the opinion.

Messrs. William V. Rowe and R. S. Lovett argued the cause, and, with *Messrs. Ralph Oakley and James S. Baker*, filed a brief for plaintiffs in error.

Mr. C. K. Bell argued the cause and filed a brief for defendant in error.

For contentions of counsel see their briefs as reported in *National Cotton Oil Co. v. Texas*, *ante*, 689.

Mr. Justice *McKenna* delivered the opinion of the court:

The Southern Cotton Oil Company is a New Jersey corporation doing business in the state of Texas by virtue of a permit issued June 3, 1897, under the laws of the state. The object of this suit is to forfeit the permit of the company for the violation of the anti-trust statutes of the state. The violation of the statutes alleged against it is the same as that alleged against the *National Cotton Oil Company* in No. 37. [*National Cotton Oil Co. v. Texas*, 197 U. S. 115, *ante*, 689, 25 Sup. Ct. Rep. 379.] The defenses are the same, and were presented by demurrer. The demurrer was overruled, and, the Southern Cotton Oil Company declining to plead further, judgment was entered forfeiting its permit to do business in the state, except such as might be and constitute interstate commerce. The judgment was affirmed by the court of civil appeals. A *rehearing was denied, and [135] a writ of error from the supreme court refused. This writ of error was then sued out.

The questions are identical with those presented in No. 37, and on its authority the judgment of the Court of Civil Appeals is affirmed.

UNITED STATES, *Petitioner*,

v.

MORRIS WHITRIDGE and Richard J. White, Trading as Whitridge, White, & Company.

(See S. C. Reporter's ed. 135-146.)

Duties—value of invoice coin—reliquidation by Secretary of the Treasury.

The reliquidation by the Secretary of the Treasury of the entry of imported gunnies at the exchange value of the invoice rupee, which

197 U. S.

is also its value as a fraction of a pound, where that value differs by more than 10 per cent from the value of the pure metal therein, as proclaimed by him at the beginning of the quarter year, is authorized by the proviso to the act of August 27, 1894 (28 Stat. at L. 509, 552, chap. 349, U. S. Comp. Stat. 1901, p. 2375), § 25, which empowers him to order the reliquidation of any entry at a different value from that so proclaimed by him, upon satisfactory evidence that the value in United States currency of the foreign money specified in the invoice was, at the date of consular certification of the invoice, at least 10 per cent more or less than the value proclaimed during the quarter.

[No. 413.]

Argued January 27, 30, 1905. Decided February 27, 1905.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit to review a decree which affirmed a decree of the Circuit Court for the District of Maryland, sustaining the decision of the board of general appraisers that the Secretary of the Treasury was not authorized to reliquidate an entry of imported merchandise at the exchange value of the invoice rupee where that differed by 10 per cent from that of the value of the pure metal therein, as proclaimed by him at the beginning of the quarter year. *Reversed.*

See same case below, 129 Fed. 33.

The facts are stated in the opinion.

Assistant Attorney General **McReynolds** argued the cause, and, with *Solicitor General Hoyt*, filed a brief for petitioner.

Messrs. Albert Comstock and William R. Sears argued the cause, and, with *Messrs. Aldis B. Browne, Howard T. Walden, and Page, McCutcheon, & Knight*, filed a brief for respondents.

Mr. Justice **Holmes** delivered the opinion of the court:

Whitridge, White, & Co., the respondents, on June 18, 1900, imported from India certain gunnies, invoiced in rupees. The invoice contained a certificate from the American consul, dated April 19, 1900, that the exchange value of the rupee at that date was 32 cents, estimated in United States gold dollars. For the purpose of ascertaining the ad valorem duties under the act of July 24, 1897 (30 Stat. at L. 151, chap. 11, U. S. Comp. Stat. 1901, p. 1663), schedule J., clause 341, in July, 1900, the collector of the port of Baltimore estimated the value of the merchandise at the date of the consular certificate by converting the invoice value into dollars, taking the rupees at 32 cents. The importers entered protest and the collector reliquidated the entry, taking the rupee at 20.7 cents. The Secretary of the

Treasury, on June 6, 1901, wrote that satisfactory evidence had been produced to him that the value of the rupee was 32 cents at the date of the consul's certificate, and directed a reliquidation at that rate. The collector of the port reliquidated accordingly on June 12, 1901. The importers (respondents) protested, and the matter was submitted to the board of general appraisers in New York. Act of June 10, 1890 (26 Stat. at L. 137, chap. 407, § 14, U. S. Comp. Stat. 1901, p. 1931). The board found that the exchange value of the rupee at the date of certification was 32 cents, but that the metal value was 20.7 cents, as estimated by the Director of the Mint and proclaimed by the Secretary of the Treasury for the quarter year beginning April 1, 1900, and ruled that the latter rate should have been taken, and directed a reliquidation on that footing. The collector appealed to the circuit court and then to the circuit court of appeals, both of which sustained the board of appraisers. 129 Fed. 33. The United States then obtained a writ of *certiorari from [141] this court. The question is whether the Secretary of the Treasury had power to order reliquidation at the rate of 32 cents.

There is, to be sure, a preliminary question as to the conclusiveness of the Secretary's action under the statute. Technically it does not appear that his decision was not based on a finding as to the metal value of the rupee; that is to say, as to the value on April 19, 1900, in fractions of a gold dollar, of the silver contained in the coin. If the decision were based on such a finding we may assume that it would not be open to review. *United States v. Klingenberg*, 153 U. S. 93, 38 L. ed. 647, 14 Sup. Ct. Rep. 790. But the greater part, at least, of the argument was made on a different assumption, which, in view of our conclusion, we shall adopt. We do so the more readily because, upon the public and well-known facts, it is not to be supposed that the imagined finding as to the value of silver was made, and the policy of the Treasury Department to adopt the exchange value of rupees was well-known and publicly declared. It would not be consistent with the honor of the government to take the exchange value and then to cover itself from correction, if it was wrong, by suggesting that it had gone upon a different ground, when that ground could not have been taken by anyone knowing the prices of the time. There is another argument for the conclusiveness of the Secretary's action which is so closely connected with the merits that we shall not separate it from our general discussion of the act.

The power of the Secretary depends on the construction of the act of August 27, 1894 (28 Stat. at L. 509, 552, chap. 349, §

[142] 25, U. S. Comp. Stat. 1901, p. 2375).† *It is argued for the respondents that the Secretary must derive his power from the proviso, if from anything, that the value dealt with in this section is the same thing throughout, and, being declared to be that of the pure metal of the coin in the body of the section, must be the same in the proviso, and that therefore the Secretary is not authorized to order a reliquidation unless it appears to him that the pure metal in the invoice coin was worth 10 per cent more or less in American gold than the value proclaimed. This argument is thought to derive some support from the history of legislation and from the history of the times, which latter is thought to show that fluctuations of silver bullion, not fluctuations of exchange values, were what Congress was likely to have had in mind. It is suggested further that the government reading makes the proviso revolutionize the body of the section and the practice of a hundred years.

On the other side we start with the consideration that, to an ad valorem tax, it must be an object to ascertain the true value of the thing taxed at the time as of which it is taxed, and that the invoice price is referred to only to that end. The history of the statutes shows a series of continually closer approximations to it, and to our mind helps the contention of the government, not that of the other side. The statutes began by fixing the rates for specified coins absolutely. Then in 1873, they provided in the language of the first part of § 25, quoted above, for an annual estimate by the Director of the Mint, and a proclamation. Act of March 3, 1873 (17 Stat. at L. 602, chap. 268, Rev. Stat. § 3564, U. S. Comp. Stat. 1901, p. 2428). In 1890 the estimate was required to be quarterly, instead of for the year. Act of October 1,

[143] 1890. (26 Stat. at L. 567, 624, *chap. 1244, § 52). Finally, on August 27, 1894, the statute received its present form, with the proviso from which the Secretary derives his clearest grant of power. The general purpose of this proviso undeniably is to secure a closer approximation still. In construing it we must bear this obvious purpose in mind. While no doubt the grammatical and logical scope of a proviso is confined to the subject-

matter of the principal clause, we cannot forget that in practice no such limit is observed, and when, as here, we are dealing with an addition made in new circumstances to a form of words adopted many years before, the general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down. *Georgia It. & Bkg. Co. v. Smith*, 128 U. S. 174, 181, 32 L. ed. 377, 380, 9 Sup. Ct. Rep. 47.

If the proviso were a separate subsequent act we should note that the case in which the Secretary is authorized to order a reliquidation is not confined in terms to a difference in the value of standard coins in circulation, but exists whenever there is such a difference in the value of the foreign money specified in the invoice. The invoice is required to be made out in the currency of the country of export or the currency actually paid, which may not be coins at all. Act of June 10, 1890 (26 Stat. at L. 131, chap. 407, § 2, U. S. Comp. Stat. 1901, p. 1886). It is true that the difference referred to in the proviso is a difference from the proclaimed value, and that the proclaimed value has reference to standard coins. Whether, in view of this fact and of Rev. Stat. § 2903 (U. S. Comp. Stat. 1901, p. 1922), the words would cover a difference in value between paper expressed in terms of current coin and current coin, if paper were the currency shown by the invoice or the consul's certificate to be the currency to which the invoice referred, need not be considered. That question did not arise in *Cramer v. Arthur*, 102 U. S. 612, 26 L. ed. 259. However that may be, suppose that the currency mentioned in the invoice, although coined, was a token currency having by legislative fiat the value of a fraction of some current coin of universal worth, but itself having no such worth derived from the metal it contained. Such a *token might[144] vary in value much below or above the fraction of the coin by which it purported to be measured. Suppose that the value of the latter coin only had been proclaimed. It would be going far to say that the Secretary could not order a reliquidation upon a variance of more than 10 per cent between the value of the token currency in the in-

† "That the value of foreign coin as expressed in the money of account of the United States shall be that of the pure metal of such coin of standard value; and the values of the standard coins in circulation of the various nations of the world shall be estimated quarterly by the Director of the Mint, and be proclaimed by the Secretary of the Treasury immediately after the passage of this act, and thereafter quarterly on the first day of January, April, July, and October in each year. And the values so proclaimed shall be followed in estimating the value of all foreign merchandise exported to the United States during the quarter for which the value

is proclaimed, and the date of the consular certification of any invoice shall, for the purposes of this section, be considered the date of exportation: *Provided*, That the Secretary of the Treasury may order the reliquidation of any entry at a different value, whenever satisfactory evidence shall be produced to him showing that the value in United States currency of the foreign money specified in the invoice was, at the date of certification, at least ten per centum more or less than the value proclaimed during the quarter in which the consular certification occurred."

voice and the proclaimed value of the governing coin.

The case last put is the case at bar, except that it is not admitted that the rupee was technically a mere token, and that the value of the rupee itself had been proclaimed, subject to a note—"value of the rupee to be determined by consular certificate." At that time, although it was not noted until a little later in the year by the Director of the Mint, India was on a gold basis. As the rupee had a legally fixed ratio to another coin also valued by the Director,—the gold pound,—it is plain that the value of the rupee as so much silver and its value as a fraction of a pound might fall apart, and yet both be given by the Director's tables. It would be giving a very literal construction to the body of § 25 to say that it forbade the Secretary to take the fraction of the pound rather than the silver bullion as the measure of the value of goods, if the former represented the unit of actual cost. But, supposing that the fraction of the pound was the unit of cost, it seems to us that at least under the proviso, if not under the body of the section, the Secretary could order a reliquidation on the basis of the units actually used. It would be simply a correction in conformity with the truth and the actual meaning of the words of the invoice. The other argument for the conclusiveness of the Secretary's action, to which we referred at the outset, was that, for all that appears, this may have been what happened. The gold which the rupee represents is 1 shilling and 4 pence, or about 32 cents. But, as in this case the exchange value and the value as a fraction of a pound were the same, it does not matter to our decision whether we say that in such circumstances the action of the Secretary was conclusive or say that it was right.

[145] *We have shown that, in our opinion, the proviso, if not the body of § 25, would have warranted the action of the Secretary if it had been a later independent statute. We are of opinion that it is not to be construed differently because of its form. In addition to the considerations which we have mentioned, we are confirmed in our view by the facts which were known at the time. It is true that the most conspicuous recent event was the fluctuation in the value of silver. But the movement of silver, especially after the repeal of the Sherman act, on November 1, 1893 (28 Stat. at L. 4, chap. 8, U. S. Comp. Stat. 1901, p. 2355), had been downward, and the proviso contemplated at least equally a possible rise in the foreign money with which it dealt. On the other hand, there was before Congress the Herschell report on the coinage of silver in 1894.

India, of which six thousand copies had been ordered to be printed by a resolve of the Senate, concurred in by the House (28 Stat. at L. Appx. p. 5), and which had been printed in 1893. This report recommended the closing of the mints against the free coinage of silver, and predicted as a consequence the divergence between the intrinsic value of the rupee and the value of its ratio to the pound as fixed, taken hypothetically as 1 shilling and 4 pence. It contemplated even a raising of the ratio as possible. The report was followed by the closing of the mints in the same year, and the result predicted came to pass. However small may have been the imports from India in 1894, the fact predicted by the Herschell report was one of the most striking incidents in the recent financial history of the world, and we cannot suppose that it was not considered when the proviso was passed. Before the date of this export gold was adopted as the standard, and the ratio of the rupee fixed at 15 to 1, or 1 shilling and 4 pence, in 1899. The exchange value did not change very much, remaining at near the conventional ratio, but the decline in bullion made the divergence referred to more marked. It was objected that some of the facts which we have mentioned were not proved in the case, but they are public facts, and when we are asked to declare that the Secretary *exceeded his powers we have to [146] consider what might have been before his mind.

As we have said, it would be only by a very literal construction of the earlier part of § 25 that the collectors would be bound to estimate the value of a cargo invoiced in rupees by the bullion of the rupee when, in the invoice, rupee meant a certain fraction of a pound. But, however that may be, we are of opinion that when the Secretary has satisfactory evidence of that state of facts, under the proviso he is authorized to order a reliquidation in order to make the value in United States currency correspond with the actual value of the goods. It is not necessary to consider any wider problems as to the power of the Secretary. We confine our decision to the particular case.

Decree reversed.

DISTRICT OF COLUMBIA, *Appt.*,
v.

ELIAS E. BARNES.

(See S. C. Reporter's ed. 146-154.)

Court of claims — equitable jurisdiction to reform contract — compensation for extra work.

1. Equitable jurisdiction to reform a contract

for street improvements in the District of Columbia, in order to determine the amount due under such contract to the claimant, was conferred on the court of claims by the District of Columbia claims act of June 16, 1880, giving the court of claims original legal and equitable jurisdiction of claims arising out of contracts for public work in the District.

2. Compensation for work done outside of the original contract may be awarded by the court of claims under the District of Columbia claims act of June 16, 1880, giving it original equitable and legal jurisdiction of all claims for work done by the order and direction of the commissioners of the District, and accepted by them for the use, purposes, or benefit of the District.

[No. 143.]

Argued January 23, 1905. Decided February 27, 1905.

A PPEAL from the Court of Claims to review an award under the District of Columbia claims act. *Affirmed.*

See same case below, 37 Ct. Cl. 342.

Statement by Mr. Justice **Day**:

The action now appealed was brought under the act of June 16, 1880, known as the District of Columbia claims act. 21 Stat. at L. 284, chap. 243. The original petition was filed August 4, 1880. At subsequent stages of the case amended petitions were filed. On October 1, 1887, the court of claims decided the case in favor of the District of Columbia, giving judgment against the claimant for the sum of \$11,074.11. 22 Ct. Cl. 366. On November 18, 1887, the claimant filed a motion for a new trial, which was submitted on March 28, 1895, and allowed on April 1, 1895. The case was then referred, as provided in the act, and upon report and hearing judgment was rendered on November 11, 1895, against the District for the claimant in the sum of \$31,754.57; being rendered for Barnes in the sum of \$22,350.54, and for Ritchie, assignee, in the sum of \$9,404.03, both sums due and payable as of January 1, 1876. On April 20, 1896, the defendant filed its motion for a new trial, which was granted on May 18, 1896. On March 31, 1902, the court rendered a judgment in favor of the claimant and his assignee, in the sum of \$23,694.47, due and payable as of March 1, 1876. 37 Ct. Cl. 342. On April 22, 1902, an appeal was taken by the District from the judgment of March 31, 1902, to this court. This appeal was dismissed for want of jurisdiction. *District of Columbia v. Barnes*, 187 U. S. 638, 47 L. ed. 344, 23 Sup. Ct. Rep. 846.

Under the act of March 3, 1903 (32 Stat. at L. 1070, chap. 1006), this appeal from the judgment of March 31, 1902, was taken

by the District, bringing the case in review before this court.

Mr. Robert A. Howard argued the cause, and, with *Assistant Attorney General Pradt*, filed a brief for appellant.

Mr. John C. Fay argued the cause and filed a brief for appellee.

Mr. Justice Day delivered the opinion of the court:

We deem it unnecessary, in the view taken of this case, to set forth the voluminous findings of fact made upon the trial in the court of claims. So much of the findings will be commented on as is necessary to a determination of the legal questions involved, which are within a narrow compass. Nor do we find it necessary to consider the alleged discrepancies between the judgment of the court of claims, when the judgment was in favor of the District (22 Ct. Cl. 366), and the findings and conclusions when the judgment was rendered which is now appealed to this court. 37 Ct. Cl. 342. [150]

This court does not sit to review findings of fact made in the court of claims. They are regarded as conclusive here, and our jurisdiction is limited to a determination of such questions of law as are properly brought to our attention upon the record. *United States v. Smith*, 94 U. S. 214-218, 24 L. ed. 115.

The original action was brought in part on two contracts, which were in writing, duly executed by the claimant and in behalf of the District of Columbia, and known as Nos. 264 and 413, and were for certain street improvements in the city of Washington. These contracts were entered into on April 29 and July 23, 1872, respectively, under authority of the act of February 21, 1871. 16 Stat. at L. 427, chap. 62. Certain verbal agreements are also set up as having been entered into between the claimant and the commissioners of the District.

The court of claims, under the proofs, heard the parties upon the question as to the right to reform the two written contracts. It refused to reform contract No. 413, and decreed in favor of the District in the sum \$13,039.79 for over payments made upon that contract. The court did reform contract No. 264, finding that, by mistake in the drafting of the contract, "the rate of 40 cents for grading old gravel streets to a depth of 2 feet" was omitted therefrom by mutual mistake of the parties, and that the written contract was executed without observing the omission. Upon the contract as reformed, the claimant was permitted to recover for work done. Much of the discussion in the oral argument and the brief of the learned counsel for the government is

directed to the authority of the court of claims to reform a written contract in the exercise of the jurisdiction of a court of equity for that purpose, and much discussion was had as to the various acts conferring jurisdiction upon that court. But we think a construction of the act under cover of which this suit was prosecuted is all that is necessary to determine the question. The act of June 16, 1880, as appears by its title, [151] was intended *to confer on the court of claims jurisdiction to hear and determine all outstanding claims against the District of Columbia. For that purpose it was recited in the 1st section of the act that the jurisdiction of the court should extend to, and it should have original legal and equitable jurisdiction of claims arising out of, the contracts made by the board of public works and extensions made thereof by the commissioners of the District of Columbia, and also of the claims arising out of the contracts made by the commissioners since the act of June 20, 1874 [18 Stat. at L. 116, chap. 337], and broadly for all claims for work done by order or direction of the commissioners, and accepted by them for the use, purposes, or benefit of the District of Columbia, and prior to the 14th day of March, 1876.

The language used is of the most comprehensive character, and confers, for the purposes stated, original legal and equitable jurisdiction.

It is true that the purpose of the various acts conferring jurisdiction upon the court of claims has been held to be to permit the adjudication of money demands against the United States, and it may be that under this act, as under others, there was no intention to confer equity jurisdiction beyond that which is required to enable a court to determine whether money relief should be granted. The intent of the act was to enable parties to submit the justice of their claims against the United States to adjudication in a competent court. For that purpose the act conferred in terms, equitable as well as legal jurisdiction.

The province of the court of claims is to pass upon the justice of the claim, and adjudge accordingly. And it is obviously intended that, when necessary to adjudicate claims against the District, the court shall be unhampered in the exercise of jurisdiction, and, as in many courts of this country having a civil code, there has been conferred upon the same tribunal the power to grant the necessary legal and equitable relief. One who has the right to money relief upon a contract mistakenly omitted to [152] be reduced to writing, in accordance *with the true agreement of the parties, has a claim of equitable cognizance, for the con-

tract must be reformed to meet the intention of the parties, and, when corrected, may be adjudged a valid claim.

For the purpose of adjudicating such claims, this statute gives to the court equitable jurisdiction in order that it may determine what the District ought to pay to the claimant. Although unable to grant a decree for specific performance, or exercise the peculiar powers of a court of equity, the court of claims may determine the money relief to which the claimant is entitled, whether arising out of an equitable or legal demand. This principle was recognized in *United States v. Jones*, 131 U. S. 1-18, 33 L. ed. 90-92, 9 Sup. Ct. Rep. 669. The court of claims in other cases has exercised the equitable jurisdiction conferred in the act of June 16, 1880 (*Cullinane v. District of Columbia*, 18 Ct. Cl. 577, 594), and like jurisdiction to reform contracts under the act of March 3, 1887, 24 Stat. at L. 505, chap. 359, U. S. Comp. Stat. 1901, p. 752; *South Boston Iron Co. v. United States*, 34 Ct. Cl. 174.

We think that the court had jurisdiction to reform the contract upon the facts found.

It is objected that the court of claims awarded relief for certain "stiff clay" excavated under claimant's contract. The findings show that this work was not specifically covered by the original agreement, and that the work was accepted by the commissioners, and the District received the benefit thereof; and the court finds that the excavation of the stiff clay was done under a verbal agreement with the commissioners after the performance of the original contract, and that the claimant was entitled to the rate established therefor, as paid to other contractors for like work.

The act of June 16, 1880, permits a recovery for work done by order and direction of the commissioners, and accepted by them for the benefit of the District. While it has been held that this would not authorize a recovery for work done under the original contract, at higher prices than had been agreed upon, yet, where there was a revival of the contract for distinct *work, there [153] might be a recovery at higher rates, which entered into the terms of renewal as understood by the parties, notwithstanding the pre-existing contract. *Campbell v. District of Columbia*, 18 Ct. Cl. 193.

The act of 1874 gave limited power to the commissioners, and in the act of February 21, 1871 (16 Stat. at L. 419, chap. 62), providing for contracts of the board of public works, it was distinctly provided that all contracts should be in writing and signed by the parties making the same. And it was held that this statute requires contracts to be actually signed, and that mere entries on

the journals of the board would not satisfy the statute. *Barnard v. District of Columbia*, 127 U. S. 409-411, 32 L. ed. 207, 8 Sup. Ct. Rep. 1202.

But, under the statute (June 16, 1880) now under consideration, the intention is manifest to permit the court of claims to adjudicate claims for all work done by the order and direction of the commissioners, and accepted by them for the use, purpose, and benefit of the District. For this purpose this is a remedial statute, and it is intended to permit parties to have an adjudication upon their demands where the District had been benefited by work actually done under the order and direction of the commissioners and duly accepted. And the findings of fact show that the claimant was only permitted to recover for work so performed and accepted. As we have said, this right of recovery might not revive claims for work completed under former contracts, but here the finding is that the new agreement applied to a distinct subject-matter, and not to work covered by and performed under the original agreement. We find no error in the judgment of the court of claims in this regard. And so as to various sums awarded under findings of fact, establishing that more work was made necessary by reason of the change of grade on North Carolina avenue by the commissioners in 1874, the change of grade making it necessary to further grade Third street and to do work for that purpose. The findings show that this was done by the direction of the commissioners, and upon terms mutually agreed upon. Under finding XIV., where the work is found

[154] not to *have been done under the original contract, it is found that it was admitted by the defendant to be correct, and is work of which the District has received the full benefit. So, as to other findings to which exceptions are made, there is no dispute that the work was actually done to the satisfaction of the commissioners upon terms agreed upon and the work duly accepted.

As we construe the statute, we think it affords ample authority to grant relief upon the facts found, which findings are conclusive upon us.

It is further urged by counsel for the government that the pleadings are not sufficient to authorize the judgment, but we think that, under the original petition and various amendments thereto, the court was authorized to grant the relief adjudged.

The court of claims is not bound by special rules of pleading. The main purpose is to arrive at and adjudicate the justice of alleged claims against the United States. *United States v. Burns*, 12 Wall. 246-254, 20 L. ed. 388-390; *United States v. Behan*, 110

U. S. 338-347, 28 L. ed. 168-171, 4 Sup. Ct. Rep. 81.

On the whole record we find no error of law to the prejudice of the District.

Judgment affirmed.

ADOLPHUS F. McCLAIN, *Plff. in Err.*,
v.

GEORGE C. RANKIN, as Receiver of the
First National Bank of South Bend,
Washington.

(See S. C. Reporter's ed. 154-169.)

Limitation of actions—enforcement of statutory liability of shareholders in national banks.

The personal liability of shareholders in a national bank, under U. S. Rev. Stat. § 5151 (U. S. Comp. Stat. 1901, p. 3465), for the contracts, debts, and engagements of the bank, cannot be regarded as a contract liability, for the purpose of making applicable the limitation prescribed by Bail. (Wash.) Code, § 4800, subd. 3, for an "action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument."

[No. 58.]

Argued November 10, 1904. Decided March 6, 1905.

IN ERROR to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment affirming, on a second writ of error, a judgment of the Circuit Court for the District of Washington, overruling a demurrer setting up the statute of limitations in an action to enforce the statutory liability of a shareholder in a national bank. Judgments of both courts reversed, and cause remanded to the Circuit Court, with directions to sustain the demurrer, and enter judgment for defendant.

See same case below, 56 C. C. A. 160, 119 Fed. 110.

Statement by Mr. Chief Justice **Fuller**:

The First National Bank of South Bend, Washington, became insolvent and was closed August 10, 1895, and on the seventeenth day of the same month one Heim was appointed receiver, who was succeeded by Aldrich, and Aldrich by George C. Rankin.

August 17, 1896, the acting Comptroller of the Currency levied an assessment against the shareholders of the bank in enforcement

NOTE.—On the enforcement of statutory liability of stockholders in national banks—see note to *Williamson v. American Bank*, 52 C. A. 6.

of their statutory liability. Adolphus F. McClaine was one of the stockholders, was notified of the levy, and demand was duly made of him to pay the assessment on or before September 17, 1896, and shortly thereafter an action was commenced against him by the receiver to recover the same. Pending the action, efforts to settle the claim were made. Subsequently, the action was dismissed. Thereupon the receiver brought an action against McClaine upon an alleged contract of compromise, which went to trial, and the receiver took a nonsuit. The present action was then brought on the assessment, August 15, 1899, and McClaine set up the statute of limitations by demurrer, which the circuit court sustained, and dismissed the action. 98 Fed. 378. The cause was taken to the circuit court of appeals, and the judgment of the circuit court reversed. 45 C. C. A. 631, 106 Fed. 791.

The case having been remanded, the circuit court overruled the demurrer, McClaine answered, and a trial was had, resulting in judgment for the receiver, which was [156] affirmed by *the circuit court of appeals. 56 C. C. A. 160, 119 Fed. 110. This writ of error was then brought.

The following are sections of the statutes of Washington in relation to limitations, as found in Ballinger's Code:

"§ 4796. Actions can only be commenced within the periods herein prescribed after the cause of action shall have accrued, except when in special cases, a different limitation is prescribed by statute; but the objection that the action was not commenced within the time limited can only be taken by answer or demurrer.

"§ 4797. The period prescribed in the preceding section for the commencement of actions shall be as follows: . . .

"§ 4798. Within six years: 1. An action upon a judgment or decree of any court of the United States, or of any state or territory within the United States.

"2. An action upon a contract in writing, or liability, express or implied, arising out of a written agreement.

"3. An action for the rents and profits or for the use and occupation of real estate."

"§ 4800. Within three years: 1. An action for waste or trespass upon real property.

"2. An action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated.

"3. An action upon a contract or liability, express or implied, which is not 197 U. S.

in writing and does not arise out of any written instrument.

"4. An action for relief upon the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud.

"5. An action against a sheriff, coroner, or constable upon a liability incurred by the doing of an act in his official capacity, and by virtue of his office, or by the omission of an official duty, including the non-payment of money collected upon *an execution; but this subdivision shall not apply to action for an escape. [157]

"6. An action upon a statute for penalty or forfeiture, where an action is given to the party aggrieved, or to such party and the state, except when the statute imposing it prescribed a different penalty [limitation].

"7. An action for seduction and breach of promise of marriage."

"§ 4805. An action for relief, not hereinbefore provided for, shall be commenced within two years after the cause of action shall have accrued."

Mr. T. O. Abbott argued the cause and filed a brief for plaintiff in error:

In Washington there is no statute relating in express language to a liability created by statute, "except for a forfeiture or penalty." An action to enforce such a liability, therefore, comes within the provision of Ballinger's Anno. Codes & Statutes (Wash.) § 4805, because it is an action upon a liability for which no relief is "hereinbefore provided."

Spokane v. Stevens, 12 Wash. 667, 42 Pac. 123; *Ballard v. West Coast Improv. Co.* 15 Wash. 572, 46 Pac. 1055; *State ex rel. Hemen v. Ballard*, 16 Wash. 418, 47 Pac. 970; *Seattle v. De Wolfe*, 17 Wash. 349, 49 Pac. 553.

The words "or liability," in § 4800, subd. 3, do not include a "statutory liability."

Hawkins v. Iron Valley Furnace Co. 40 Ohio St. 507.

The learned court below having ascertained that the obligation was contractual for some purposes, it concluded that it was contractual for all purposes. It relied largely upon the decision of this court in *First Nat. Bank v. Hawkins*, 174 U. S. 364, 43 L. ed. 1007, 19 Sup. Ct. Rep. 739. But the statute of limitations was not involved in that case. That action was upon an original subscription, and the sole question was whether one banking association possessed the right to subscribe for and hold the stock of another banking association. The obligation was declared to be contractual for that purpose.

See *Aldrich v. McClaine*, 45 C. C. A. 631, 106 Fed. 791.

But since *First Nat. Bank v. Hawkins* and the case at bar were decided this court has had occasion to consider the direct question in issue here, and has adopted the rule contended for by plaintiff in error.

McDonald v. Thompson, 184 U. S. 71, 46 L. ed. 437, 22 Sup. Ct. Rep. 297.

A liability may be at the same time a statutory and a contract liability; and so it has been held by this court with respect to the liability of stockholders. It is a statutory liability as to the statute of limitations (*Moore v. Boyd*, 74 Cal. 167, 15 Pac. 670), and a contract liability as to the right of attachment (*Kennedy v. California Sav. Bank*, 97 Cal. 93, 33 Am. St. Rep. 163, 31 Pac. 846), and as to the law defining the jurisdiction of justices of the peace (*Dennis v. Superior Court*, 91 Cal. 548, 27 Pac. 1031).

Bliss v. Sneath, 119 Cal. 530, 51 Pac. 848.

The liability is not on, but for, the contract, debt, or agreement.

Wilson v. Book, 13 Wash. 676, 43 Pac. 939.

Without the aid of a statute, the creditor has no remedy directly against the stockholder. It is therefore a statutory remedy, and is governed by the statute of limitations applicable to such remedies, and not by the statute applicable to actions upon contracts.

Thomp. Corp. § 1991. See also *Wood, Limitation of Actions*, 3d ed. §§ 36, 39; *Robertson v. Blaine County*, 47 L. R. A. 459, 32 C. C. A. 512, 61 U. S. App. 242, 90 Fed. 63.

An action to enforce this liability is certainly not a case of express contract; and the most that can, by the utmost straining, be asserted, is, that it is a case arising quasi *ex contractu*. It is in truth, however, a mere legal liability created by statute, which may furnish the foundation or consideration of a contract, express or implied, but it is not of itself a contract.

Bullard v. Bell, 1 Mason, 243, Fed. Cas. No. 2,121.

Statutes in derogation of the common law are not presumed to make any alteration in the common law further than the clear import of the language necessarily requires.

Shaw v. North Pennsylvania R. Co. (*Shaw v. Merchants' Nat. Bank*) 101 U. S. 557, 25 L. ed. 892; *Johnson v. Southern P. Co.* 54 C. C. A. 508, 117 Fed. 462.

Mr. Francis F. Oldham argued the cause and filed a brief for defendant in error:

The liability of the plaintiff in error as a stockholder of a national bank must be held to be, not only statutory, but contractual as well.

Aldrich v. McClaine, 45 C. C. A. 631, 106 Fed. 791; *First Nat. Bank v. Hawkins*, 174

U. S. 364, 43 L. ed. 1007, 19 Sup. Ct. Rep. 739; *McDonald v. Thompson*, 184 U. S. 71, 46 L. ed. 437, 22 Sup. Ct. Rep. 297.

In *Metropolitan R. Co. v. District of Columbia*, 132 U. S. 1, 13, 33 L. ed. 231, 235, 10 Sup. Ct. Rep. 19, the court said that the fact that the duty which the defendant failed to perform was a statutory one does not make the action one upon the statutes. The action is clearly one of those described in the statute of limitations.

Carrol v. Green, 92 U. S. 509, 23 L. ed. 738, is strongly in point. There the action was brought against shareholders of an insolvent bank to enforce their liability for double the amount of their stock according to the provisions of the charter. It was held by this court that the liability of the shareholders arose from their acceptance of the charter and their implied promises to fulfil its requirements, and that the legal remedy to enforce it was an action on the case to which the statute of limitations would apply; and hence, that it applied to a bill in equity founded on the same application.

Mr. Chief Justice Fuller delivered the opinion of the court:

It is conceded that, in the absence of any provision of the act of Congress creating the liability, fixing a limitation of time for commencing actions to enforce it, the statute of limitations of the particular state is applicable. Rev. Stat. 721, U. S. Comp. Stat. 1901, p. 581; *Campbell v. Haverhill*, 155 U. S. 610, 39 L. ed. 280, 15 Sup. Ct. Rep. 217. If, then, this action was barred by the statute of limitations of the state of Washington, that ended it, and both judgments below must be reversed and the cause remanded to the circuit court, with a direction that judgment be entered for defendant.

Reference to the state statutes shows that subd. 2 of § 4798 relates to "an action upon a contract in writing, or liability, express or implied, arising out of a written agreement;" while subd. 3 of § 4800 relates to "an action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument." The one relates to contracts or liabilities growing out of contracts in writing, and the other to contracts or liabilities growing out of contracts not in writing. The receiver's contention is that the case falls within subd. 3 of § 4800, imposing the limitation of three years. If it does not, it is not otherwise provided for, and falls within § 4805, which fixes the limitation at two years.

And as this action was commenced within three years, but not within two years, after the assessment became due and pay-

able, the question is whether subd. 3 of § 4800 applies.

It is contended that the meaning of the word "liability" as used in that subdivision is not restricted to contract liabilities, but, reading it with subd. 2 of § 4798, and [159] in *view of the enumeration of other actions to enforce liabilities, we think that this cannot be so, and, indeed, the subdivision has been construed by the supreme court of Washington as applicable only to contracts. *Suter v. Wenatchee Water Power Co.* 35 Wash. 1, 76 Pac. 298; *Sargent v. Tacoma*, 10 Wash. 212, 38 Pac. 1048. The circuit court was of that opinion when the case was originally disposed of, and held that the cause of action arose by force of the statute, and did not spring from contract. 98 Fed. 378. But that judgment was reversed by the circuit court of appeals on the ground that the liability was not only statutory, but contractual as well, and that the limitation of three years applied in the latter aspect. 45 C. C. A. 631, 106 Fed. 791. Conceding that a statutory liability may be contractual in its nature, or more accurately, quasi-contractual, does it follow that an action given by statute should be regarded as brought on simple contract, or for breach of a simple contract, and, therefore, as coming within the provision in question?

The national bank act provides that "the shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares." Rev. Stat. § 5151, U. S. Comp. Stat. 1901, p. 3465.

And under other sections the duty is imposed on the Comptroller of the Currency to give the creditors of an insolvent national bank the benefit of the enforcement of this personal liability, and to decide whether the whole, or a part, and, if only a part, how much, shall be collected, he being also authorized to make more than one assessment, as circumstances may require. *Kennedy v. Gibson*, 8 Wall. 498, 19 L. ed. 476; *Studebaker v. Perry*, 184 U. S. 258, 46 L. ed. 528, 22 Sup. Ct. Rep. 463, and cases cited. But even his decision does not determine the liability except as to contracts, debts, and engagements of the bank lawfully incurred. *Schrader v. Manufacturers' Nat. Bank*, 133 U. S. 67, 33 L. ed. 564, 10 Sup. Ct. Rep. 238.

[160] *The liability is conditional, and statutes of limitation do not commence to run until after assessment has been made. *McDonald* 197 U. S.

v. Thompson, 184 U. S. 71, 46 L. ed. 437, 22 Sup. Ct. Rep. 297.

In the latter case the statute of Nebraska provided (§ 10) that actions must be commenced within five years, "upon a specialty, or any agreement, contract, or promise in writing, or foreign judgment;" and (§ 11) within four years "upon a contract not in writing, express or implied; an action upon a liability created by statute other than a forfeiture or penalty."

The action was brought on an assessment upon the stockholders of a national bank to the amount of the par value of the shares, and not to recover an amount unpaid on the original subscription, and it was held that the five-year limitation did not apply, because the cause of action was not upon a written contract, but that the four-year limitation applied, "whether the promise raised by the statute was an implied contract not in writing or a liability created by statute," no distinction between them as to the limitation being made by the state statute. And Mr. Justice Brown, speaking for the court, said: "Whether the promise raised by the statute was an implied contract, not in writing, or a liability created by statute, it is immaterial to inquire. For the purposes of this case it may have been both. The statute was the origin of both the right and the remedy, but the contract was the origin of the personal responsibility of the defendant. Did the statute make a distinction between them with reference to the time within which an action must be brought, it might be necessary to make a more exact definition; but, as the action must be brought in any case within four years, it is unnecessary to go farther than to declare what seems entirely clear to us, that it is not a contract in writing within the meaning of § 10 of the Nebraska act." And it was also said: "Granting there was a contract with the creditors to pay a sum equal to the value of the stock taken, in addition to the sum invested in the shares, this was a contract created by the statute, and obligatory upon the stockholders by reason of *the statute existing at the time [161] of their subscription; but it was not a contract in writing within the meaning of the Nebraska act, since the writing—that is, the subscription—contained no reference whatever to the statutory obligation, and no promise to respond beyond the amount of the subscription. In none of the numerous cases upon the subject in this court is this obligation treated as an express contract, but as one created by the statute and implied from the express contract of the stockholders to take and pay for shares in the association."

In the present case the limitation imposed

on an action upon a statute for penalty or forfeiture, where an action was given, was three years (subd. 6, § 4800), and on any other action to enforce a statutory liability was two years, because not otherwise provided for, and, therefore, the question must be met whether this is an action brought on a contract or not. But it is an action to recover on an assessment levied by the Comptroller of the Currency by virtue of the act of Congress, and although the shareholder, in taking his shares, subjected himself to the liability prescribed by the statute, the question still remains whether that liability constituted a contract within the meaning of the statute of limitations of the state of Washington.

Some statutes imposing individual liability are merely in affirmation of the common law, while others impose an individual liability other than that at common law. If § 5151 had provided that subscribing to stock or taking shares of stock amounted to a promise directly to every creditor, then that liability would have been a liability by contract. But the words of § 5151 do not mean that the stockholder promises the creditor, as surety for the debts of the corporation, but merely impose a liability on him as secondary to those debts, which debts remain distinct, and to which the stockholder is not a party. The liability is a consequence of the breach by the corporation of its contract to pay, and is collateral and statutory. *Brown v. Eastern Slate Co.* 134 [162] Mass. *590; *Platt v. Wilmot*, 193 U. S. 402, 48 L. ed. 809, 24 Sup. Ct. Rep. 542. In *Matteson v. Dent*, 176 U. S. 521, 44 L. ed. 571, 20 Sup. Ct. Rep. 419, the stock still stood in the name of the decedent, and it was decided that the statutory liability was a debt within the state law, but not that it was a true contract.

It is true that in particular cases the liability has been held to be, in its nature, contractual, yet, it is nevertheless conditional, and enforceable only according to the Federal statute, independent of which the cause of action does not exist; so that the remedy at law in effect given by that statute is subject to the limitations imposed by the state statute on such actions.

Cases such as *Carrol v. Green*, 92 U. S. 509, 23 L. ed. 738, and *Metropolitan R. Co. v. District of Columbia*, 132 U. S. 1, 33 L. ed. 231, 10 Sup. Ct. Rep. 19, are not controlling, for in them the right to recover was direct and immediate, and not secondary and contingent. In *Metropolitan R. Co. v. District of Columbia*, the charter of the company provided "that the said corporation hereby created shall be bound to keep said tracks, and for the space of 2 feet beyond the outer rail thereof, and also

the space between the tracks, at all times well paved and in good order, without expense to the United States or to the city of Washington." The declaration set out a large amount of paving done by the city, which it was averred should have been done by the company. The action was based on the implied obligation on the part of defendant to reimburse plaintiff for moneys expended in performing the duty which the statute imposed on defendant. In *Carrol v. Green* it was said: "According to the statute, the liability of 'each stockholder' arose upon 'the failure of the bank.' The liability gave at once the right to sue; and, by necessary consequence, the period of limitation began at the same time."

But here the right to sue did not obtain until the Comptroller of the Currency had acted, and his order was the basis of the suit. The statute of limitations did not commence to run until assessment made, and then it ran as against an action *to enforce [163] the statutory liability, and not an action for breach of contract.

We think that subd. 3 of § 4800 did not apply, and that § 4805 did.

The judgment of the Circuit Court of Appeals is reversed; the judgment of the Circuit Court is also reversed, and the cause remanded to that court with a direction to sustain the demurrer and enter judgment for defendant.

Mr. Justice **White**, with whom concur Mr. Justice **Brown** and Mr. Justice **McKenna**, dissenting:

The statutes of the state of Washington limit to three years the right to bring "an action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument." The cause of action here involved is now held not to be embraced within this statute, and therefore barred by the following provision: "An action for relief, not hereinbefore provided for, shall be commenced within two years after the cause of action shall have accrued."

The liability sought to be enforced is the obligation of a shareholder of a national bank to pay an amount equal to the par of his shares of stock. The circuit court held the action not to be one upon contract, but to enforce a conditional liability imposed by the law as an incident to ownership of bank stock, and therefore barred by two years. 98 Fed. 378. The circuit court of appeals reversed this judgment, and decided that the period of limitation was three years, because the liability was contractual. 45 C. C. A. 631, 106 Fed. 791.

In *Suler v. Wenatchee Water Power Company*, decided April 18, 1904, 35 Wash. 1, 197 U. S.

76 Pac. 298, the supreme court of Washington construed the provision of the statutes of limitation here involved, providing that an action might be brought within three years "upon a contract or liability, express or implied, which is not in writing," and held that it did not embrace torts, "but was evidently intended to refer to a contractual *liability." The court, in its opinion, among other authorities, referred to this case as decided below, saying:

"Such, in effect, was the decision in *Sargent v. Tacoma*, 10 Wash. 212, 215, 38 Pac. 1048. The same statute was construed by the United States circuit court, district of Washington, in *Aldrich v. Skinner*, 98 Fed. 375, and also in *Aldrich v. McClaine*, 98 Fed. 378. The last-named case was, on appeal to the United States circuit court of appeals, reversed. *Aldrich v. McClaine*, 45 C. C. A. 631, 106 Fed. 791. The reversal was, however, upon the ground that the liability involved was a contractual one, the lower court having held otherwise. The appellate court construed the statute itself as did the lower court."

It might well be considered that the supreme court of Washington regarded the interpretation of the court of appeals as harmonizing with its own views of the meaning of the provision in question. But be this as it may, the prior decisions of this court to me seem conclusive, since, in deciding various questions concerning the liability of stockholders in national banks to pay the double liability, this court has expressly held that such liability is contractual. *Matteson v. Dent*, 176 U. S. 521, 525, 526, 44 L. ed. 571, 573, 574, 20 Sup. Ct. Rep. 419; *First Nat. Bank v. Hawkins*, 174 U. S. 364, 372, 43 L. ed. 1007, 1011, 19 Sup. Ct. Rep. 739; *Richmond v. Irons*, 121 U. S. 27, 55, 56, 30 L. ed. 864, 873, 7 Sup. Ct. Rep. 788. In *Richmond v. Irons* the court said (pp. 55, 56, L. ed. p. 873, Sup. Ct. Rep. p. 801):

"Under that [the national banking] act the individual liability of the stockholders is an essential element in the contract by which the stockholders became members of the corporation. It is voluntarily entered into by subscribing for and accepting shares of stock. Its obligation becomes a part of every contract, debt, and engagement of the bank itself; as much so as if they were made directly by the stockholder, instead of by the corporation. There is nothing in the statute to indicate that the obligation arising upon these undertakings and promises should not have the same force and effect, and be as binding in all respects, as any other contracts of the individual stockholder. We hold, therefore, that the obligation

[165] of the stockholder survives as *against his 197 U. S.

personal representatives. *Flash v. Conn*, 109 U. S. 371, 27 L. ed. 966, 3 Sup. Ct. Rep. 221; *Hobart v. Johnson*, 19 Blatchf. 359, 8 Fed. 493. In Massachusetts it was held, in *Grew v. Bred*, 10 Met. 569, that administrators of deceased stockholders were chargeable in equity, as for other debts of their intestate, in their representative capacity."

In *Matteson v. Dent* the evidence showed that at the time of the death of Matteson he was the owner of ten shares of stock in a national bank,—a going concern. His widow and heirs, by the decree of a probate court of Minnesota, became the joint and undivided owners of the stock, which continued, however, to stand in the name of Matteson. Thereafter the bank failed, and, on the ground that they had received assets of the estate, a suit was brought against the widow and heirs for the amount of an assessment made by the Comptroller against the stock. The suit was defended on two grounds: First, that the assessment was not binding, because the bank had not failed at the time of Matteson's death, and at the time when, by the decree of the probate court, the widow and heirs had become the owners in indivision of the stock; and, second, that under the national banking law they could only be made liable, in any event, each in proportion to his or her interest in the stock. In considering the first ground the court, approvingly citing the passage from *Richmond v. Irons*, above quoted, said (p. 524, L. ed. p. 573, Sup. Ct. Rep. p. 420):

"Because the insolvency of the bank took place after the death of Matteson, did it result that the assessment, which was predicated upon the insolvency, was not a debt of his estate? To so decide, the statute must be construed as imposing the liability on the shareholder for the amount of his subscription when necessary to pay debts only in case insolvency arises during the lifetime of the shareholder. In other words, that all liability of shareholders to contribute to pay debts ceases by death. This construction, however, would be manifestly unsound. The obligation of a subscriber to stock to contribute to the amount of his subscription *for the purpose of the pay-[166] ment of debts is contractual, and arises from the subscription to the stock. True, whether there is to be a call for the performance of this obligation depends on whether it becomes necessary to do so in consequence of the happening of insolvency. But the obligation to respond is engendered by, and relates to, the contract from which it arises. This contract obligation, existing during life, is not extinguished by death, but, like other contract obligations, sur-

vives, and is enforceable against the estate of the stockholder."

And the same principle has been applied to similar liabilities imposed upon stockholders in state corporations, the court uniformly holding that the liability, although statutory in its origin, was contractual in its nature, and therefore the cause of action was transitory. *Whitman v. National Bank*, 176 U. S. 559, 44 L. ed. 587, 20 Sup. Ct. Rep. 477; *Flash v. Conn.*, 109 U. S. 371, 27 L. ed. 966, 3 Sup. Ct. Rep. 263.

In *Whitman v. National Bank*, discussing a statute of the state of Kansas, the court, through Mr. Justice Brewer, said (p. 563, L. ed. p. 590, Sup. Ct. Rep. p. 478):

"The liability which, by the Constitution and statutes, is thus declared to rest upon the stockholder, though statutory in its origin, is contractual in its nature. It would not be doubted that, if the stockholders in this corporation had formed a partnership, the obligations of each partner to the others and to creditors would be contractual, and determined by the general common law in respect to partnerships. If Kansas had provided for partnerships with limited liability, and these parties, complying with the provisions of the statute, had formed such a partnership, it would also be true that their obligations to one another and to creditors would be contractual, although only in the statute was to be found the authority for the creation of such obligations. And it is none the less so when these same stockholders organized a corporation under a law of Kansas which prescribed the nature of the obligations which each thereby assumed to the others and to the creditors. While the statute of Kansas permitted the forming of the corporation [167] under certain conditions, the action *of these parties was purely voluntary. In other words, they entered into a contract authorized by statute."

And the principle sustained by the previous decisions of this court is also supported by the decisions of state courts of last resort. Thus, the supreme judicial court of Maine in *Pulsifer v. Greene*, 96 Me. 438, 52 Atl. 921, held the doctrine to be consonant with reason and natural justice and sustained by the weight of authority, the court citing not only the decisions of this court previously referred to, but also decisions of the courts of California, Connecticut, Illinois, Kansas, Massachusetts, and Michigan. And the decisions of the state courts of last resort thus referred to were, in many cases, in part rested upon the previous adjudications of this court to which I have referred, those decisions being considered as conclusive on the subject

of the contract nature of the liability. My mind sees no reason for saying that the doctrine thus settled is not applicable to a statute of limitations, for if the liability of the stockholder be contractual, for the purpose of enforcing the obligation, it is not by me perceived upon what principle it can be held that it is not contractual, but purely statutory, for the purpose of determining whether an action to enforce the liability is barred by a statute of limitations. But the unsoundness of the distinction as an original question in my opinion does not require to be demonstrated, since it is absolutely foreclosed by previous decisions of this court. Thus, in *Carrol v. Green*, 92 U. S. 509, 23 L. ed. 738,—an action against stockholders of a South Carolina bank to enforce a double liability provided for in the act of incorporation,—it was expressly held that, as the liability was contractual, it was barred by a statute of limitations applicable to simple contract indebtedness. Reference was made to decisions of the courts of New York and Massachusetts, holding the same doctrine in analogous cases (pp. 514, 515, L. ed. p. 740), and, in concluding the opinion, the court expressly noticed and overruled the contention "that the liability here in question, being created by a statute, is to be regarded as a debt by specialty."

**Carrol v. Green* was subsequently approved and followed in *Metropolitan R. Co. v. District of Columbia*, 132 U. S. 1, 23 L. ed. 231, 10 Sup. Ct. Rep. 19. The action was to recover the cost of certain street paving, the liability being recited in the act of incorporation. The trial court overruled demurrers to pleas of the statute of limitations, among other reasons, upon the ground that the action was founded on a statute, and that the statute of limitations did not apply to actions founded on statutes or other records or specialties. This ruling was held to be erroneous, the court saying (p. 12, L. ed. p. 235, Sup. Ct. Rep. p. 23):

"It is an action on the case upon an implied assumpsit arising out of the defendant's breach of a duty imposed by statute, and the required performance of that duty by the plaintiff in consequence. This raised an implied obligation on the part of the defendant to reimburse and pay to the plaintiff the moneys expended in that behalf. The action is founded on this implied obligation, and not on the statute, and is really an action of assumpsit. The fact that the duty which the defendant failed to perform was a statutory one does not make the action one upon the statute. The action is clearly one of those described in the statute of limitations."

To avoid the controlling effect of these rulings upon this case, on the theory that, by virtue of the statutes which were considered in *Carrol v. Green*, and the *Metropolitan Railroad Case*, the right to recover was direct and immediate, whilst in the case at bar, in consequence of provisions of the national banking act, the right to recover is secondary and contingent, is, in effect, in my opinion, to overrule the cases in this court determining that the liability of a stockholder in a national bank is contractual. This becomes apparent when the ground of the alleged distinction is considered. That ground is this, that, as the national banking act empowers the Comptroller to determine the necessity for an assessment on the stockholders of national banks, and to make a call for such assessment, thereby the obligation of the stockholder becomes secondary and contingent, and hence statutory, and not contractual.

[169]*To me it seems that this interpretation, whilst overruling the previous cases also originally considered, gives to the national banking act an erroneous construction. The mere fact that the act gives to the Comptroller the power of making a call on stockholders for the purpose of enforcing their contract liability, in my judgment, lends no support to the proposition that the ministerial duty created to better enforce the contract must be considered as destroying the contract itself. The consequences which must arise from the new construction now placed upon the national banking act, it seems to me, will be of the most serious nature; and being unable to agree with such construction, I cannot concur in the opinion and judgment of the court.

I am authorized to say that Mr. Justice **Brown** and Mr. Justice **McKenna** join this dissent.

HENRY DALLEMAGNE, Consul General
of the Republic of France, *Appt.*,

v.

JEAN FRANÇOIS MOISAN.

(See S. C. Reporter's ed. 169-178.)

Constitutional law—validity of arrest by state officer under Federal treaty—due process of law—treaties—arrest of insubordinate seamen on foreign vessel—habeas corpus—right to discharge for unauthorized arrest—time-limit of imprisonment.

1. A state police officer is not forbidden to make an arrest on the requisition of a consul of a foreign nation, charging a seaman on a vessel of that nation with insubordina-

tion, conformably to a treaty provision, because of the guaranty of the state Constitution against the deprivation of personal liberty without due process of law.

2. Only a Federal marshal can make an arrest on the requisition of a French consul, charging a seaman on a French vessel with insubordination, conformably to art. 8 of the treaty with France of August 12, 1853 (10 Stat. at L. 992, 996), since this, being the mode of arrest specified by the act of Congress of June 11, 1864 (13 Stat. at L. 121, chap. 116), enacted to provide for the execution of treaties respecting consular jurisdiction over the crews of foreign vessels in the waters and ports of the United States, and re-enacted in substance in U. S. Rev. Stat. §§ 4079-4081 (U. S. Comp. Stat. 1901, p. 2766), must be regarded as the only means proper to be adopted for this purpose.
3. An unauthorized arrest by a state official on a requisition of a French consul, charging a seaman on a French vessel with insubordination, conformably to art. 8 of the treaty with France of August 12, 1853 (10 Stat. at L. 992, 996), does not entitle the seaman to his discharge on habeas corpus when brought before a Federal district court, since the objection to the irregularity of the arrest is obviated by the action of that court in examining into the case under the authority conferred upon it by the act of June 11, 1864 (13 Stat. at L. 121, chap. 116), carried forward in substance as U. S. Rev. Stat. §§ 4079-4081 (U. S. Comp. Stat. 1901, p. 2766), enacted to provide for the execution of treaties respecting consular jurisdiction over the crews of foreign vessels in the waters and ports of the United States.
4. The imprisonment of an insubordinate seaman on a French vessel, pursuant to art. 8 of the treaty with France of August 12, 1853 (10 Stat. at L. 992, 996), providing that such persons may be arrested on the written requisition of the consul, "supported by an official extract from the register of the ship or the list of the crew, and shall be held, during the whole time of their stay in the port, at the disposal of the consuls," need not end with the departure of the vessel from the port at which the seaman was taken from the vessel, but may last until the expiration of the two months, which is the limit prescribed by the act of June 11, 1864 (13 Stat. at L. 121, chap. 116), carried forward in substance as U. S. Rev. Stat. §§ 4079-4081 (U. S. Comp. Stat. 1901, p. 2766), enacted to provide for the execution of treaties respecting consular jurisdiction over the crews of foreign vessels in the waters and ports of the United States.

[No. 104.]

Submitted December 15, 1904. Decided
March 13, 1905.

APPEAL from the District Court of the United States for the Northern District of California, to review a discharge, on habeas corpus, of an insubordinate seaman on a French vessel, arrested on the requisition of the French consul. *Reversed* and remanded for further proceedings.

Statement by Mr. Justice **Peckham**:

This is an appeal on the part of the consul general of the Republic of France from the judgment of the district court of the United States for the northern district of California, discharging the defendant Moisan from imprisonment.

The proceeding arises on habeas corpus, to inquire into the validity of the detention of defendant in the city prison of San Francisco, in the state of California. His application for the writ was addressed to the district court of the United States for the northern district of California, and it showed that he was a citizen of France, and was imprisoned by virtue of a requisition in writing, signed by the French consul general residing in San Francisco, and addressed to the chief of police of San Francisco, California, requiring his arrest as one of the crew of the French ship Jacques, then in that port, on account of his insubordinate conduct as one of such crew. (The requisition contained all the averments of fact which would warrant the arrest of the petitioner under the provisions of the treaty of 1853 between the United States and France.) The petitioner also averred that, at the time of the making of his application for the writ, the ship was not in the port of San Francisco, but had departed therefrom some time before. The petitioner was arrested by the chief of police, under such requisition, on the 1st day of May, 1903, and since that time had been confined in the city prison of San Francisco. He asserted that his imprisonment was illegal, because the facts set forth did not confer jurisdiction upon the consul or the chief of police, or either of them, to restrain complainant from his liberty, or to imprison him.

[171] *The petition was dated the 26th day of May, 1903, and the writ was issued, returnable before the district court on the 28th day of May, 1903. The chief of police produced the body of the defendant, pursuant to the command of the writ, and justified the imprisonment, under the requisition referred to.

The district court, after hearing counsel, made an order discharging the defendant from arrest, on the ground that it appeared to the court that the bark Jacques, of the crew of which the defendant was a member, had departed from the port of San Francisco, and was no longer in that port. It was further ordered that the execution of the order should be stayed for the term of one day. Immediately thereon the consul general filed with the district court his petition for appeal to the Supreme Court of the United States from the judgment discharging the defendant from imprisonment, which appeal was duly allowed, and thereupon the

petitioner was admitted to bail by the district court.

Messrs. Walter V. R. Berry and Benjamin S. Minor submitted the cause for appellant:

The language of the treaty is so plain and unambiguous that there is no room for interpretation or construction.

17 Am. & Eng. Enc. Law, p. 4, *Interpretation and Construction*; 28 Am. & Eng. Enc. Law, pp. 488, 489; 2 Phillimore, *International Law*, § 70; 1 Halleck, *International Law*, p. 297, chap. 8, § 39; 2 Vattel, *Le Droit des Gens*, § 263; Calvo, *Droit International*, § 1650; *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 39 L. ed. 601, 15 Sup. Ct. Rep. 508; 26 Am. & Eng. Enc. Law, p. 598, *Statutes*; *Tucker v. Alexandroff*, 183 U. S. 424, 437, 46 L. ed. 264, 270, 22 Sup. Ct. Rep. 195.

A treaty should be carried out in a spirit of *uberrima fides*, and construed so as to give effect to the object designed.

Re Ross (Ross v. McIntyre) 140 U. S. 453, 475, 35 L. ed. 581, 589, 11 Sup. Ct. Rep. 897.

The court should find an interpretation, if it can be done, which will involve no violation of the pledged faith of the government of the United States to the government of another country, and should give that interpretation without hesitation.

Ropes v. Clinch, 8 Blatchf. 304, Fed. Cas. No. 12,041.

Mr. William Denman submitted the cause for appellee:

Congress could not impose a tax on the salary of a judicial officer of the state.

The Collector v. Day (Buffington v. Day) 11 Wall. 113, 20 L. ed. 122.

In an attempt by a state to tax the salary of a Federal officer the converse was held to be true.

Dobbins v. Erie County, 16 Pet. 435, 10 L. ed. 1022.

Any instrumentality employed for carrying on the operation of state government is beyond the reach of Federal interference.

United States v. Baltimore & O. R. Co. 17 Wall. 329, 21 L. ed. 600; *Pollock v. Farmers' Loan & T. Co.* 157 U. S. 583, 39 L. ed. 820, 15 Sup. Ct. Rep. 673.

The same principle of the inviolability of the machinery of a state from Federal interference has been laid down where national stamp duties were attempted to be imposed upon the process of state courts.

Warren v. Paul, 22 Ind. 279; *Jones v. Keep*, 19 Wis. 390; *Fifield v. Close*, 15 Mich. 505; *Smith v. Short*, 40 Ala. 385.

The state official cannot be granted a function the exercise of which is forbidden by the laws of his state.

Prigg v. Pennsylvania, 16 Pet. 539, 10 L. ed. 1060; *Robertson v. Baldwin*, 165 U. S. 275, 41 L. ed. 715, 17 Sup. Ct. Rep. 326.

A Federal treaty is of no higher sanction than Federal legislation.

Chae Chan Ping v. United States, 130 U. S. 600, 32 L. ed. 1073, 9 Sup. Ct. Rep. 623; *Fong Yue Ting v. United States*, 149 U. S. 698, 37 L. ed. 905, 13 Sup. Ct. Rep. 1016.

A state cannot enforce the criminal laws of a foreign government.

Huntington v. Attrill, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224.

Extradition as a part of the criminal procedure of a foreign nation is no exception to the general rule.

Holmes v. Jennison, 14 Pet. 540, 10 L. ed. 579; *Ex parte Holmes*, 12 Vt. 631; *People ex rel. Barlow v. Curtis*, 50 N. Y. 321, 10 Am. Rep. 483.

Mr. Justice **Peckham**, after making the foregoing statement of the facts, delivered the opinion of the court:

This case involves the construction of certain language in the 8th article of the consular convention between the United States and France, concluded on the 23d day of February, 1853, and proclaimed by the President of the United States on the 12th day of August, 1853, the whole convention being still in full force and effect. 10 Stat. at L. 992, 996. The article is reproduced in the margin.†

The first objection made by the defendant is to the validity of the requisition of the consul general, because it was directed to the chief of police of San Francisco, he being an officer of the state, as distinguished from a Federal officer, the defendant contending that a Federal treaty cannot impose on a state officer, as such, a function [174] violating the Constitution of the *state which he represents in his official character. It has long been held that power may be conferred upon a state officer, as such, to execute a duty imposed under an act of Congress, and the officer may execute the same, unless its execution is prohibited by the Constitution or legislation of the state. *Prigg v. Pennsylvania*, 16 Pet. 539, 622, 10 L. ed. 1060, 1091; *Robertson v. Baldwin*, 165 U. S. 275, 41 L. ed. 715, 17 Sup. Ct.

Rep. 326. As to the objection that there was any statute, or any constitutional provision of the state, prohibiting the execution of the power conferred by the treaty upon the state officer, we think it unfounded. We find nothing in the Constitution or in the statutes of California which forbids or would prevent the execution of the power by a state officer, in case he were willing to execute it. The provisions in the Constitution of the state, cited by counsel for defendant, relate, in substance, only to the general proposition that no person should be deprived of his liberty without due process of law. The execution of a treaty between the United States and a foreign government, such as the one in question, would not violate any provision of the California Constitution; the imprisonment is not pursuant to a conviction of crime, but is simply a temporary detention of a sailor, whose contract of service is an exceptional one (*Robertson v. Baldwin*, 165 U. S. 275, 41 L. ed. 715, 17 Sup. Ct. Rep. 326), for the purpose of securing his person during the time, and under the circumstances, provided for in the treaty, as concerning the internal order and discipline of the vessel. The murder on a foreign vessel, while in one of the ports of this country, of one of the crew of such vessel by another member of that crew, has been held not to come within the terms of a somewhat similar treaty with Belgium, because the crime charged concerned more than the internal order or discipline of the foreign vessel. *Wildenhus's Case (Mali v. Keeper of Common Jail)*, 120 U. S. 1, 30 L. ed. 565, 7 Sup. Ct. Rep. 385.

The chief of police voluntarily performed the request of the consul as contained in the written requisition, and the arrest was, therefore, not illegal so far as this ground is concerned.

There is another difficulty, however, and that is founded upon the provisions of the statutes of the United States. By *the act [175] of Congress, approved June 11, 1864 (13 Stat. at L. 121, chap. 116), entitled "An Act to Provide for the Execution of Treaties between the United States and Foreign Nations, Respecting Consular Jurisdiction over the Crews of Vessels of Such Foreign Na-

†Article VIII. The respective consuls general, consuls, vice consuls, or consular agents, shall have exclusive charge of the internal order of the merchant vessel of their nation, and shall alone take cognizance of differences which may arise, either at sea or in port, between the captain, officers, and crew, without exception, particularly in reference to the adjustment of wages and the execution of contracts. The local authorities shall not, on any pretext, interfere in these differences, but shall lend forcible aid to the consuls when they may ask it, to arrest and imprison all persons composing the
197 U. S.

crew whom they may deem it necessary to confine. Those persons shall be arrested at the sole request of the consuls, addressed in writing to the local authority, and supported by an official extract from the register of the ship or the list of the crew, and shall be held, during the whole time of their stay in the port, at the disposal of the consuls. Their release shall be granted at the mere request of the consuls, made in writing. The expenses of the arrest and detention of those persons shall be paid by the consuls.

tions in the Waters and Ports of the United States," full provision was made for the execution of such treaties. It was therein provided (§ 2) that application for the arrest might be made "to any court of record of the United States, or any judge thereof, or to any commissioner appointed under the laws of the United States." The act then provided for the issuing of a warrant for the arrest of the individual complained of, directed to the marshal of the United States, and requiring him to arrest the individual, and bring him before the court or person issuing the warrant for examination; and if, on such examination, it appeared that the matter complained of concerned only the internal order or discipline of the foreign ship, the court should then issue a warrant committing such person to prison, etc. It was further provided that no person should be detained more than two months after his arrest, but at the end of that time he should be allowed to depart, and should not again be arrested for the same cause. The act was carried forward, in substance, into the Revised Statutes of the United States, as §§ 4079, 4080, 4081. See also U. S. Comp. Stat. 1901, p. 2766. This statute, having been passed by the United States for the purpose of executing the treaties it had entered into with foreign governments, must be regarded as the only means proper to be adopted for that purpose. Consequently, the requisition of the consul general should have been presented to the district court or judge, etc., pursuant to the act of Congress, and the arrest should have been made by the marshal, as therein provided for. Therefore the arrest of the seaman by the chief of police was unauthorized. When, however, the defendant was brought before the district court of the United States upon the writ of habeas corpus, that court being mentioned in the statute as one of the authorities to issue war-

[176]rants for the arrest of the *individual complained of, and having power under the statute to examine into the question, and to commit the person thus arrested to prison, according to the provisions of the act, it would have been the duty of the court, under such circumstances, upon the production of the defendant under the writ, and upon the request of the consul, to have made an examination, and to have committed the defendant to prison if he were found to come under the terms of the treaty. It was, therefore, but a formal objection to the regularity of the arrest, which would have been obviated by the action of the court in examining into the case, and the defendant would not have been entitled to discharge merely because the person exe-

cuting the warrant was not authorized so to do.

The important question remains as to the true construction of the 8th article of the treaty, with reference to the limitation of the imprisonment of the person coming within its terms. The district court has held that the imprisonment must end with the departure of the vessel from the port at which the seaman was taken from the vessel. This we regard as an erroneous construction of the terms of the article.

The provisions of that article seem to us plain, and they refer to the imprisonment of the seaman and his detention during the time of his stay in port, and the language does not refer, in that respect, to the stay of the ship in port. The treaty provides that the local authorities shall lend forcible aid to the consuls when they may ask for the arrest and imprisonment of persons composing the crew, whom they may deem it necessary to confine. The language has no reference whatever to the ship, and they (the persons arrested) are held during their stay in the port "at the disposal of the consul." Surely the ship is not held at the disposal of the consul. It is the persons arrested who are held, and they are to be released at the mere request of the consul, made in writing, and the expenses of the arrest and detention of the persons arrested are to be paid by the consul. From the language of the treaty the departure of the ship from the port need have no effect *whatever upon the imprisonment of the [177] persons arrested. The statute (Rev. Stat. § 4081, U. S. Comp. Stat. 1901, p. 2767) provides that the imprisonment shall in no case last longer than two months, and at the end of that time the person arrested is to be set at liberty, and shall not again be arrested for the same cause. The statute makes no reference to the stay of the vessel in port, and the legislative construction of the treaty is that the imprisonment is not limited by the departure of the ship. Therefore the statute provides that such imprisonment shall not last, in any event, longer than two months. That term might end while the vessel was still in port. This construction not only carries out the plain language of the treaty, but, it seems to us, it is its reasonable interpretation. A vessel may arrive in port with a mutinous sailor, whose arrest is asked for under the treaty. When imprisoned pursuant to the terms of the treaty, he ought not to be discharged without the request of the consul while within the limit of the term of imprisonment provided by the statute, simply because the vessel from which he was taken has left the port. If that were so, the result would be either that the sailor would

be discharged as soon as the ship left the port, or, in order to prevent such discharge, he would be taken on board the ship again, and probably be placed in irons. The ship might then continue a voyage which would not bring it back to France for months. During this time the sailor might be kept in irons and in close confinement on board ship, or else the discipline and safety of the ship might be placed in peril. By the other construction, although the ship had left the port without the mutinous sailor, he would not be entitled to his discharge from imprisonment within the two months provided for by the statute, and this would give an opportunity to the consul to send the sailor back to France, at the earliest opportunity, and at the expense of the French government, by a vessel which was going directly to that country.

The district court erred in discharging the defendant before the expiration of the [178] two months provided for in the act of *Congress, and against the protest of the French consul. Less than one of the two months of imprisonment permitted by the statute had expired when the defendant was discharged. The order discharging him must be reversed, and the defendant remanded to imprisonment in a prison where prisoners under sentence of a court of the United States may be lawfully committed (Rev. Stat. § 4081), subject to the jurisdiction of the French consular authority of the port of San Francisco; but such imprisonment must not exceed, when taken with the former imprisonment of the defendant, the term of two months in the aggregate.

Reversed, and remanded for further proceedings consistent with this opinion.

Mr. Justice **Harlan** dissented.

CITY OF DAWSON, *Appt.*,
v.

COLUMBIA AVENUE SAVING FUND,
SAFE DEPOSIT, TITLE, & TRUST
COMPANY.

(See S. C. Reporter's ed. 178-182.)

Jurisdiction of Federal courts—diversity of citizenship—suits under Federal Constitution.

1. A Federal circuit court has no jurisdic-

NOTE.—As to diverse citizenship as ground of Federal jurisdiction—see *Shipp v. Williams*, 10 C. C. A. 247, and note; *Mason v. Dufflagham*, 27 C. C. A. 296, and note; *Seddon v. Virginia T. & C. Steel & I. Co.* 1 L. R. A. 108, and note; *Myers v. Murray, N. & Co.* 11 L. R. A. 216, and note. And see note to *Roberts v. Lewis*, 36 L. ed. U. S. 579.

197 U. S. U. S., Book 49.

tion, on the ground of diversity of citizenship, of a suit brought against a municipality by the mortgagee of a waterworks company, to enforce the municipality's contract with that company, where there is no diversity of citizenship between the municipality and the waterworks company, and the interests of the latter and its mortgagee are not antagonistic, it obviously being made a defendant instead of plaintiff solely for the purpose of reopening, in the Federal courts, a controversy which had been decided against the waterworks company in the state court.

2. The formal repudiation by a municipality of its contract with a waterworks company, and its refusal to perform its obligations under it, cannot give rise to a suit under the Federal Constitution, of which a Federal circuit court can take jurisdiction without reference to the citizenship of the parties.

[No. 154.]

Argued January 26, 27, 1905. Decided March 6, 1905.

A PPEAL from the Circuit Court of the United States for the Northern District of Georgia, to review a decree in favor of complainant, in a suit brought against a municipality by the mortgagee of a waterworks company, to enforce a contract between that company and the municipality. *Reversed*, and remanded with instructions to dismiss the bill for want of jurisdiction.

The facts are stated in the opinion.

Messrs. Charles A. Douglass and Dupont Guerry argued the cause, and, with *Mr. Homer Guerry*, filed a brief for appellant:

If the water company is the real party, and complainant's interest nominal, the bill should have been dismissed.

Smith v. Kernochen, 7 How. 216, 12 L. ed. 673.

A mortgage given by a water company covering rentals accruing under a contract with a city cannot clothe the mortgagee with the right to maintain an action against the city in a Federal court, where the mortgagor and the city are both corporations of the same state.

American Waterworks & G. Co. v. Home Water Co. 115 Fed. 171; *New York Guaranty & Indemnity Co. v. Memphis Water Co.* 107 U. S. 205, 27 L. ed. 484, 2 Sup. Ct. Rep. 279; *Eau Claire v. Payson*, 46 C. C. A. 466, 107 Fed. 552, 48 C. C. A. 608, 109 Fed. 676.

It was the duty of the court below to have

As to Federal question as conferring jurisdiction on United States courts—see notes to *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co.* 35 C. C. A. 7; and *Bailey v. Mosher*, 11 C. C. A. 308; and *Re Buchanan*, 39 L. ed. U. S. 884.

ascertained the matter in controversy, and to have arranged the parties according to interest; and, when so arranged, if it appeared that citizens of the same state were parties on both sides of the controversy, the court had no jurisdiction.

Pacific R. Co. v. Ketchum, 101 U. S. 298, 25 L. ed. 936; *Barney v. Latham*, 103 U. S. 211, 26 L. ed. 516; *Removal Cases* (*Meyer v. Delaware R. Constr. Co.*) 100 U. S. 457, 25 L. ed. 593; *Walsh v. Memphis, C. & N. W. R. Co.* 2 McCrary, 156, 6 Fed. 797; *Saginaw Gaslight Co. v. Saginaw*, 28 Fed. 529; *Covert v. Waldron*, 33 Fed. 312; *Pittsburgh, C. & St. L. R. Co. v. Baltimore & O. R. Co.* 10 C. C. A. 20, 22 U. S. App. 359, 61 Fed. 709; *Tug River Coal & Salt Co. v. Brigel*, 14 C. C. A. 577, 31 U. S. App. 665, 67 Fed. 629; *Oberlin College v. Blair*, 70 Fed. 414; *First Nat. Bank v. Radford Trust Co.* 26 C. C. A. 1, 47 U. S. App. 692, 80 Fed. 572.

A breach is not the impairment of the binding force of a valid contract within the inhibition of the Federal Constitution, and the remedy therefor and for refusal to pay accrued rentals would be a suit at law.

Texas & P. R. Co. v. Marshall, 136 U. S. 393, 34 L. ed. 385, 10 Sup. Ct. Rep. 846; *Rutland Marble Co. v. Ripley*, 10 Wall. 358, 19 L. ed. 961; *St. Paul Gaslight Co. v. St. Paul*, 181 U. S. 142, 45 L. ed. 788, 21 Sup. Ct. Rep. 575; *Raton Waterworks Co. v. Raton*, 174 U. S. 360, 43 L. ed. 1005, 19 Sup. Ct. Rep. 719; *Lehigh Water Co. v. Easton*, 121 U. S. 392, 30 L. ed. 1060, 7 Sup. Ct. Rep. 916; *Fergus Falls v. Fergus Falls Water Co.* 19 C. C. A. 212, 36 U. S. App. 480, 72 Fed. 873.

A right of action against a city to recover water rentals claimed to be due under a contract is at law, and a Federal court of equity is without jurisdiction to enforce the payment of such rentals, even where it has acquired jurisdiction to determine other matters in controversy between the parties.

American Waterworks & G. Co. v. Home Water Co. 115 Fed. 172.

The general rule that a court of equity, having once obtained jurisdiction of a cause, should retain it, does not apply in causes of this kind in the Federal courts.

Ibid.

The Constitution used the word "obligation" advisedly (*Sturges v. Crowninshield*, 4 Wheat. 197, 4 L. ed. 549; *Ogden v. Saunders*, 12 Wheat. 269, 6 L. ed. 625), and mere annulments or breaches of contract were not within its purview.

A contract is the meeting of the minds, but the obligation resulting therefrom does not depend upon the will of the parties, but upon the law and its remedies as they existed when the contract was entered into.

Ogden v. Saunders, 12 Wheat. 317, 6 L.

ed. 641; *Sturges v. Crowninshield*, 4 Wheat. 197, 4 L. ed. 549.

The Constitution intended to protect the obligation as it existed and was recognized by the laws in force when the contract was made.

Ogden v. Saunders, 12 Wheat. 327, 6 L. ed. 645; *McCraeken v. Hayward*, 2 How. 612, 11 L. ed. 399; *Bronson v. Kinzie*, 1 How. 317, 11 L. ed. 145.

The obligation, then, protected by the Constitution, is the binding force of any contract as recognized and sustained by the law when incurred, since it is the law and its remedies which obligate a person to perform his agreement.

McCraeken v. Hayward, 2 How. 612, 11 L. ed. 399; *Ogden v. Saunders*, 12 Wheat. 302, 6 L. ed. 636; *Cooley, Const. Lim.* 7th ed. 403.

The means for the enforcement of the obligations of the contract, viz., the laws and remedies which existed when the contract was made, constitute the breach of the contract (*Edwards v. Kearzey*, 96 U. S. 600, 24 L. ed. 796), and they have remained unchanged.

So long as the state law has not destroyed or diminished the legal duty to fulfil the obligation of a contract it cannot be said that there has been any state impairment of such obligation, and the issues raised by complainant do not arise under the Constitution (*Fergus Falls v. Fergus Falls Water Co.* 19 C. C. A. 212, 36 U. S. App. 480, 72 Fed. 873), and to entertain jurisdiction would constitute an encroachment upon the province and prerogatives of the state courts.

St. Paul Gaslight Co. v. St. Paul, 181 U. S. 142, 45 L. ed. 788, 21 Sup. Ct. Rep. 575; *Lehigh Water Co. v. Easton*, 121 U. S. 392, 30 L. ed. 1060, 7 Sup. Ct. Rep. 916.

Mr. Olin J. Wimberly argued the cause, and, with **Mr. John I. Hall**, filed a brief for appellee:

There is no improper joinder or arrangement of parties, and jurisdiction may properly be invoked on the ground of diversity of citizenship.

Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Seymour v. Farmers' Loan & T. Co.* 128 Fed. 907; *Bowdoin College v. Merritt*, 63 Fed. 213; *Belding v. Gaines*, 37 Fed. 817; *Omaha Hotel Co. v. Wade*, 97 U. S. 13, 24 L. ed. 917; *Farmers' Loan & T. Co. v. Sioux Falls*, 131 Fed. 890.

If the present suit were an action at law, brought by the trustee for the recovery of the hydrant rentals, we think, even in that case, that the fact that in the waterworks contract the city undertakes and agrees to pay the hydrant rentals either to the water-

works company or to the trustee for bondholders, as alternative payees, would give the trustee the right to sue in a Federal court.

Seymour v. Farmers' Loan & T. Co. 128 Fed. 907.

The city being one of the properly constituted instrumentalities of the state, the ordinances of the municipality are the acts of the state, and their unconstitutionality is the unconstitutionality of a state law, within the meaning of the Constitution and acts of Congress touching the jurisdiction of the Federal courts.

Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; *Davis & F. Mfg. Co. v. Los Angeles*, 189 U. S. 207, 47 L. ed. 778, 23 Sup. Ct. Rep. 498; *St. Paul Gaslight Co. v. St. Paul*, 181 U. S. 142, 45 L. ed. 788, 21 Sup. Ct. Rep. 575.

The jurisdiction of the circuit court is established when it is shown that the company had, or claimed to have, a contract with a state or municipality which the latter had attempted to impair; and so long as the claim was apparently made in good faith, and is not frivolous, the case can be heard and decided on the merits.

Pacific Electric R. Co. v. Los Angeles, 194 U. S. 112, 48 L. ed. 896, 24 Sup. Ct. Rep. 586; *City R. Co. v. Citizens' Street R. Co.* 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653; *Illinois C. R. Co. v. Adams*, 180 U. S. 28, 45 L. ed. 410, 21 Sup. Ct. Rep. 251.

The ordinances impair the obligation of the contract.

Vicksburg Waterworks Co. v. Vicksburg, 185 U. S. 68, 46 L. ed. 809, 22 Sup. Ct. Rep. 585; *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; *City R. Co. v. Citizens' Street R. Co.* 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653.

It is for the protection and furtherance of the interest of the complainant as trustee that this bill is filed, and the fact that it may result in a benefit to the water company is in no sense a reason why the company should not be made a party defendant.

Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047.

The United States courts would have jurisdiction of a suit brought by the waterworks company seeking the relief that is sought in the original and amended bill in this case to the extent of enjoining the city of Dawson from breaking its contract, for a Federal question is raised by the pleadings, and the pleadings are supported by the evidence.

Defiance Water Co. v. Defiance, 90 Fed. 753; *Walla Walla v. Walla Walla Water Co.* 197 U. S.

172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77.

The action of the mayor and council of the city of Dawson in proceeding by an election for the issue of water bonds to build its own waterworks, and notice to the water company that it would not carry out the contract with the water company, is a distinct effort to revoke the same and erect waterworks of its own; thus bringing the contract in this case squarely in line with the contract between the city of Walla Walla and the Walla Walla Waterworks Company.

Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a bill in equity, brought in the circuit court by the appellee, the trust company, as mortgagee of the Dawson Waterworks Company, to restrain the city of Dawson from taking measures to build a new set of waterworks, and to compel it specifically to perform a contract made with the waterworks company in 1890, to pay that company or its mortgagee a certain sum for the use of its water for twenty years. The trust company is a Pennsylvania corporation, and the only ground of jurisdiction for the bill as originally filed was diversity of citizenship. The bill, after stating the contract, set up a formal repudiation of the same by the city on June 27, 1894, refusals to pay for the water from that time, and attempts to collect taxes which, by the contract, were to be satisfied by the furnishing of water, but alleged a continued use of the water by the city. It further stated the calling of an election for December 12, 1894, to see if the city should issue bonds to erect or buy waterworks or electric lights, a vote in favor of the issue, an issue of \$10,000 for the erection of an electric-light plant, and a present intent to sell the residue for the purpose of erecting new waterworks. It also alleged that the waterworks company, recognizing the plaintiff's right to be paid the rentals for the water, in the events which had happened, which had made the waterworks *company unable to pay the interest on the[180] mortgage, had yielded to the plaintiff's demand that it should collect the rentals, and that the plaintiff had notified the city, and had made demand, but that the city refused to pay. Other details are immaterial. The waterworks company was made a party defendant, and was served with process. An answer was served, although not filed, by the defendants other than the waterworks company, setting up, among other things, that

the waterworks company was the real plaintiff, and was made defendant solely to avoid the effect of a decision by the supreme court of the state in a suit by the waterworks company against the city, to the effect that the contract relied on was void. 106 Ga. 696, 32 S. E. 907. The answer, on this ground, denied the jurisdiction of the court. After service of this answer the bill was amended so as to allege that the acts of the city impaired the obligation of its contract, and deprived the plaintiff of its property without due process of law, contrary to the Constitution of the United States. A prayer was added, also, that the waterworks company be decreed to perform its contract with the city, that thereby the rights of bondholders might be saved. The further proceedings do not need mention. They ended in a decree in accordance with the prayer, and the city appealed to this court. *Davis & F. Mfg. Co. v. Los Angeles*, 189 U. S. 207, 216, 47 L. ed. 778, 780, 23 Sup. Ct. Rep. 498.

We are of opinion that the bill should have been dismissed for want of jurisdiction. The waterworks company is admitted to have been a necessary party, and it, like the defendant city, was a Georgia corporation. It was made a defendant, but the court will look beyond the pleadings, and arrange the parties according to their sides in the dispute. When that is done, it is obvious that the waterworks company is on the plaintiff's side, and was made a defendant solely for the purpose of reopening, in the United States court, a controversy which had been decided against it in the courts of the state. There was a pretense of asking relief against it, as we have stated, but no foundation for the prayer was laid in the [181] allegations of the bill. On the contrary, it appears from those allegations that the waterworks company insisted on its contract with the city, and did everything in its power to carry the contract out. It also recognized the plaintiff's right to receive the rentals, and yielded to its demand. No difference or collision of interest or action is alleged or even suggested. If we assume that the plaintiff is more than an assignee of the city's contract to pay (which we do not intimate), still, when the arrangement of the parties is merely a contrivance between friends for the purpose of founding a jurisdiction which otherwise would not exist, the device cannot be allowed to succeed. See *Removal Cases* (*Meyer v. Delaware R. Constr. Co.*), 100 U. S. 457, 469, 25 L. ed. 593, 598; *Hawes v. Oakland* (*Hawes v. Contra Costa Water Co.*), 104 U. S. 450, 453, 26 L. ed. 827, 829; *Detroit v. Dean*, 106 U. S. 537, 541, 27 L. ed. 300, 302, 1 Sup. Ct. Rep. 560; *Doctor v. Harrington*, 196

U. S. 579, *ante*, 606, 25 Sup. Ct. Rep. p. 355. Act March 3, 1875 (18 Stat. at L. 472, chap. 137, § 5, U. S. Comp. Stat. 1901, p. 508).

The attempt, by an afterthought, to give jurisdiction by setting up constitutional rights, must fail also. The bill presents a naked case of breach of contract. The first step of the city was to repudiate the contract and to refuse to pay. Whatever it may have done subsequently, its wrong, if contrary to the decision of the supreme court of the state, there was a wrong, was complete then. The repudiation and refusal were kept up until the bill was filed, and the other acts were subsequent, subordinate to, and in aid of, them. The mere fact that the city was a municipal corporation does not give to its refusal the character of a law impairing the obligation of contracts, or deprive a citizen of property without due process of law. That point was decided in *St. Paul Gaslight Co. v. St. Paul*, 181 U. S. 142, 150, 45 L. ed. 788, 792, 21 Sup. Ct. Rep. 575.

Undoubtedly the decisions on the two sides of the lines are very near to each other. But the case at bar is governed by the one which we have cited, and not by *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77, which is cited and distinguished in *St. Paul Gaslight Co. v. St. Paul*. In *Vicksburg Waterworks Co. v. Vicksburg*, 185 U. S. 65, 46 L. ed. 808, 22 Sup. Ct. Rep. 585, the city had made a contract with the waterworks company, and afterwards a law was passed [182] authorizing the city to build new works. The city, acting under this law, denied liability, and took steps to build the works, whereupon the waterworks company filed its bill, alleging the law to be unconstitutional. The bill was held to present a case under the Constitution. In the case before us there was no legislation subsequent to the contract, and it is not even shown that there is color of previous legislation for the city's acts. Those acts are alleged to be unlawful, and the allegation would be maintained by showing that they were not warranted by the laws of the state. See *Hamilton Gaslight & Coke Co. v. Hamilton*, 146 U. S. 258, 266, 36 L. ed. 963, 967, 13 Sup. Ct. Rep. 30; *Lehigh Water Co. v. Easton*, 121 U. S. 388, 392, 30 L. ed. 1059, 1060, 7 Sup. Ct. Rep. 916. We repeat that something more than a mere refusal of a municipal corporation to perform its contract is necessary to make a law impairing the obligation of contracts, or otherwise to give rise to a suit under the Constitution of the United States. The decree of the circuit court must be reversed, and the cause remanded with instructions to dismiss the

bill. *Newburyport Water Co. v. Newburyport*, 193 U. S. 561, 576, 48 L. ed. 795, 799, 24 Sup. Ct. Rep. 553.

Decree reversed.

Mr. Justice **Brewer** and Mr. Justice **McKenna** dissented.

Mr. Justice **White**, not having been present at the argument, took no part in the decision.

[183] *WINFIELD S. GREGG, *Petitioner*,

METROPOLITAN TRUST COMPANY *et al.*

(See S. C. Reporter's ed. 183-197.)

Railroad mortgages—preference for supplies over lien of mortgage.

A claim for the ties necessary to the preservation of a railroad, furnished within six months of the appointment of a receiver, is not, in the absence of any special circumstances other than the receiver's use of those ties on hand at the time of his appointment, in the maintenance of the railroad as a going concern, entitled to preference over a lien expressly created by a mortgage of the railroad property, recorded before the contract under which the ties were furnished was made.

[No. 141.]

Argued January 20, 23, 1905. Decided March 6, 1905.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to review a decree affirming a decree of the Circuit Court for the Southern District of Ohio, denying preference of a claim for supplies over the lien of a railroad mortgage. *Affirmed.*

See same case below, 59 C. C. A. 637, 124 Fed. 721.

The facts are stated in the opinion.

Mr. **Harlan Cleveland** argued the cause and filed a brief for petitioner:

The diversion of current earnings for the benefit of first-mortgage bondholders was not a condition precedent to the payment of Gregg as a supply claimant out of the proceeds of the sale of the mortgaged property.

Central Trust Co. v. East Tennessee, V. & G. R. Co. 26 C. C. A. 30, 47 U. S. App. 663, 80 Fed. 624; *New England R. Co. v. Carnegie Steel Co.* 21 C. C. A. 219, 33 U. S. App. 491, 75 Fed. 54; *Wood v. New York & N. E.*

NOTE.—On priority of claims against a receiver over the lien of a railroad mortgage—see notes to *Manchester Locomotive Works v. Truesdale*, 9 L. R. A. 140; *Decker v. Gardner*, 11 L. R. A. 480.

197 U. S.

R. Co. 70 Fed. 741; *Finance Co. v. Charleston, C. & C. R. Co.* 10 C. C. A. 323, 8 U. S. App. 547, 62 Fed. 205; *St. Louis Trust Co. v. Riley*, 30 L. R. A. 456, 16 C. C. A. 610, 36 U. S. App. 100, 70 Fed. 32; *Central Trust Co. v. Clark*, 26 C. C. A. 397, 49 U. S. App. 453, 81 Fed. 269; *New York Guaranty & Indemnity Co. v. Tacoma R. & Motor Co.* 27 C. C. A. 550, 48 U. S. App. 668, 83 Fed. 365; *Miltenberger v. Logansport, C. & S. W. R. Co.* 106 U. S. 286, 27 L. ed. 117, 1 Sup. Ct. Rep. 140; *Union Trust Co. v. Illinois Midland R. Co.* 117 U. S. 434, 29 L. ed. 963, 6 Sup. Ct. Rep. 809.

The only cases in this court in which a charge against the corpus of the property has been denied are the following:

Fosdick v. Schall, 99 U. S. 235, 25 L. ed. 339; *Huidekoper v. Hinckley Locomotive Works*, 99 U. S. 258, 25 L. ed. 344; *Penn. v. Calhoun*, 121 U. S. 251, 30 L. ed. 915, 7 Sup. Ct. Rep. 906; *St. Louis, A. & T. H. R. Co. v. Cleveland, C. C. & I. R. Co.* 125 U. S. 658, 31 L. ed. 832, 8 Sup. Ct. Rep. 1011; *Kneeland v. American Loan & T. Co.* 136 U. S. 89, 34 L. ed. 379, 10 Sup. Ct. Rep. 950; *Morgan's L. & T. R. & S. S. Co. v. Texas C. R. Co.* 137 U. S. 171, 34 L. ed. 625, 11 Sup. Ct. Rep. 61; *Louisville, E. & St. L. R. Co. v. Wilson*, 138 U. S. 501, 34 L. ed. 1023, 11 Sup. Ct. Rep. 405; *Thomas v. Western Car Co.* 149 U. S. 95, 37 L. ed. 663, 13 Sup. Ct. Rep. 824.

None of these cases involved claims for supplies furnished or labor rendered to a railroad company necessary to maintain the railroad from day to day as a going concern.

Equity requires that the claims of the supply claimants should be put upon an equal footing with those of the laborers who have been paid.

New England R. Co. v. Carnegie Steel Co. 21 C. C. A. 219, 33 U. S. App. 491, 75 Fed. 54.

Even had the orders not been originally made directing the payment of the claims at bar, still the court might have subsequently provided for their payment.

Fosdick v. Schall, 99 U. S. 235-253, 25 L. ed. 339-342; *Wood v. New York & N. E. R. Co.* 70 Fed. 741; *Finance Co. v. Charleston, C. & C. R. Co.* 10 C. C. A. 323, 8 U. S. App. 547, 62 Fed. 205.

A fortiori, should such an order which has been partly carried out have been enforced by the court below as to all claimants of the same class. The trustee of the bondholders should not be allowed to change its attitude, and switch the proceeds of receivers' certificates to the permanent improvement of the property.

The purchase of the ties by the railroad company at a time when it was, as it knew, hopelessly insolvent, and had no reasonable expectation of paying therefor, and after it

had defaulted on the interest due upon its bonds, was a fraudulent purchase which would have entitled Gregg, had the ties not been in the possession of the court, to have retaken them, and which would have entitled and justified the court to order their redelivery to him, or, in default thereof, payment therefor.

Donaldson v. Farwell, 93 U. S. 631, 23 L. ed. 993; *Wilmot v. Lyon*, 49 Ohio St. 296, 34 N. E. 720; *Talcott v. Henderson*, 31 Ohio St. 162, 27 Am. Rep. 501; *Morrow Shoe Mfg. Co. v. New England Shoe Co.* 24 L. R. A. 417, 6 C. C. A. 508, 18 U. S. App. 256, 57 Fed. 693; *Davis v. Stewart*, 3 McCrary, 174, 8 Fed. 803; *Jaffrey v. Brown*, 29 Fed. 476.

This court has recognized special equities entirely apart from any question of diversion.

St. Louis, A. & T. H. R. Co. v. Cleveland, C. C. & I. R. Co. 125 U. S. 658, 673, 31 L. ed. 832, 8 Sup. Ct. Rep. 1011; *Union Trust Co. v. Souther*, 107 U. S. 591, 27 L. ed. 488, 2 Sup. Ct. Rep. 295; *Morgan's L. & T. R. & S. S. Co. v. Texas C. R. Co.* 137 U. S. 171, 197, 34 L. ed. 625, 634, 11 Sup. Ct. Rep. 61.

Mr. **Herbert Parsons** argued the cause and filed a brief for respondents:

While this court may sometimes have permitted the payment of a current claim out of the proceeds of sale without proof of diversion, those were exceptional instances.

Miltenberger v. Logansport, C. & S. W. R. Co. 106 U. S. 286, 27 L. ed. 117, 1 Sup. Ct. Rep. 140; *Union Trust Co. v. Illinois Midland R. Co.* 117 U. S. 434, 29 L. ed. 963, 6 Sup. Ct. Rep. 809.

In order to entitle such a claim as that of the petitioner to payment, the petitioner must prove that current earnings were diverted for the benefit of mortgage creditors, and that there has been no restoration of the diverted fund.

St. Louis, A. & T. H. R. Co. v. Cleveland, C. C. & I. R. Co. 125 U. S. 673, 31 L. ed. 837, 8 Sup. Ct. Rep. 1011; *Kneeland v. American Loan & T. Co.* 136 U. S. 97, 34 L. ed. 383, 10 Sup. Ct. Rep. 950; *Southern R. Co. v. Carnegie Steel Co.* 176 U. S. 284, 44 L. ed. 470, 20 Sup. Ct. Rep. 347.

Mr. **Lawrence Maxwell, Jr.**, also argued the cause for respondents.

[186] *Mr. Justice **Holmes** delivered the opinion of the court:

This is a petition against a receiver appointed in proceedings for the foreclosure of two railroad mortgages. The petitioner, in pursuance of a contract made on December 1, 1896, with the Columbus, Sandusky, & Hocking Railroad Company, the mortgagor, delivered railroad ties to the value of \$4,709.53 in May and on June 1, 2, and 3, 1897. The receiver was appointed on June

1, 1897. After his appointment there was found on hand a part of the above ties, to the value of \$3,200, and these ties were used in the maintenance of the railroad as a going concern. The petitioner makes a claim on the body of the fund in the receiver's hands, for these and other necessary supplies furnished within six months, amounting in all to \$6,804.49. The claim for the ties, at least, is admitted to have been "a necessary operating expense in keeping and using said railroad, and preserving said property in a fit and safe condition as such." The petitioner waives a special claim against the receiver for \$863.39 for the ties received June 2 and 3, but does claim a lien for \$3,200, for ties on hand and not returned to him after the receiver's appointment, in case his whole claim is not allowed. The circuit court of appeals affirmed a decree of the circuit court establishing this claim as a six months' claim, but denying the right to go against the body of the fund, whereupon a certiorari was allowed by this court. 48 C. C. A. 318, 109 Fed. 220, 59 C. C. A. 637, 124 Fed. 721.

The case stands as one in which there has been no diversion of income by which the mortgagees have profited, or otherwise, and the main question is the general one, whether, in such a case, a claim for necessary supplies furnished within six months before the receiver was appointed should be charged on the corpus of the fund. There are no special circumstances affecting the claim as a whole, and if it is charged on the corpus it can be only by laying down a general rule that such claims for supplies are entitled to precedence over a lien *ex-[187] pressly created by a mortgage recorded before the contracts for supplies were made. An impression that such a general rule was to be deduced from the decisions of this court led to an evidently unwilling application of it in *New England R. Co. v. Carnegie Steel Co.* 21 C. C. A. 219, 33 U. S. App. 491, 75 Fed. 54, 58, and perhaps in other cases. But we are of opinion, for reasons that need no further statement (*Kneeland v. American Loan & T. Co.* 136 U. S. 89, 97, 34 L. ed. 379, 383, 10 Sup. Ct. Rep. 950), that the general rule is the other way, and has been recognized as being the other way by this court.

The case principally relied on for giving priority to the claim for supplies is *Miltenberger v. Logansport, C. & S. W. R. Co.* 106 U. S. 286, 27 L. ed. 117, 1 Sup. Ct. Rep. 140. But while the payment of some pre-existing claims was sanctioned in that case, it was expressly stated that "the payment of such debts stands, prima facie, on a different basis from the payment of claims arising under the receivership." The

ground of such allowance as was made was not merely that the supplies were necessary for the preservation of the road, but that the payment was necessary to the business of the road,—a very different proposition. In the later cases the wholly exceptional character of the allowance is observed and marked. *Kneeland v. American Loan & T. Co.* 136 U. S. 89, 97, 98, 34 L. ed. 379, 383, 10 Sup. Ct. Rep. 950; *Thomas v. Western Car Co.* 149 U. S. 95, 110, 111, 37 L. ed. 663, 668, 669, 13 Sup. Ct. Rep. 824; *Virginia & A. Coal Co. v. Central R. & Bkg. Co.* 170 U. S. 355, 370, 42 L. ed. 1068, 1073, 18 Sup. Ct. Rep. 657. In *Union Trust Co. v. Illinois Midland R. Co.* 117 U. S. 434, 465, 29 L. ed. 963, 973, 6 Sup. Ct. Rep. 809, labor claims accruing within six months before the appointment of the receiver were allowed without special discussion, but the principles laid down in the *Miltenberger Case* had been repeated in the judgment of the court, and the allowance was said to be in accordance with them. It would seem from *St. Louis, A. & T. H. R. Co. v. Cleveland, C. C. & I. R. Co.* 125 U. S. 658, 673, 674, 31 L. ed. 832, 837, 8 Sup. Ct. Rep. 1011, that in both those cases there was a diversion of earnings. But the payment of the employees of the road is more certain to be necessary in order to keep it running than the payment of any other class of previously incurred debts.

Cases like *Union Trust Co. v. Souther*, 107 U. S. 591, 27 L. ed. 488, 2 Sup. Ct. Rep. [188] 295, where *the order appointing the receiver authorized him to pay debts for labor or supplies furnished within six months out of income, stand on the special theory which has been developed with regard to income, and afford no authority for a charge on the body of the fund. *Fosdick v. Schall*, 99 U. S. 235, 25 L. ed. 339; *Burnham v. Bowen*, 111 U. S. 776, 28 L. ed. 596, 4 Sup. Ct. Rep. 675; *Morgan's Louisiana & T. R. & S. S. Co. v. Texas C. R. Co.* 137 U. S. 171, 34 L. ed. 625, 11 Sup. Ct. Rep. 61; *Virginia & A. Coal Co. v. Central R. & Bkg. Co.* 170 U. S. 355, 42 L. ed. 1068, 18 Sup. Ct. Rep. 657; *Southern R. Co. v. Carnegie Steel Co.* 176 U. S. 257, 44 L. ed. 458, 20 Sup. Ct. Rep. 347. It is agreed that the petitioner may have a claim against surplus earnings, if any, in the hands of the receiver, but that question is not before us here.

The order appointing the receiver did not go beyond the distinction which we have mentioned, and gave the petitioner no new or higher right than he had before. After directing him to do certain things, it gave him authority, but did not direct him, to make various payments. It gave him au-

thority, among other things, "to pay the employees, officials, and other persons having claims for wages, services, materials, and supplies due and to become due, and unpaid, growing out of the operation of the railroad of the defendant, including current and unpaid vouchers; to settle accounts incurred in the operation of the railroad of the defendant company; to pay any and all obligations accrued or accruing upon any equipment trust made by the defendant railroad company; and for such purpose, as well as for the purpose of meeting the obligations of the pay rolls," he was authorized, "in his discretion, to borrow such sums of money as may be necessary for such purpose, not exceeding \$35,000. But said receiver will pay no claims against the said railroad company which have accrued due more than six months prior to the date of this order." It is questionable whether the purposes for which the \$35,000 might be borrowed were other than paying equipment trust debts and pay rolls. But even if any words in the order authorized a charge on the corpus in order to pay claims like that of the petitioner, or a payment of them *except from income,[189] certainly there are none requiring it, or going beyond giving authority to the receiver if, for instance, he thought payments of previous debts necessary to the continued operation of the road. A strict construction of the decree is warranted by the previous decision of the same circuit court of appeals in *International Trust Co. v. T. B. Townsend Brick & Contracting Co.* 37 C. C. A. 396, 95 Fed. 850.

A few days later, on June 7, 1897, the receiver applied for and received leave to issue certificates up to \$200,000, "for the purpose of paying car trusts, maturing and matured, pay rolls, interest on terminal property, traffic balances, taxes, and sundry other obligations created in and about the maintenance and operation of said railroad within six months next preceeding and following the appointment of a receiver herein." By a further decree on July 7, \$30,000 of these certificates were applied to payment for land bought by the company, \$135,000 to car trust obligations, current pay rolls, necessary repairs, and expenses of operating the road, and \$35,000 to the pay rolls for the previous April and May. The petitioner suggested that the latter decree was a diversion of funds in which, by the terms of the order authorizing the certificates, he was entitled to share, and that the payment of the \$35,000 for the April and May labor entitles him to come in on principles of equality. It is not necessary to answer this contention at length. The original order gave the petitioner no such

rights as he asserts. It would have been a stretch of authority for the receiver, in his discretion, to apply the borrowed money to this debt. At least, he was not bound to do so. The petition on which the original order was made stated that the money was wanted to pay certain obligations, "or so much thereof as may be necessary," embodying the distinction which we have drawn from the cases. We already have intimated that the payment of railroad hands might stand on stronger grounds than the payment for past supplies; and, if the payment was wrong, it would not be righted by making another, less obviously within the scope of the decree.

[190] *We are of opinion, finally, that there is no special equity with regard to the \$3,200 worth of ties on hand and used by the receiver after his appointment. It is said that the purchase by the railroad company after it had defaulted, as it had, in the interest of its bonds, was fraudulent, and that the petitioner would have been entitled to take back the ties but for the appointment of the receiver. The answers to the contention again are numerous. It does not appear that the purchase of the ties was fraudulent. *Donaldson v. Farwell*, 93 U. S. 631, 23 L. ed. 993. It does not appear, and is not likely, that the company bought with the intention not to pay the price. It does not appear that it concealed its insolvency. The default in the interest of the bonds was a public fact. Again, it is a mere speculation whether the petitioner, if he had had the right, would have demanded back the ties. He did not demand them of the receiver. It is quite as likely that, if he had known the whole truth, he would have taken his chances. The thing that he is least likely to have known is the form of the appointment of the receiver, and, therefore, it is probably a fiction that that encouraged him to wait. It should not have encouraged him, because, as we have said, it gave him no rights. The fact that the receiver used the ties is of no importance. They already were the property of the road, and it was his business to use them. The material point is not the time when they were used, but the time when they were acquired.

Decree affirmed.

Mr. Justice **McKenna**, with whom concur Mr. Justice **Harlan** and Mr. Justice **White**, dissenting:

I am unable to concur in the opinion of the court, and the importance of the questions involved justifies an expression of the ground of my dissent.

The controversy arises from a claim, to quote from the circuit court of appeals,

"for cross ties essential to the replacement of ties decayed in current operation of the railroad. *A large proportion were on hand [191] when the receiver was appointed, and were used by him in the maintenance of the roadway. They were all purchased within six months before the receivership, and under circumstances indicating an expectation that they would be paid for out of current income. The claim is, in every respect, a highly meritorious one."

This description is supplemented by stipulation of counsel that the claim is for "necessary operating expenses in keeping and using said railroad and preserving said property in a fit and safe condition." The claim is denied, affirming the judgment of the lower court, payment out of the body of the fund in the hands of the receiver; and why? That the decisions of this court may be construed as extending the equity of claims for supplies so far is conceded. It is said: "An impression that such a general rule was to be deduced from the decisions of this court led to an evidently unwilling application of it in *New England R. Co. v. Carnegie Steel Co.* 21 C. C. A. 219, 33 U. S. App. 491, 75 Fed. 54, 58, and perhaps in other cases."

The concession hardly exhibits the strength of the sanction which the rule has received at circuit, and, apparently, neither willingly nor unwillingly, but in the desire only to ascertain what this court has decided, and to follow it. I may refer to *St. Louis Trust Co. v. Riley*, decided by the circuit court of appeals of the eighth circuit (30 L. R. A. 456, 16 C. C. A. 610, 36 U. S. App. 100, 70 Fed. 32), *Finance Co. v. Charleston, C. & C. R. Co.* in circuit court of appeals of the fourth circuit (10 C. C. A. 323, 8 U. S. App. 547, 62 Fed. 205), *New York Guaranty & Indemnity Co. v. Tacoma R. & Motor Co.* in the circuit court of appeals of the ninth circuit (27 C. C. A. 550, 48 U. S. App. 668, 83 Fed. 365). See also 36 Fed. 808; *Farmers' Loan & T. Co. v. Kansas City, W. & N. W. R. Co.* 53 Fed. 182; *Farmers' Loan & T. Co. v. Northern P. R. Co.* 68 Fed. 36; *Atlantic Trust Co. v. Woodbridge & Irrig. Co.* 79 Fed. 39. And even the sixth circuit, from whence the pending case now comes. *Central Trust Co. v. East Tennessee, V. & G. R. Co.* 26 C. C. A. 30, 47 U. S. App. 663, 80 Fed. 624.

*There is strength in this agreement at [192] circuit, and much that was said could be quoted with advantage; but, as my ultimate reliance must be the decisions of this court, I shall proceed immediately to an examination of them.

Miltenberger v. Logansport, C. & S. W. R. Co. 106 U. S. 286, 27 L. ed. 117, 1 Sup. Ct. Rep. 140, is one of the most important

of the cases. Indeed, it is the leading case, and is carried into and approved in a number of subsequent cases. The decisions which precede it, including *Fosdick v. Schall*, 99 U. S. 235, 25 L. ed. 339, I assume, are understood. *Wallace v. Loomis*, 97 U. S. 146, 24 L. ed. 895, may, however, be noticed. It was a suit to foreclose a mortgage on a railroad, in which suit a receiver was appointed. The receivers were authorized to raise money by loan upon certificates to be issued by them, "to put the road and property in repair, and to complete any uncompleted portions thereof, and to procure rolling stock, and to manage and operate the road to the best advantage, so as to prevent the property from further deteriorating, and to save and preserve the same for the benefit and interest of the first mortgage bondholders, and all others having an interest therein." The receivers obeyed the order, and the decree of the court "declared the amount due on the receiver's certificates to be a lien on the property in their hands prior to that of the first mortgage bonds." This court sustained the decree as follows:

"The power of a court of equity to appoint managing receivers of such property as a railroad, when taken under its charge as a trust fund for the payment of encumbrances, and to authorize such receivers to raise money necessary for the preservation and management of the property, and make the same chargeable as a lien thereon for its repayment, cannot at this day be seriously disputed. It is a part of that jurisdiction, always exercised by the court, by which it is its duty to protect and preserve the trust funds in its hands. It is, undoubtedly, a power to be exercised with great caution; and, if possible, with the consent or acquiescence of the parties interested in the fund."

[193] "The principle expressed was applied in the *Miltenberger Case*. The receiver appointed in that case was empowered by the court to purchase four engines, four passenger cars, and one hundred new coal cars; also to adjust certain indebtedness of connecting lines, not exceeding \$10,000, and to expend \$30,000 to complete 5 miles of road, and build a bridge, and to enter into the contracts required therefor. With the expenditure, the earnings of the road were charged "as with a first lien, prior to all encumbrances upon such road." The legality of this was contested. Speaking of the order this court said: The authority conferred by it "was intended to benefit the *res* in the hands of the court, which was the entire mortgaged property as covered by both mortgages, and not merely the equity of redemption of the mortgagor as against
197 U. S.

the mortgagee." And the power to make it was decided, the court quoting from *Wallace v. Loomis* as above, and observing "the principle thus recognized covers most of the objections here urged." The payment of \$10,000 due to connecting lines of road for materials and repairs, etc., was also sustained. It thus appears that not only expenditures made after the appointment of the receiver, but debts incurred prior to the appointment, were directed to be paid out of the corpus of the property. Justifying its decision, the court said:

"It cannot be affirmed that no items which accrued before the appointment of a receiver can be allowed in any case. *Many circumstances may exist which may make it necessary and indispensable to the business of the road and the preservation of the property, for the receiver to pay pre-existing debts of certain classes, out of the earnings of the receivership, or even the corpus of the property, under the order of the court, with a priority of lien. Yet the discretion to do so should be exercised with very great care. The payment of such debts stands, prima facie, on a different basis from the payment of claims arising under the receivership, while it may be brought within the principle of the latter by special circumstances.* It is easy to see that the payment *of unpaid debts for operating[194] expenses, accrued within ninety days, due by a railroad company suddenly deprived of the control of its property, due to the operatives in its employ, whose cessation from work simultaneously is to be deprecated, in the interests both of the property and of the public, and the payment of the limited amounts due to other and connecting lines of road for materials and repairs and for unpaid ticket and freight balances, the outcome of indispensable business relations, where a stoppage of the continuance of such business relations would be a probable result in case of nonpayment, the general consequence involving largely also the interests and accommodation of travel and traffic, may well place such payments in the category of payments to preserve the mortgaged property in a large sense, by maintaining the goodwill and integrity of the enterprise, and entitle them to be made a first lien. This view of the public interest in such a highway for public use as a railroad is, as bearing on the maintenance and use of its franchises and property in the hands of a receiver, with a view to public convenience, was the subject of approval by this court, speaking through Mr. Justice Woods, in *Barton v. Barbour*, 104 U. S. 126, 26 L. ed. 672. The appellants furnish no basis for questioning any specific amounts allowed

in respect to the arrears referred to, but object to the allowance of anything out of the sale of the corpus for such expenditures. Under all the circumstances of this case, we see no valid objection to the provisions of the orders complained of."

The case is not overruled; it is distinguished, and the distinction seems to be based upon the difference between supplies for preservation of the road and payments necessary to the business of the road. Is not the distinction questionable? Can anything be done for the preservation of a road that is not done for its business? If a distinction can be made, how immediate to the business must the supplies be? Is not a bridge across a stream as indispensable to the "accommodation of travel and traffic" as "unpaid ticket and freight balances?" *Or (as in the case at bar) is not "the replacement of ties decayed in current operation" as indispensable as the payment of laborers? It is conceded that labor claims were decreed to be paid in *Union Trust Co. v. Illinois Midland R.* 117 U. S. 434, 29 L. ed. 963, 6 Sup. Ct. Rep. 809. Then why not the other? What distinction in principle can there be in expenditures for any of the many things which are necessary to keep a railroad a going concern? Let all the expenditures be declared subordinate which are subsequent to the mortgage, and it can be understood. But how can a distinction be made in value and preferential payment between equally indispensable things?

It is said, however, that the later cases have observed and marked "the wholly exceptional character of the allowance" made in the *Miltenberger Case*. *Kneeland Case*, 136 U. S. 89, 34 L. ed. 379, 10 Sup. Ct. Rep. 950, *Thomas Case*, 149 U. S. 95, 37 L. ed. 663, 13 Sup. Ct. Rep. 824, and *Virginia & A. Coal Co. v. Central R. & Bkg. Co.* 170 U. S. 355, 42 L. ed. 1068, 18 Sup. Ct. Rep. 657, are cited. Two deductions may be made. If it is meant that the instances were exceptional, I am not at present concerned with it. If it is meant that the principle was, I cannot assent. Admonition to care in the application of a principle is one thing: its overthrow another; and the principle of the *Miltenberger Case* has never been overthrown. *Virginia & A. Coal Co. v. Central R. & Bkg. Co.* explains the other two cases. It involved the payment for coal supplied before the appointment of a receiver. There was surplus income during the receivership, and the point under discussion in the case at bar was not directly presented. But there were some observations made which are of value. They remove diversion of income as an element of decision or confusion. It was declared to be immaterial to the equity invoked for the

claim whether there had been diversion of income by the company before the appointment of the receiver or afterwards by the receiver; and it is only necessary to consider whether the equity was confined to surplus earnings. I think that it was not so confined. There were surplus earnings, and the principle which established an equity in them was alone contested, *and[196] was alone necessary to be decided. The decision was carefully made upon a review and an estimate of prior cases. The admonitions of the *Kneeland Case* and the *Thomas Case* were not overlooked. Regarding them, and in connection with them, the *Miltenberger Case* was quoted from, and not only left undisturbed, but approved; and from it, as well as from other cases, was deduced the principle which was applied in the judgment. And that principle has its foundation in the public interests. A railroad, from its nature and public responsibilities, must be kept a going concern. This is the supreme necessity, and affords the test of the equity invoked for the claims for supplies. It cannot depend upon diversion of income or upon the existence of income. It cannot be confined to debts contracted during the receivership. It may extend to debts contracted before the appointment of the receiver. But, recognizing that there must be some limitation of time, the courts have fixed six months as the period within which preferential claims may accrue. And there is no infringement of the rights of mortgagees. Their interests are served, as those of the public are, by keeping the railroad in operation. The limitations of the rule dependent upon the conditions under which supplies are furnished are expressed in *Virginia & A. Coal Co. v. Central R. & Bkg. Co.* 170 U. S. 355, 42 L. ed. 1068, 18 Sup. Ct. Rep. 657, and in *Southern R. Co. v. Carnegie Steel Co.* 176 U. S. 257, 44 L. ed. 458, 20 Sup. Ct. Rep. 347.

The claim in controversy is manifestly within the rule. It is, as we have seen, "for cross ties essential to the replacement of ties decayed in current operation." In other words, used in and necessary for the business of the road, and comes even within the limitation which the court implies may put on the *Miltenberger Case*. There is another consideration which may be urged in addition to or independently of the general rule. Ties of the value of \$3,200 were used by the receiver after his appointment. This circumstance is too summarily dismissed from consideration. "The material point is," it is said, "not the time when they were used, but the time when *they[197] were acquired." A broad declaration, and seems to make all claims accruing before the receivership nonpreferential. This prob-

ably is not intended; and, not extending the remark so far, is not the time of use important if we regard the substance of things? It must not be overlooked that we are dealing with equitable considerations. What would be said of an expenditure by the receiver for ties to displace decaying ones, if those furnished by petitioner had not been at hand? Was it not, at least, competent for a court of equity to have restored the ties upon the application of the petitioner? It is said, however, "it is mere speculation if he would have demanded back the ties." He was not given an opportunity. But suppose "he would have taken his chance?" Of what and upon what assurance? Certainly upon the assurance, in addition to his general equity, that a court of equity would not deliberately use his property through its officer, the receiver, in the interest of the business of the road, whose affairs it was administering, and not find in its powers the means and right to order payment for the property so used.

J. B. CARO *et al.*, *Plffs. in Err.*,
v.

W. H. DAVIDSON *et al.*

(See S. C. Reporter's ed. 197-200.)

Error to state court—Federal question—decision by necessary intendment.

A decision sustaining the validity, under the *ex post facto* clause of the Federal Constitution, of Fla. act of May 30, 1901, amending Fla. Rev. Stat. § 970, so as to prevent collateral attack of a judgment for a disqualification which does not appear of record in the cause, is not so necessarily involved in the denial by the highest state court of a petition to vacate a decree entered before the amendment, for the relationship existing between the judges and one of the parties, which was not known at the time, as to sustain the exercise by the Federal Supreme Court of its appellate jurisdiction over state courts.

[No. 196.]

Submitted January 23, 1905. Decided March 13, 1905.

IN ERROR to the Supreme Court of the State of Florida to review a decree

which affirmed a decree of the Circuit Court of Escambia County, in that state, denying a petition to vacate certain decrees for the relationship existing between the judge and one of the parties. On motion to dismiss for want of jurisdiction, *dismissed*.

The facts are stated in the opinion.

Messrs. H. A. Herbert and Benjamin Micou submitted the cause for plaintiffs in error. **Messrs. E. T. Davis and Simeon S. Belden** were on the brief.

Messrs. William A. Blount and A. C. Blount, Jr., submitted the cause for defendants in error.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

Plaintiffs in error filed their petition in the circuit court *of Escambia county, Flor-[199]ida, in April, 1901, for the vacation of certain interlocutory and final decrees rendered March 5, 1887, April 4, 1887, and January 17, 1889, in favor of complainants, in a certain cause theretofore pending, on the ground that the said orders and decrees were null and void because the judge by whom they were entered was the husband of the sister of one of the complainants, having at the time living children, the issue of their marriage, it being also averred that the relationship was not known until February, 1901.

Defendants in error set up by answer two defenses: (1) That the original cause was carried to the supreme court of Florida, and there examined upon its merits, and a decree rendered affirming the decree below. (2) That the wife of the circuit judge had died ten years prior to the bringing of that suit.

The petition to vacate the decree was denied July 13, 1901, by the circuit court, and its decree to that effect was affirmed by the supreme court, November 17, 1903 (the case having been submitted March 31, 1902), whereupon this writ of error was allowed, and comes before us on a motion to dismiss for want of jurisdiction.

The state supreme court delivered no opinion in affirming the decree denying the petition to vacate, and the record discloses no title, right, privilege, or immunity spe-

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see *Hamblin v. Western Land Co.* 37 L. ed. U. S. 287; *Kipley v. Illinois*, 42 L. ed. U. S. 998, and *Re Buchanan*, 39 L. ed. U. S. 884.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to *Apex Transp. Co. v. Garbade*, 62 L. R. A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme
197 U. S.

Court of the United States—see note to *Mutual L. Ins. Co. v. McGrew*, 63 L. R. A. 33.

On what the record must show respecting the presentation and decision of a Federal question in order to confer jurisdiction on the Supreme Court of the United States on a writ of error to a state court—see note to *Hooker v. Los Angeles*, 63 L. R. A. 471.

As to what is the record for the purpose of showing the jurisdiction of the Supreme Court of the United States of a writ of error to a state court—see note to *Home for Incurables v. New York*, 63 L. R. A. 329.

cially set up or claimed under the Constitution or any law of the United States, which was denied by the decision; nor any assertion of an infraction of the 14th Amendment, or any provision of the Constitution. But it is said that, by necessary intentment the validity of an act of the general assembly of Florida of May 30, 1901, was drawn in question as repugnant to the Constitution of the United States, and its validity sustained. The act referred to provided that § 970 of the Revised Statutes of Florida was thereby amended so as to read: "Any and all judgments, decrees, and orders heretofore or hereafter rendered in causes where the disqualifications appear of record in the cause, shall be void; but where the [200] disqualification *does not so appear, they shall not be subject to collateral attack." Fla. Sess. Laws, 1901, p. 39.

The contention is that the judgment of the supreme court proceeded upon this act, which was invalid, if so applied, because *ex post facto*, and that, therefore, this court has jurisdiction, inasmuch as the validity of the act was thus drawn in question, and its validity sustained. Yet no definite issue as to the validity of that statute was distinctly deducible from the record, no decision in favor of its validity appeared therefrom, and the judgment might have rested on grounds not involving its validity.

Whether the supreme court of Florida, if it sustained the decree of the circuit court in denying the petition on either of the grounds set up in defense, committed error cognizable here, or whether the act referred to was applied, as asserted, in contravention of the Constitution of the United States, we are not called on to consider; since we do not find that any Federal question was so raised, on the petition or in the proceedings thereunder, at the proper time and in the proper way, as to give us jurisdiction under § 709 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 575). *Mutual L. Ins. Co. v. McGrew*, 188 U. S. 291, 307, 308, 47 L. ed. 480, 485, 23 Sup. Ct. Rep. 375; *Powell v. Brunswick County*, 150 U. S. 433, 37 L. ed. 1134, 14 Sup. Ct. Rep. 166; *Sayward v. Denny*, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777.

Writ of error dismissed.

UNITED STATES, *Appt.*,

v.

JAMES STINSON and Henry J. Stinson, and Michael S. Bright, as Receiver of James Stinson.

(See S. C. Reporter's ed. 200-207.)

Appeal—review of finding as to fraud.

The concurrent findings of the two lower courts

that a patentee of lands conveyed to him by the entrymen immediately after entry under the pre-emption laws was not guilty of fraud in acquiring the title, so as to permit the United States to maintain an action to set aside the patents, will not be disturbed by the Federal Supreme Court, where the suit was begun forty years after the alleged fraud, when the property had passed into the possession of the receiver of the patentee, appointed at the instance of his creditors, and the testimony of those of the still living pre-emptors who were called to testify on the question of fraud was conflicting.

[No. 153.]

Argued January 25, 26, 1905. Decided March 13, 1905.

A PPEAL from the United States Circuit Court of Appeals for the Seventh Circuit to review a decree which affirmed a decree of the Circuit Court for the Western District of Wisconsin, dismissing a bill to set aside patents for certain sections of land, alleged to have been fraudulently acquired. *Affirmed.*

See same case below, 60 C. C. A. 615, 125 Fed. 907.

Statement by Mr. Justice **Brewer**:

This suit was commenced in the circuit court of the United States for the western district of Wisconsin, on February 25, 1895, to set aside the patents for fourteen quarter sections of land, charged to have been fraudulently acquired by the defendant James Stinson. The lands were entered under the pre-emption laws, in 1854-55, by different individuals, and immediately thereafter conveyed by them to James Stinson. The government, as admitted, received \$1.25 per acre, the statutory price for lands so entered. The frauds charged are that the entrymen did not occupy and improve the lands as required by law, and did not enter them for their own benefit, but were employed by James Stinson to make the entries; that he paid the purchase price to the government, and also paid the entrymen for their services, and thus, in defiance of the provisions of the statutes, obtained title to the lands. James Stinson, in his answer, under oath, denied specifically the alleged frauds. Quite a volume of testimony was taken. Upon this the circuit court found that it was not true, as alleged, that James Stinson had been guilty of fraud in obtaining the title to the lands, and dismissed the bill. This dismissal was affirmed by the circuit court of appeals (60 C. C. A. 615, 125 Fed. 907), from whose decree the United States appealed to this court.

Messrs. Marsden C. Burch and John B. Simmons argued the cause, and, with *Solicitor General Hoyt*, filed a brief for appellant.

Mr. R. M. Bashford argued the cause, and, with *Messrs. John C. Spooner* and *A. L. Sanborn*, filed a brief for appellees.

Messrs. William E. Church, Robert McMurdy, and Roger Sherman filed a special brief for appellees.

Mr. Justice Brewer delivered the opinion of the court:

While the government, like an individual, may maintain any appropriate action to set aside its grants and recover property of which it has been defrauded, and while laches or limitation do not of themselves constitute a distinct defense as against it, yet certain propositions in respect to such an action have been fully established. First, the respect due to a patent,—the presumption that all the preceding steps required by law have been observed before its issue. The immense importance and necessity of the stability of titles depending upon these official instruments demand that suits to set aside and annul them should be sustained only when the allegations on which this is attempted are clearly stated and fully sustained by proof. *Maxwell Land-Grant Case (United States v. Maxwell Land-Grant Co.)*, 121 U. S. 325, 30 L. ed. 949, 7 Sup. Ct. Rep. 1015; *Colorado Coal & I. Co. v. United States*, 123 U. S. 307, 31 L. ed. 182, 8 Sup. Ct. Rep. 131; *United States v. San Jacinto Tin Co.* 125 U. S. 273, 31 L. ed. 747, 8 Sup. Ct. Rep. 850; *United States v. Des Moines Nav. & R. Co.* 142 U. S. 510, 35 L. ed. 1099, 12 Sup. Ct. Rep. 308; *United States v. Budd*, 144 U. S. 154, 36 L. ed. 384, 12 Sup. Ct. Rep. 575; *United States v. American Bell Teleph. Co.* 167 U. S. 224, 42 L. ed. 144, 17 Sup. Ct. Rep. 809.

[205] *Second. The government is subjected to the same rules respecting the burden of proof, the quantity and character of evidence, the presumptions of law and fact, that attend the prosecution of a like action by an individual. "It should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful." *Maxwell Land-Grant Case (United States v. Maxwell Land-Grant Co.)*, 121 U. S. 325, 381, 30 L. ed. 949, 959, 7 Sup. Ct. Rep. 1015; *United States v. Iron Silver Min. Co.* 128 U. S. 673, 677, 32 L. ed. 571, 573, 9 Sup. Ct. Rep. 195; *United States v. Des Moines Nav. & R. Co.* 142 U. S. 510, 541, 35 L. ed. 1099, 1108, 12 Sup. Ct. Rep. 308.

Third. It is a good defense to an action to set aside a patent that the title has passed
197 U. S.

to a bona fide purchaser, for value, without notice. And, generally speaking, equity will not simply consider the question whether the title has been fraudulently obtained from the government, but also will protect the rights and interests of innocent parties. *United States v. Burlington & M. River R. Co.* 98 U. S. 334, 342, 25 L. ed. 198, 200. *Colorado Coal & I. Co. v. United States*, 123 U. S. 307, 313, 31 L. ed. 182, 185, 8 Sup. Ct. Rep. 131,—a case in which, as here, suit was brought to set aside land patents on the ground that they had been obtained by fraud, and in which we said:

"But it is not such a fraud as prevents the passing of the legal title by the patents. It follows that, to a bill in equity to cancel the patents upon these grounds alone, the defense of a bona fide purchaser for value, without notice, is perfect." *United States v. Marshall Silver Min. Co.* 129 U. S. 579, 589, 32 L. ed. 734, 738, 9 Sup. Ct. Rep. 343; *United States v. California & O. Land Co.* 148 U. S. 31, 41, 37 L. ed. 354, 359, 13 Sup. Ct. Rep. 458; *United States v. Winona & St. P. R. Co.* 165 U. S. 463, 479, 41 L. ed. 789, 796, 17 Sup. Ct. Rep. 368.

Waiving any inquiry as to the claim of ignorance on the part of the government, in respect to the matters complained of, until shortly before suit, and simply noting the fact that there was fragmentary testimony tending to show notice at about the time of the entries, sufficient to put upon the government the duty of inquiry, we pass to consider the merits of the case. Forty years intervened between the time of the alleged fraud and the commencement of [206] this suit. Six, at least of the fourteen pre-emptors, were then dead. One of the living was shown to be quite old, and to have failed in health and memory. Only four were called as witnesses: two by the government and two by the defendant. The evidence of the former tended to sustain the allegations of fraud, and that of the latter supported the denial of the defendant. At such a lapse of time it is not strange that the memory of all the witnesses should be of doubtful reliability. They might remember the general fact that they entered the land, and that they received some money out of the transaction, but the details—the various acts and conversations—might well be forgotten. There is nothing to show that their attention was ever called to the matter during the intervening time; nothing transpired which would induce them to fix their memories upon any particular facts. Even the testimony on behalf of the government shows that they believed that they were engaged in a legitimate effort to obtain title to the lands, and expected to make profit out of them. They naturally took

the steps in reference to occupation and improvement which they were advised were sufficient, and, having paid for the land, supposed that everything was rightfully done. The conduct of defendant Stinson does not indicate a consciousness of wrongdoing. He remained a resident of the locality, the title was not transferred, there was no attempt to place it in the hands of a bona fide purchaser,—no such conduct as would ordinarily characterize a conscious wrongdoer. He came to Superior when it was a mere village, interested himself with others in the building up of a city, having faith in its future. The money which was invested in these lands was his father's, and he took the title in his own name, but really in trust for his father. Subsequently he became the owner of part or all, and retained the title until after this suit was brought. The lands, at the time of the entry, were in the forest, with only scanty population within a reasonable distance, and apparently were worth no more than [207] the purchase price. *Now that Superior has grown to be a city, they have increased largely in value. He engaged in financial operations, contracted debts on the strength of a responsibility based upon the ownership of these lands, and finally became so deeply in debt that the property passed into the possession of a receiver, appointed at the instance of his creditors. Although the latter may not be technically a bona fide purchaser, yet he holds the lands for those who have dealt with the defendant Stinson on the faith of his ownership, and they are equitably entitled to protection.

Further, the circuit court, on its review of the testimony, found that there was no fraud, and decreed a dismissal, and that finding and decree were approved by the court of appeals. While such a finding is not conclusive upon this court, yet it is entitled to great consideration, and should not be disturbed unless plainly against the testimony.

Putting all these things together, we are of the opinion that the *decree of the circuit court was right, and it is affirmed.*

SAMUEL M. CLYATT

v.

UNITED STATES.

(See S. C. Reporter's ed. 207-223.)

Constitutional law—validity of congressional legislation against peonage—scope of statute—evidence to sustain conviction—appeal—sufficiency of bill of exceptions.

1. The enactment of the prohibition against

peonage in any state or territory of the United States, contained in U. S. Rev. Stat. §§ 1990, 5526 (U. S. Comp. Stat. 1901, pp. 1266, 3715), was authorized by the provisions of U. S. Const. 13th Amend., forbidding slavery or involuntary servitude within the United States or any place subject to their jurisdiction, and granting to Congress the power to enforce the prohibition by appropriate legislation.

2. The holding of another in a state of peonage, whether sanctioned or not by municipal or state law, is included in the prohibition against peonage in any state or territory of the United States, contained in U. S. Rev. Stat. §§ 1990, 5526 (U. S. Comp. Stat. 1901, pp. 1266, 3715), enacted by Congress in the exercise of its power, under U. S. Const. 13th Amend., to enforce, by appropriate legislation, the provision of that amendment forbidding slavery or involuntary servitude within the United States or in any place subject to their jurisdiction.
3. Evidence of a prior condition of peonage, to which the persons so held were returned by the acts of the defendant, is essential to support a conviction under an indictment charging him with returning certain designated persons to a condition of peonage.
4. The lack of an affirmative statement in the bill of exceptions, in a criminal case, that it contains all the testimony, is not fatal, where the recitals in such bill sufficiently show that fact.
5. The failure to request that the jury be instructed to find for the defendant will not prevent the Federal Supreme Court, in reviewing a conviction of crime, from examining the record to see if there was any proof of a material element of the crime charged.

[No. 235.]

Argued December 13, 14, 1904. Decided March 13, 1905.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, bringing up for review a judgment of the Circuit Court for the Northern District of Florida, convicting defendant of returning certain specified persons to a condition of peonage, which judgment had been taken to the Circuit Court of Appeals by a writ of error to the Circuit Court. *Reversed* and the cause remanded for a new trial.

Statement by Mr. Justice **Brewer**:

Sections 1990 and 5526, Rev. Stat. (U. S. Comp. Stat. 1901, pp. 1266, 3715), read:

"Sec. 1990. The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in the territory of New Mexico, or in any other territory or state of the United States; and all acts, laws, resolutions, orders, regulations, or usages of the territory of New Mexico, or of any other terri-

tory or state, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise, are declared null and void."

"Sec. 5526. Every person who holds, arrests, returns, or causes to be held, arrested, or returned, or in any manner aids in the arrest or return of any person to a condition of peonage, shall be punished by a [209] fine of not less than one thousand nor more than five thousand dollars, or by imprisonment not less than one year nor more than five years, or by both."

On November 21, 1901, the grand jury returned into the circuit court of the United States for the northern district of Florida an indictment in two counts, the first of which is as follows:

"The grand jurors of the United States of America impaneled and sworn within and for the district aforesaid, on their oaths present, that one Samuel M. Clyatt, heretofore, to wit: on the eleventh day of February, in the year of our Lord one thousand nine hundred and one, in the county of Levy, state of Florida, within the district aforesaid, and within the jurisdiction of this court, did then and there unlawfully and knowingly return one Will Gordon and one Mose Ridley to a condition of peonage, by forcibly and against the will of them, the said Will Gordon and the said Mose Ridley, returning them, the said Will Gordon and Mose Ridley, to work to and for Samuel M. Clyatt, D. T. Clyatt, and H. H. Tift, copartners doing business under the firm name and style of Clyatt & Tift, to be held by them, the said Clyatt & Tift, to work out a debt claimed to be due to them, the said Clyatt & Tift, by the said Will Gordon and Mose Ridley; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States."

The second count differs only in charging that defendant caused and aided in returning Gordon and Ridley. A trial resulted in a verdict of guilty, and thereupon the defendant was sentenced to confinement at hard labor for four years. The case was taken on appropriate writ to the court of appeals for the fifth circuit, which certified to this court three questions. Subsequently the entire record was brought here on a writ of certiorari, and the case was heard on its merits.

197 U. S.

Messrs. William G. Brantley and A. O. Bacon argued the cause, and, with Mr. W. M. Hammond, filed a brief for Clyatt:

To apply the congressional legislation to the acts of individuals in a state where no law or usage exists to justify them would be to confer upon Congress a power not only prohibited to Congress, but specifically reserved to the states.

Moore v. Illinois, 14 How. 17, 14 L. ed. 307; *United States v. Dewitt*, 9 Wall. 41, 19 L. ed. 593; *Martin v. Hunter*, 1 Wheat. 324, 326, 4 L. ed. 102, 103; *Slaughter-House Cases*, 16 Wall. 82, 21 L. ed. 410; *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *Coffee v. Groover*, 123 U. S. 31, 31 L. ed. 63, 8 Sup. Ct. Rep. 1; *United States v. Fox*, 95 U. S. 672, 24 L. ed. 539; *United States v. Harris*, 106 U. S. 629, 27 L. ed. 290, 1 Sup. Ct. Rep. 601; *Re Rahrer (Wilkinson v. Rahrer)* 140 U. S. 554, 35 L. ed. 574, 11 Sup. Ct. Rep. 865; *Cooley*, Const. Lim. 704, 706; *Pom. Constitutional Law*, p. 154.

Before Congress could inflict punishment on a citizen of a state for the offense of slavery or involuntary servitude the penalty would have to be directed against those who practised slavery or involuntary servitude by virtue of some law or license of their state, for in no other way could the slavery or involuntary servitude referred to in U. S. Const., 13th Amend., exist.

Plessy v. Ferguson, 163 U. S. 542, 41 L. ed. 257, 16 Sup. Ct. Rep. 1138; *Cleland v. Waters*, 16 Ga. 505; *Civil Rights Cases*, 109 U. S. 20, 27 L. ed. 842, 3 Sup. Ct. Rep. 18; 25 Am. & Eng. Enc. Law, p. 1089; *Jones v. Vanzandt*, 2 McLean, 601, Fed. Cas. No. 7,501; *Miller v. McQuerry*, 5 McLean, 469, Fed. Cas. No. 9,583; *Williams v. Johnson*, 30 Md. 500, 96 Am. Dec. 613; *Lemmon v. People*, 20 N. Y. 563.

The only peonage affected by the 13th Amendment is that which develops or amounts to slavery or involuntary servitude.

Slaughter-House Cases, 16 Wall. 72, 21 L. ed. 407.

The same rule applies to peonage that applies to slavery; and, the rule as to slavery being, if there is no law to authorize it there is no slavery, it necessarily follows, if there is no law to authorize peonage there is no peonage.

The 13th Amendment in its prohibitory feature is aimed solely at the states.

Slaughter-House Cases, 16 Wall. 69, 21 L. ed. 406; *Le Grand v. United States*, 12 Fed. 577; *People v. Brady*, 40 Cal. 198, 6 Am. Rep. 604; *Re Parrott*, 6 Sawy. 349, 1 Fed. 481; *Re Turner*, 1 Abb. (U. S.) 84, Fed. Cas. No. 14,247; *United States v.*

Cruikshank, 1 Woods, 308, Fed. Cas. No. 14,897.

The 13th Amendment in its declaratory phase does apply to individuals.

Civil Rights Cases, 109 U. S. 20, 27 L. ed. 842; *Re Turner*, 1 Abb. (U. S.) 84, Fed. Cas. No. 14,247; *Re Sah Quah*, 31 Fed. 327.

The decisions under the 14th Amendment give no intimation or suggestion that the power of Congress over the citizens of the states, or over the police power of the states, was broadened by the 13th Amendment.

Coffee v. Groover, 123 U. S. 31, 31 L. ed. 63, 8 Sup. Ct. Rep. 1; *United States v. Stanley*, 109 U. S. 17, 27 L. ed. 841, 3 Sup. Ct. Rep. 18; *Slaughter-House Cases*, 16 Wall. 78, 21 L. ed. 409; *United States v. Harris*, 106 U. S. 629, 27 L. ed. 290, 1 Sup. Ct. Rep. 601; *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *Ex parte Virginia*, 100 U. S. 339, 25 L. ed. 676; *Re Kemmler*, 136 U. S. 436, 34 L. ed. 519, 10 Sup. Ct. Rep. 930; *Re Converse*, 137 U. S. 624, 34 L. ed. 796, 11 Sup. Ct. Rep. 191; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; *Leeper v. Texas*, 139 U. S. 463, 35 L. ed. 225, 11 Sup. Ct. Rep. 577; *Claybrook v. Owensboro*, 16 Fed. 301; *United States v. Washington*, 4 Woods, 351, 20 Fed. 630.

The 15th Amendment is also limited to state action.

James v. Bowman, 190 U. S. 136, 47 L. ed. 981, 23 Sup. Ct. Rep. 678.

These Amendments, together with the 13th, being one general scheme to confer civil rights upon the negro, it would seem that, reasoning by analogy alone, the prohibition feature or part of the 13th Amendment is, likewise, limited to state action.

The power, duty, and responsibility to protect the citizens of a state and to enforce their rights under any amendment to the United States Constitution rest with the state, and not with the United States, government.

Neal v. Delaware, 103 U. S. 370, 26 L. ed. 567.

The statute has no application to Georgia, there being no peonage in Georgia.

United States v. Eberhart, 127 Fed. 252.

There is no concurrent jurisdiction of the state and of the United States to punish the same criminal offense.

United States v. Cruikshank, 92 U. S. 550, 23 L. ed. 590; *Gibbons v. Ogden*, 9 Wheat. 234, 6 L. ed. 79; *Fox v. Ohio*, 5 How. 434, 12 L. ed. 223; *United States v. Marigold*, 9 How. 560, 13 L. ed. 257; *Cross v. United States*, 132 U. S. 131, 33 L. ed. 287, 10 Sup. Ct. Rep. 47.

No rights not granted or secured by the Constitution can be protected by act of Congress.

United States v. Cruikshank, 92 U. S. 550, 23 L. ed. 590.

The right to personal liberty is not granted by the 13th Amendment, or by any other part of the Constitution, but is a right inherent in the people, and to be protected against lawless violence by the state.

United States v. Cruikshank, 92 U. S. 553, 23 L. ed. 591.

The right to personal liberty is secured against violation by the United States in the 5th Amendment, and against violation by the state in the 14th Amendment. We are, therefore, at once to understand that it is a right not created or conferred by the Constitution, and that the affirmative enforcement of the right belongs to the state as a part of its residuary sovereignty.

United States v. Cruikshank, 92 U. S. 554, 23 L. ed. 592, 1 Woods, 308, Fed. Cas. No. 14,897; *Logan v. United States*, 144 U. S. 293, 36 L. ed. 439, 12 Sup. Ct. Rep. 617; *Re Kemmler*, 136 U. S. 448, 34 L. ed. 524, 10 Sup. Ct. Rep. 930; *Re Converse*, 137 U. S. 632, 34 L. ed. 799, 11 Sup. Ct. Rep. 191.

A ground in a motion for a new trial or in arrest of judgment, of an entire absence of evidence on a material point, raises purely a question of law.

Metropolitan R. Co. v. Moore, 121 U. S. 567, 30 L. ed. 1024, 7 Sup. Ct. Rep. 1334.

Attorney General **Moody** argued the cause, and, with Assistant Attorney General **Purdy**, filed a brief for the United States:

Under the 13th Amendment Congress has the power, so far as is necessary and proper, to eradicate all forms of slavery and involuntary servitude; and such legislation may be direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not.

Plessy v. Ferguson, 163 U. S. 537, 542, 41 L. ed. 256, 257, 16 Sup. Ct. Rep. 1138; *Slaughter-House Cases*, 16 Wall. 36, 67, 68, 72, 21 L. ed. 394, 405, 407; *Civil Rights Cases*, 109 U. S. 3, 20, 23, 27 L. ed. 836, 842, 843, 3 Sup. Ct. Rep. 18; *Robertson v. Baldwin*, 165 U. S. 275, 280, 41 L. ed. 715, 717, 17 Sup. Ct. Rep. 326.

The system of Mexican peonage and the holding of a person to a condition of peonage is involuntary servitude within the meaning of the Constitution.

Jaremillo v. Romero, 1 N. M. 190.

Enforced labor on the part of the servant under a contract with the master for personal services has never been regarded as sanctioned either by the laws of England or America.

Robertson v. Baldwin, 165 U. S. 275, 41 L. ed. 715, 17 Sup. Ct. Rep. 326; *Smith, Mast. & S.* chap. 9, p. 273. See also 1 Bl. Com. chap. 14; 2 Kent, Com. 7th ed. p. 282;

Clark's Case, 1 Blackf. 122, 12 Am. Dec. 213; Reeve, Dom. Rel. 4th ed. p. 418.

So far as the enforcement and operation of this statute are concerned, the question of the existence of a state law or usage creating or sanctioning peonage or a system of peonage is entirely immaterial.

Peonage Cases, 123 Fed. 671.

Where the whole of the evidence is not preserved in the bill of exceptions or some other part of the record, the appellate court will not review objections based upon the insufficiency of the evidence. The record must expressly show that it contains all the evidence, and the presumption will not be indulged in that the record contains all the evidence. It has even been held that an express statement in the bill of exceptions that it contains all the evidence is not conclusive if it clearly shows that it does not.

Marshall v. State, 32 Fla. 462, 14 So. 92; *Carmichael v. State*, 111 Ga. 653, 36 S. E. 872; *Griffin v. State*, 116 Ga. 562, 42 S. E. 752; *Pace v. State*, 152 Ind. 343, 53 N. E. 183; *State v. Sexauer*, 88 Iowa, 722, 54 N. W. 431; *State v. Reilly*, 37 La. Ann. 5; *State v. Clarkson*, 96 Mo. 364, 9 S. W. 925; *State v. Gardner*, 33 Or. 149, 54 Pac. 809; *Griggs v. State*, 58 Ala. 425, 29 Am. Rep. 762; *Tarble v. People*, 111 Ill. 120; *Siple v. State*, 154 Ind. 647, 57 N. E. 544; *State v. French*, 96 Iowa, 255, 65 N. W. 156; *People v. Bradner*, 44 Hun, 233; *McAllister v. State*, 112 Wis. 496, 88 N. W. 212; *Gill v. State*, 43 Ala. 38; *Herzinger v. State*, 70 Md. 278, 17 Atl. 81; *State v. Carey*, 4 Wash. 424, 30 Pac. 729; *Morrow v. State*, 48 Ind. 432.

Mr. Justice **Brewer** delivered the opinion of the court:

The constitutionality and scope of §§ 1990 and 5526 present the first questions for our consideration. They prohibit peonage. What is peonage? It may be defined as a status or condition of compulsory service, based upon the indebtedness of the peon to the master. The basal fact is indebtedness. As said by Judge Benedict, delivering the opinion in *Juremillo v. Romero*, 1 N. M. 190, 194: "One fact existed universally: all were indebted to their masters. This was the cord by which they seemed bound to their master's service." Upon this is based a condition of compulsory service. Peonage is sometimes classified as voluntary or involuntary; but this implies simply a difference in the mode of origin, but none in the character of the servitude. The one exists where the debtor voluntarily contracts to enter the service of his creditor. The other is forced upon the debtor by some provision of law. But peonage, however created, is compulsory service,—involuntary servitude. The peon can release him-

self therefrom, it is true, by the payment of the debt, but otherwise the service is enforced. A clear distinction exists between peonage and the voluntary performance of labor or rendering of services in payment of a debt. In the latter case the debtor, though contracting to pay his indebtedness by labor or service, and subject, like any other contractor, to an action for damages for breach of that contract, can elect at any time to break it, and no law or force compels *performance or a continuance of the service. We need not stop to consider any possible limits or exceptional cases, such as the service of a sailor (*Robertson v. Baldwin*, 165 U. S. 275, 41 L. ed. 715, 17 Sup. Ct. Rep. 326), or the obligations of a child to its parents, or of an apprentice to his master, or the power of the legislature to make unlawful, and punish criminally, an abandonment by an employee of his post of labor in any extreme cases. That which is contemplated by the statute is compulsory service to secure the payment of a debt. Is this legislation within the power of Congress? It may be conceded, as a general proposition, that the ordinary relations of individual to individual are subject to the control of the states, and are not intrusted to the general government; but the 13th Amendment, adopted as an outcome of the Civil War, reads:

"Sec. 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

"Sec. 2. Congress shall have power to enforce this article by appropriate legislation."

This amendment denounces a status or condition, irrespective of the manner or authority by which it is created. The prohibitions of the 14th and 15th Amendments are largely upon the acts of the states; but the 13th Amendment names no party or authority, but simply forbids slavery and involuntary servitude, grants to Congress power to enforce this prohibition by appropriate legislation. The differences between the 13th and subsequent amendments have been so fully considered by this court that it is enough to refer to the decisions. In the *Civil Rights Cases*, 109 U. S. 3, 20, 23, 27 L. ed. 835, 842, 843, 3 Sup. Ct. Rep. 18, 28, 30, Mr. Justice Bradley, delivering the opinion of the court, uses this language:

"This amendment, as well as the 14th, is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances. By its own unaided force and effect it abolished slavery, and *established[217]

universal freedom. Still, legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation may be primary and direct in its character; for the amendment is not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States. . . .

"We must not forget that the province and scope of the 13th and 14th Amendments are different; the former simply abolished slavery: the latter prohibited the states from abridging the privileges or immunities of citizens of the United States; from depriving them of life, liberty, or property without due process of law, and from denying to any the equal protection of the laws. The amendments are different, and the powers of Congress under them are different. What Congress has power to do under one, it may not have power to do under the other. Under the 13th Amendment, it has only to do with slavery and its incidents. Under the 14th Amendment, it has power to counteract and render nugatory all state laws and proceedings which have the effect to abridge any of the privileges or immunities of citizens of the United States, or to deprive them of life, liberty, or property without due process of law, or to deny to any of them the equal protection of the laws. Under the 13th Amendment, the legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not; under the 14th, as we have already shown, it must necessarily be, and can only be, corrective in its character, addressed to counteract and afford relief against state regulations or proceedings."

[218] *In *Plessy v. Ferguson*, 163 U. S. 537, 542, 41 L. ed. 256, 257, 16 Sup. Ct. Rep. 1138, 1140, Mr. Justice Brown, delivering the opinion of the court, said:

"That it does not conflict with the 13th Amendment, which abolished slavery and involuntary servitude except as a punishment for crime, is too clear for argument. Slavery implies involuntary servitude,—a state of bondage; the ownership of mankind as a chattel, or at least the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property, and services. This amendment was said in the *Slaughter House Cases*, 16 Wall. 36, 21 L. ed. 394, to have been intended primarily to abolish slavery, as it had been

previously known in this country, and that it equally forbade Mexican peonage or the Chinese coolie trade, when they amounted to slavery or involuntary servitude, and that the use of the word 'servitude' was intended to prohibit the use of all forms of involuntary slavery, of whatever class or name."

Other authorities to the same effect might be cited. It is not open to doubt that Congress may enforce the 13th Amendment by direct legislation, punishing the holding of a person in slavery or in involuntary servitude except as a punishment for crime. In the exercise of that power Congress has enacted these sections denouncing peonage, and punishing one who holds another in that condition of involuntary servitude. This legislation is not limited to the territories or other parts of the strictly national domain, but is operative in the states and wherever the sovereignty of the United States extends. We entertain no doubt of the validity of this legislation, or its applicability to the case of any person holding another in a state of peonage, and this whether there be a municipal ordinance or state law sanctioning such holding. It operates directly on every citizen of the Republic, wherever his residence may be.

Section 5526 punishes "every person who holds, arrests, returns, or causes to be held, arrested, or returned." Three distinct acts are here mentioned,—holding, arresting, returning. *The disjunctive "or" indicates the [219] separation between them, and shows that either one may be the subject of indictment and punishment. A party may hold another in a state of peonage without ever having arrested him for that purpose. He may come by inheritance into the possession of an estate in which the peon is held, and he simply continues the condition which was existing before he came into possession. He may also arrest an individual for the purpose of placing him in a condition of peonage, and this whether he be the one to whom the involuntary service is to be rendered or simply employed for the purpose of making the arrest. Or he may, after one has fled from a state of peonage, return him to it, and this whether he himself claims the service or is acting simply as an agent of another to enforce the return.

The indictment charges that the defendant did "unlawfully and knowingly return one Will Gordon and one Mose Ridley to a condition of peonage, by forcibly, and against the will of them, the said Will Gordon and the said Mose Ridley, returning them, the said Will Gordon and the said Mose Ridley, to work to and for Samuel M. Clyatt."

Now a "return" implies the prior exist-

ence of some state or condition. Webster defines it "to turn back; to go or come again to the same place or condition." In the Standard dictionary it is defined "to cause to take again a former position; put, carry, or send back, as to a former place or holder." A technical meaning in the law is thus given in Black's Law Dictionary: "The act of a sheriff, constable, or other ministerial officer, in delivering back to the court a writ, notice, or other paper."

It was essential, therefore, under the charge in this case, to show that Gordon and Ridley had been in a condition of peonage, to which, by the act of the defendant, they were returned. We are not at liberty to transform this indictment into one charging that the defendant held them in a condition or state of peonage, or that he arrested them with a view of placing them in such condition or state. The pleader [220] has seen *fit to charge a return to a condition of peonage. The defendant had a right to rely upon that as the charge, and to either offer testimony to show that Gordon and Ridley had never been in a condition of peonage, or to rest upon the government's omission of proof of that fact.

We must, therefore, examine the testimony; and the first question that arises is whether the record sufficiently shows that it contains all the testimony. The bill of exceptions, after reciting the impaneling of the jury, proceeds in these words:

"And thereupon the plaintiff, to maintain the issues upon its part, produced and offered as a witness, James R. Dean, who, being first duly sworn, did testify as follows."

That recital is followed by what purports to be the testimony of the witness. Then follows in succession the testimony of several witnesses, each being preceded by a statement in a form similar to this: "The plaintiff then introduced and offered as a witness, H. S. Sutton, who, being first duly sworn, did testify as follows." At the close of the testimony of the last witness named is this statement:

"Whereupon the plaintiff rests its case.

"Defendant rests—introduces no testimony.

"And the said judge, after charging the jury on the law in the case, submitted the said issues and the evidence so given on the trial, to the jury, and the jury aforesaid then and there gave their verdict for the plaintiff."

It is true there is no affirmative statement in the bill of exceptions that it contains all the testimony, but such omission is not fatal. This question was presented in *Gunnison County v. E. H. Rollins & Sons*, 173 U. S. 255, 43 L. ed. 689, 19 Sup. Ct. 197 U. S.

Rep. 390, a civil case, brought to this court on certiorari to the circuit court of appeals, which court had held that the bill of exceptions did not purport to contain all the evidence adduced at the trial, and for that reason did not consider the question whether error was committed in instructing the jury to find for the defendant. Mr. Justice Harlan, delivering the unanimous opinion *of the court, disposed of that question in [221] these words (p. 261, L. ed. p. 693, Sup. Ct. Rep. p. 392):

"We are of opinion that the bill of exceptions should be taken as containing all the evidence. It appears that as soon as the jury was sworn to try the issues in the cause 'the complainants, to sustain the issues on their part, offered the following oral and documentary evidence.' Then follow many pages of testimony on the part of the plaintiffs, when this entry appears: 'Whereupon complainants rested.' Immediately after comes this entry: 'Thereupon the defendants, to sustain the issues herein joined on their part, produced the following evidence.' Then follow many pages of evidence given on behalf of the defendant, and the evidence of a witness recalled by the defendant, concluding with this entry: 'Whereupon the further proceedings herein were continued until the 20th day of May, 1896, at 10 o'clock A. M.' Immediately following this entry: 'Wednesday, May 20th, at 10 o'clock, the further trial of this cause was continued as follows.' The transcript next shows some discussion by counsel as to the exclusion of particular evidence, after which is this entry: 'Thereupon counsel for defendant made a formal motion under the evidence on both sides that the court instruct the jury to return a verdict for the defendant.' Although the bill of exceptions does not state, in words, that it contains all the evidence, the above entries sufficiently show that it does contain all the evidence."

The present case is completely covered by that decision. If, in a civil case, such recitals in the bill of exceptions are sufficient to show that it contains all the testimony, *a fortiori* should this be the rule in a criminal case, and the defendant therein should not be deprived of a full consideration of the question of his guilt by an omission from the bill of the technical recital that it contains all the evidence.

While no motion or request was made that the jury be instructed to find for defendant, and although such a motion is the proper method of presenting the question whether there is evidence to sustain the verdict, yet *Wiborg v. United States*, *163 U. S. 632, 658, [222] 41 L. ed. 290, 298, 16 Sup. Ct. Rep. 1127, 1197, justifies us in examining the question

in case a plain error has been committed in a matter so vital to the defendant.

The testimony discloses that the defendant, with another party, went to Florida, and caused the arrest of Gordon and Ridley on warrants issued by a magistrate in Georgia for larceny; but there can be little doubt that these criminal proceedings were only an excuse for securing the custody of Gordon and Ridley, and taking them back to Georgia to work out a debt. At any rate, there was abundant testimony from which the jury could find that to have been the fact. While this is true, there is not a scintilla of testimony to show that Gordon and Ridley were ever theretofore in a condition of peonage. That they were in debt, and that they had left Georgia and gone to Florida without paying that debt, does not show that they had been held in a condition of peonage, or were ever at work, willingly or unwillingly, for their creditor. We have examined the testimony with great care to see if there was anything which would justify a finding of the fact, and can find nothing. No matter how severe may be the condemnation which is due to the conduct of a party charged with a criminal offense, it is the imperative duty of a court to see that all the elements of his crime are proved, or at least that testimony is offered which justifies a jury in finding those elements. Only in the exact administration of the law will justice in the long run be done, and the confidence of the public in such administration be maintained.

We are constrained, therefore, to order a reversal of the judgment, and remand the case for a new trial.

Mr. Justice **McKenna** concurs in the judgment.

Mr. Justice **Harlan**: I concur with my brethren in holding that the statutes in question relating to peonage are valid under the Constitution of the United States. I agree, also, that the record sufficiently shows that it contains all the evidence introduced at the trial.

[223] *But I cannot agree in holding that the trial court erred in not taking the case from the jury. Without going into the details of the evidence, I care only to say that, in my opinion, there was evidence tending to make a case within the statute. The opinion of the court concedes that there was abundant testimony to show that the accused, with another, went from Georgia to Florida to arrest the two negroes, Gordon and Ridley, and take them, against their will, back to Georgia to work out a debt. And they were taken to Georgia by force. It is

732

conceded that peonage is based upon the indebtedness of the peon to the master. The accused admitted to one of the witnesses that the negroes owed him. In any view, there was no motion or request to direct a verdict for the defendant. The accused made no objection to the submission of the case to the jury, and it is going very far to hold in a case like this, disclosing barbarities of the worst kind against these negroes, that the trial court erred in sending the case to the jury.

UNITED STATES, *Appt.*,

v.

STEPHEN C. MILLS.

(See S. C. Reporter's ed. 223-229.)

Army—increased pay for service in the Philippines—"pay proper" includes longevity pay.

The "pay proper" on which the percentage of increased pay to an Army officer serving in the Philippine Islands is to be computed, under acts of May 26, 1900 (31 Stat. at L. 211, chap. 586), and March 2, 1901 (31 Stat. at L. 903, chap. 803, U. S. Comp. Stat. 1901, p. 896), includes the longevity pay to which he is entitled, under U. S. Rev. Stat. § 1262 (U. S. Comp. Stat. 1901, p. 896), as well as the minimum pay prescribed by § 1261 (U. S. Comp. Stat. 1901, p. 893) for his grade.

[No. 509.]

Submitted February 20, 1905. Decided March 13, 1905.

A PPEAL from the Court of Claims to review a judgment sustaining the claim of an Army officer that the percentage of increased pay due him for his service in the Philippine Islands should be computed on the minimum pay of his grade, enlarged by the longevity pay to which he was entitled. *Affirmed.*

Statement by Mr. Justice **Peckham**:

This is an appeal from a judgment of the court of claims in favor of the appellee. The question relates to the amount of compensation payable to him under the acts of May 26, *1900, and March 2, 1901, making [224] appropriations for the Army. The particular provisions of these acts are set forth in the margin.†

†Act of May 26, 1900 (31 Stat. at L. 211, chap. 586).

"That hereafter the pay proper of all officers and enlisted men serving in Porto Rico, Cuba, the Philippine Islands, Hawaii, and in the territory of Alaska shall be increased ten per centum for officers, and twenty per centum

197 U. S.

The court gave judgment in favor of appellee upon the authority of its opinion in *Irwin v. United States*, 38 Ct. Cl. 87.

The facts found by the court are as follows:

"The claimant, Stephen C. Mills, entered the military service of the United States as a cadet at the Military Academy, July 1, 1873, was commissioned second lieutenant June 15, 1877, and by successive promotions became major and inspector general July 25, 1888, and lieutenant colonel and inspector general February 2, 1901, and still holds the last-named rank and office.

"The claimant was, by proper military orders, on duty with the Army of the United States in the Philippine Islands from a date prior to May 26, 1900, continuously until April 15, 1902, when, in accordance with orders, he arrived at San Francisco, California, on his return from said Philippine Islands. During all of that period he was serving in the Philippine Islands, and beyond the limits of the states comprising the Union, and the territories of the United States contiguous thereto.

[225] "During the entire period from May 26, 1900, to April 15, 1902, named in the next preceding finding, the claimant, while *holding the rank of major, was paid at the rate of \$2,500 a year, the minimum pay of the grade of major, established by § 1261 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 893); \$1,000 longevity increase, established by § 1262 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 896), and \$250 a year as the increase of 10 per cent upon his pay proper, provided by the act of May 26, 1900 (31 Stat. at L. 211, chap. 586), but calculated only upon the minimum or grade pay fixed by said § 1261.

"While holding the rank of lieutenant colonel during said period the claimant was paid at the rate of \$3,000 a year, the minimum pay of that grade, as provided by § 1261 of the Revised Statutes, \$1,000 longevity increase, provided by § 1262, and \$300 a year as 10 per cent increase on his pay proper, as provided by the acts of May 26, 1900, and March 2, 1901 (31 Stat. at L. 211, chap. 586, 31 Stat. at L. 903, chap. 803, U. S. Comp. Stat. 1901, p. 896), but computed only on the minimum pay of the grade.

"If said 10 per cent increase should be calculated upon the total pay of \$3,500 re-

ceived by the claimant while in the rank of major, his increase would be at the rate of \$350 a year instead of \$250, and, if so calculated while he was in the rank of lieutenant colonel, the increase would be at the rate of \$400 a year instead of \$300, making a difference of \$100 a year for the period covered by the claim, and aggregating for the entire period \$188.87."

Assistant Attorney General Pradt and Mr. John Q. Thompson submitted the cause for appellant.

Messrs. George A. King and William B. King submitted the cause for appellee.

Mr. Justice Peckham, after making the foregoing statement, delivered the opinion of the court:

The question is, upon what principal sum the 10 per cent increase of compensation, to which the government concedes the appellee is entitled, is to be computed. The appellee, as *major, was entitled, by § 1261 of [226] the Revised Statutes (U. S. Comp. Stat. 1901, p. 893), to the pay of \$2,500 a year. Subsequently, as lieutenant colonel, he was entitled, by the same section, to the pay of \$3,000 per year. By the following section (1262, U. S. Comp. Stat. 1901, p. 896) it is provided that there shall be paid to the officers below the rank of brigadier general "10 per centum of their current yearly pay for each term of five years of service," and by § 1263 (U. S. Comp. Stat. 1901, p. 897), the total amount of such increase for length of service cannot exceed, in any case, "40 per centum on the yearly pay of the grade as provided by law." Under § 1262 the appellee had become entitled to pay to the amount of \$1,000 a year in addition to the pay provided for in § 1261; thus, as major, he was entitled to \$2,500 per year, and under § 1262, \$1,000 more, or \$3,500 under these two sections; as lieutenant colonel he was paid \$3,000 per year under § 1261 and \$1,000 more under § 1262, or \$4,000 under these two sections. He contended that the additional 10 per cent under the acts of 1900 and 1901 should be computed on the respective sums of \$3,500 and \$4,000, the total compensation granted by the two sections, while the government insists that the percentage must be computed upon the sums of \$2,500 and \$3,000, respectively, the minimum pay

for enlisted men, over and above the rates of pay proper as fixed by law in time of peace."

Act of March 2, 1901 (31 Stat. at L. 903, chap. 803, U. S. Comp. Stat. 1901, p. 896).

"That hereafter the pay proper of all officers and enlisted men serving beyond the limits of the states comprising the Union, and the

territories of the United States contiguous thereto, shall be increased ten per centum for officers, and twenty per centum for enlisted men, over and above the rates of pay proper as fixed by law for time of peace, and the time of such service shall be counted from the date of departure from said states to the date of return thereto."

granted to the grades of major and lieutenant colonel.

The court of claims directed the computation to be made on the total of the sums given by the two sections, and, in our opinion, that court was right in so doing. The term "pay proper" used in the acts of May 26, 1900, and March 2, 1901, includes, in our opinion, the longevity pay under § 1262 as well as the sum named as pay under § 1261, the latter being the minimum sum for the grade. Every five years of service, under § 1262, up to a certain percentage of the yearly pay of the grade, as provided by law (§ 1263), entitles the officer to be paid 10 per centum of his yearly pay. The term "current yearly pay" (§ 1262) was the subject of examination as to its meaning in [227] *United States v. Tyler*, *105 U. S. 244, 26 L. ed. 985. That case related to the claim of a retired officer, and the question was whether he was entitled to the benefit of the section (1262) after his retirement; and also, if he were so entitled, how was the computation to be made. The court held that he was entitled to the benefit of the section, and that the percentage was to be computed on the total amount of the pay of the officer, increased as it might be by the periods of five years of service. Thus, the increased pay derived from additional periods of five years' service was added to the minimum pay of the grade, and 10 per centum of that total was held to be the proper compensation.

The government, however, contends that the term "current yearly pay," mentioned in § 1262, has a different meaning from the term "pay proper," contained in the acts under discussion, and it insists that the latter term is not as comprehensive as the former. We do not think that there is any such material difference between the two expressions as in this case to demand their different construction. "Current yearly pay" and "pay proper," as used in the sections, mean the regular, ordinary pay which an officer may be entitled to under the facts in his case; and if, by virtue of length of service, he is entitled to receive the compensation provided for in § 1262, that compensation is his "pay" or his "pay proper," as distinguished from possible other compensation by any allowances or commutation or otherwise. The method of computation adopted herein by the court of claims is the same as that adopted in *United States v. Tyler*, 105 U. S. 244, 26 L. ed. 985; that method has therefore received the approval of this court, or, at least, it has been held that the 10 per centum of the current yearly pay is to be calculated upon the aggregate pay provided for in the two sec-

tions (1261 and 1262), and not merely upon the minimum pay granted by § 1261.

In regard to retired officers, Congress subsequently provided otherwise. 22 Stat. at L. 118, chap. 254.

The words, "pay proper," we see no reason to think are to be construed differently from the word "pay." The term *means com-[228] pensation, which may properly be described or designated as "pay," as distinguished from allowances, commutations for rations, or other methods of compensation, not specifically described as pay.

The government refers to the act of Congress approved March 15, 1898 (Army appropriation act, 30 Stat. at L. 318, chap. 69), as giving some ground for the contention it makes in this case, because, as is stated, Congress itself therein distinguishes between "pay proper," and "additional pay for length of service," and it is urged that pay proper does not include longevity pay in the opinion of Congress, as expressed in the act. The provision of the act is as follows:

"For pay proper of enlisted men of all grades, four million two hundred and ninety thousand dollars.

"Additional pay for length of service, including hospital corps, six hundred and seventy-one thousand, one hundred and seventy-two dollars."

The act cited by the government, it will be seen, refers to enlisted men, and not to officers at all. In that same act of 1898 a provision for the payment of officers is in the following language (30 Stat. at L. 318, chap. 69):

"For pay of officers of the line, two million eight hundred sixty-five thousand dollars.

"For pay of officers for length of service, to be paid with their current monthly pay, seven hundred and ninety thousand dollars."

And in the appropriation act of March 3, 1899, the appropriation for enlisted men was changed so that it reads as follows (30 Stat. at L. 1065, chap. 423):

"Pay of enlisted men of all grades, including recruits, thirteen million, five hundred thousand dollars.

"For additional pay for length of service, seven hundred and twenty-five thousand dollars."

Under the language of the act of March 15, 1898, the Comptroller of the United States had held that the language used in that act showed that the compensation of enlisted men, *upon which the per centum[229] provided for was to be computed, was the minimum pay, not enlarged by any longevity pay to which the person was entitled. At the very next session of Congress the form

of the appropriation was changed, as we have seen. That change has been continued since. See acts of May 26, 1900 (31 Stat. at L. 206, chap. 586), March 2, 1901 (31 Stat. at L. 896, chap. 803, U. S. Comp. Stat. 1901, p. 919), June 30, 1902 (32 Stat. at L. 508, chap. 1328), March 2, 1903 (32 Stat. at L. 929, chap. 975), and April 23, 1904 (33 Stat. at L. 260).

The ground for arguing that the term "pay proper" does not include the "additional pay for length of service" was thus taken away by a change in the form of the appropriation in all the acts subsequent to that of 1898. As we have already stated, however, that particular form in regard to enlisted men in the act of 1898 was never adopted providing for the pay of officers. Their regular compensation and their compensation by reason of longevity services are both spoken of in that act as "pay."

We have no doubt that the pay of the officer under the statutes of 1900 and 1901, in connection with the Revised Statutes referred to, consists of the amount granted for longevity service as well as of the amount provided in § 1261, and that the total is "pay proper," upon which total the percentage is to be computed provided for in the acts of 1900 and 1901. Our attention has not been called to any decision of this court looking to the contrary principle.

The judgment of the Court of Claims is right and must be affirmed.

only where there is no collector at the place of location of a public work.

[No. 259.]

Submitted February 27, 1905. Decided March 13, 1905.

APPEAL from the Court of Claims to review a judgment rejecting a claim of a disbursing clerk of the Treasury Department to compensation for services performed by him under the direction of the Secretary of the Treasury as disbursing agent of the funds appropriated for a postoffice at Washington. *Affirmed.*

See same case below, 39 Ct. Cl. 338.

The facts are stated in the opinion.

Mr. J. M. Vale submitted the cause for appellant.

Assistant Attorney General Pradt and **Mr. Frederick De Courcy Faust** submitted the cause for appellee.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an appeal from a judgment of the court of claims rejecting the claim of the appellant. 39 Ct. Cl. 338. The claimant, while a disbursing clerk of the Treasury Department, received a letter from the Secretary of the Treasury, as follows: "George A. Bartlett, disbursing clerk, Treasury Department, Washington, D. C. Sir: You are hereby appointed disbursing agent for such funds as may be advanced to you from time to time on account of the appropriation for postoffice, Washington, D. C. You will be entitled to such compensation for the services named as is provided by law, and the same rate of compensation will be allowed on all amounts disbursed by you since October 15, 1891, on account of the appropriation named." Directions followed.

The claimant gave no new bond and took no additional oath of office. He proceeded to disburse nearly two and a half millions of dollars, and claims $\frac{3}{4}$ of 1 per cent upon the sum disbursed.

The claimant puts his right to compensation on two grounds: the general powers of the Secretary of the Treasury, apart from statute, and Rev. Stat. § 3658 (U. S. Comp. Stat. 1901, p. 2430). As to the former, it is enough to say that whatever power the Secretary might have in the absence of legislation, Congress has dealt with the subject so fully that it is plain that we must look to the statutes alone. Rev. Stat. §§ 1760-1765, 3657, 3658, 255 (U. S. Comp. Stat. 1901, pp. 1204-1207, 2430, 141); act of August 7, 1882 (22 Stat. at L. 306, chap. 433; U. S. Comp. Stat. 1901, p. 2428). Looking to the statutes, the claimant relies

[230] *GEORGE A. BARTLETT, Appt.,

v.

UNITED STATES.

(See S. C. Reporter's ed. 230-234.)

Officers—disbursing agent—right to compensation.

1. The right of a disbursing clerk of the Treasury Department to compensation for services performed by him under the direction of the Secretary of the Treasury, as disbursing agent of the funds appropriated for a postoffice at Washington, depends solely upon the congressional legislation on that subject.
2. The existence of a collector of customs, under U. S. Rev. Stat. § 2550 (U. S. Comp. Stat. 1901, p. 1745), for the Georgetown district, which is defined in § 2550 as comprising "all the waters and shores of the Potomac river within the state of Maryland and the District of Columbia, from Pomonkey creek to the head of the navigable waters of that river," precludes the Secretary of the Treasury from appointing, with a right to compensation, a disbursing agent for the funds appropriated for a postoffice at Washington, under § 3658 (U. S. Comp. Stat. 1901, p. 2430), which authorizes such appointments

on Rev. Stat. § 3658: "Where there is no collector at the place of location of any public work specified in the preceding section [which section specifies postoffices], the Secretary of the Treasury may appoint a [233] disbursing agent *for the payment of all moneys appropriated for the construction of any such public work, with such compensation as he may deem equitable and just." It is urged that there is no collector at Washington, the place of location of the public work concerned.

The statutes as to the collector for Washington are as follows: Rev. Stat. § 2550 (U. S. Comp. Stat. 1901, p. 1745): "There shall be, in the District of Columbia, one collection-district, as follows: The district of Georgetown; to comprise all the waters and shores of the Potomac river within the state of Maryland and the District of Columbia, from Pomonkey creek to the head of the navigable waters of that river; in which Georgetown shall be the port of entry." § 2551 (U. S. Comp. Stat. 1901, p. 1745): "There shall be in the district of Georgetown a collector." It appears from § 2550 that the collection district of Georgetown is more extensive than the city of Georgetown. And this is not changed by the later statute making Georgetown a part of Washington. Act of February 11, 1895 (28 Stat. at L. 650, chap. 79). We do not perceive on what ground it is denied that the Washington postoffice is within this district. The words, "shores of the Potomac river," seem to us broad enough to include the whole of a city on those shores and within the other limits named. "Waters and shores" is the usual phrase in Rev. Stat. Title 34, chap. 1, §§ 2517-2607 (U. S. Comp. Stat. 1901, pp. 1711-1800). The words "in which" assume that Georgetown is embraced within the district. If within the district, it is so simply because it is on the shores, as that word is used in § 2550; and if Georgetown is within it, Washington is in it also, on the same ground. The same form of expression and the same assumption constantly recur in other sections. To show still further that collection districts run inland, and are not limited to the mathematical line which bounds the water, it may be observed that, while "waters and shores" is the most common expression, a district frequently is declared to include towns; e. g. § 2517, Seventh, Thirtieth; § 2522; § 2531, First, Second; § 2533, First. It may include lands (§ 2519), or embrace a county [234] (§ 2517, First, Sixth), or *even a state (§ 2522). If Washington is within the collection-district, then there was a collector at the place of location of the Washington postoffice (see § 3657), and the authority of the Secretary to appoint a disbursing

agent under § 3658 was excluded by its very words.

The claimant does not contend that his case gets any appreciable help from the act of August 7, 1882 (22 Stat. at L. 306, chap. 433, U. S. Comp. Stat. 1901, p. 2428). That gives the compensation allowed by law to collectors of customs to disbursing agents appointed to disburse any appropriation for any United States postoffice or other buildings, "not located within the city of Washington." No other statute is relied upon. No doubt the Secretary was under the impression, when the letter was written, that he was making an appointment which would entitle the claimant to distinct compensation for new work and responsibility. He did not regard the claimant as designated to be disbursing agent within the claimant's district under Rev. Stat. § 255, and therefore as not entitled to any additional pay. Rev. Stat. §§ 1764, 1765 (U. S. Comp. Stat. 1901, pp. 1206, 1207). But we do not see how the case can be put any higher. It is agreed that the claimant was not appointed to a new office by the Secretary's letter. Therefore, no help is to be got from *United States v. Saunders*, 120 U. S. 126, 129, 30 L. ed. 594, 595, 7 Sup. Ct. Rep. 467. The case is a hard one, but we are of opinion that the decision of the court of claims was right.

Judgment affirmed.

*GREER COUNTY, Oklahoma Territory, [235]
Plff. in Err.,

v.

STATE OF TEXAS.

(See S. C. Reporter's ed. 235-243.)

Public lands—Texas school grant—succession in foreign corporation—rights of Greer county, Oklahoma, under grant to Greer county as Texas corporation.

The legal title to the Texas lands patented to Greer county, under the mistaken supposition that this county was Texas territory, and was, therefore, entitled to share in the grant of lands for school purposes to each county in the state, made by Tex. Gen. Laws 1883, chap. 55, did not pass to the corporation subsequently organized out of the same territory as Greer county, Oklahoma, by the act of Congress of May 4, 1896 (29 Stat. at L. 113, chap. 155), but, upon the disappearance of the *de facto* Texas county, such title vested in the state of Texas.

[No. 160.]

Submitted March 6, 1905. Decided March 20, 1905.

IN ERROR to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas, to review a judgment which affirmed a judgment of the District Court of Travis County, in that state, in favor of the state in an action to recover lands for which patents were issued to Greer county, Texas, under the mistaken supposition that this county was Texas territory, and as such entitled to share in the grant of lands to each county in the state, for school purposes. *Affirmed.*

See same case below, 31 Tex. Civ. App. 223, 72 S. W. 104.

The facts are stated in the opinion.

Messrs. George Clark and H. N. Atkinson submitted the cause for plaintiff in error. **Mr. D. C. Bolinger** was on the brief:

When a grant is made by a state to an individual or municipal corporation, and the grant is accepted, the contract is complete; and any action by the state through either its legislative, executive, or judicial department, which tends to impair the obligation of such contract, is in violation of U. S. Const. art. 1, § 10.

Fletcher v. Peck, 6 Cranch, 87-148, 3 L. ed. 162-181; *Baltimore Trust & G. Co. v. Baltimore*, 64 Fed. 153; *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. ed. 629; *Chicago v. Sheldon*, 9 Wall. 50, 19 L. ed. 594.

When the land in controversy was patented to Greer county as a part of Texas, such county took title to the land.

Cameron v. State, 95 Tex. 551, 68 S. W. 508.

The grants evidenced by the patents issued by the state of Texas vested title in Greer county, which title, so vested, was beyond recall by the state through any department of its government, executive, legislative, or judicial.

Cameron v. State, 95 Tex. 545, 68 S. W. 508; *Milam County v. Bateman*, 54 Tex. 166; *Palo Pinto County v. Gano*, 60 Tex. 251.

The rights of private property are never affected, either by cession, conquest, change of sovereignty, or otherwise, and the change in such sovereignty never divests rights of property. The decision of this court in 1895 that Greer county did not belong to Texas, but was a part of the domain of the United States, can, therefore, have no effect upon the rights of property or grants hitherto made to Greer county by the state of Texas.

United States v. Roselius, 15 How. 36, 14 L. ed. 590; *Townsend v. Greely*, 5 Wall. 326, 18 L. ed. 547; *Dent v. Emmeger*, 14 Wall. 308, 20 L. ed. 838; *Hardy v. De Leon*, 5 Tex. 234; *Musquis v. Blake*, 23 Tex. 466; *Kil-*
197 U. S.

patrick v. Sisneros, 23 Tex. 124; *Maxey v. O'Connor*, 23 Tex. 242; *United States v. Percheman*, 7 Pet. 51, 8 L. ed. 604; *Strother v. Lucas*, 12 Pet. 410, 9 L. ed. 1137; *Airhart v. Massieu*, 98 U. S. 496, 25 L. ed. 215.

When the state enters her courts as a suitor or the same law applies to it as to citizens. The undisputed evidence demonstrates that the state of Texas, through all its departments, executive, legislative, and judicial, at the time the lands were granted to Greer county, was fully aware of the controversy then existing between the United States and the state of Texas as to the ownership of the county, and perfected the grants to Greer county with such knowledge. And, where the means of inquiry or knowledge are equally open to both parties, if a mistake occurs without fraud or falsehood, neither party is entitled to relief.

Fristoe v. Blum, 92 Tex. 80, 45 S. W. 998; *Houston & T. C. R. Co. v. Van Alstyne*, 56 Tex. 448; *Galveston County v. Gorham*, 49 Tex. 303; *Gilliam v. Alford*, 69 Tex. 271, 6 S. W. 757; *Farnsworth v. Duffner*, 142 U. S. 43, 35 L. ed. 931, 12 Sup. Ct. Rep. 164; *Baltzer v. Raleigh & A. Air Line R. Co.* 115 U. S. 634, 29 L. ed. 505, 6 Sup. Ct. Rep. 216; *May v. Le Claire*, 11 Wall. 217, 20 L. ed. 50; *Adams*, Eq. 7th ed. 166 *et seq.*, and notes; *Fonblanque*, Eq. 116, and notes.

Mr. C. K. Bell submitted the cause for defendant in error. **Mr. T. S. Reese** was on the brief:

The grants of 4 leagues of land for school purposes was not to the territory embraced within the limits of Greer county, nor to the inhabitants thereof, but to Greer county as a political subdivision and municipal corporation of the state of Texas, in trust for the benefit of the public free schools of the county as such, and to be administered under the general control and supervision of the legislature.

Palo Pinto County v. Gano, 60 Tex. 251; *Worley v. State*, 48 Tex. 12.

Upon the decision of this court in the *Greer County Case* (*United States v. Texas*, 162 U. S. 1, 40 L. ed. 867, 16 Sup. Ct. Rep. 725), and the surrender by the political department of the state government of all claim to, or right of control over, the territory formerly embraced in the geographical limits of Greer county, Texas, the title to the lands involved in this suit was extinguished, and the lands reverted to the state.

1 Dill. Mun. Corp. § 169a; *Meriwether v. Garrett*, 102 U. S. 472, 512, 513, 26 L. ed. 197, 204; *Bass v. Fontleroy*, 11 Tex. 698.

The grant was not a contract within the meaning of U. S. Const. art. 1, § 10.

East Hartford v. Hartford Bridge Co. 10 How. 511, 13 L. ed. 518; *Newton v. Mahoning County*, 100 U. S. 548, 25 L. ed. 710.

There is no question presented in the record of legislation impairing the obligation of a contract.

Central Land Co. v. Laidley, 159 U. S. 103-109, 40 L. ed. 91-93, 16 Sup. Ct. Rep. 80.

Mr. C. A. Culberson also submitted the cause for defendant in error. *Messrs. R. V. Davidson* and *T. S. Reese* were on his brief.

Mr. Justice Holmes delivered the opinion of the court:

This is a suit brought by the state of Texas to recover certain lands in Hockley and Cochran counties, Texas, for which patents were issued to Greer county, Texas, on July 18, 1887, under color of the general laws of the state granting four leagues of land to each county of the state for school purposes. Texas Gen. Laws, 1883, chap. 55. Greer county, Texas, was created by an act of February 8, 1860, and was organized as a county in 1886. In March, 1896, it was decided by this court that the territory known as Greer county belonged to the United States, and not to the state of Texas. *United States v. Texas*, 162 U. S. 1, 40 L. ed. 867, 16 Sup. Ct. Rep. 725. Thereupon, by act of Congress of May 4, 1896, chap. 155, the same territory was organized as Greer county, Oklahoma,—the present defendant, plaintiff in error. 29 Stat. at L. 113, chap. 155. On April 13, 1897, Texas passed a law purporting to set aside the land in controversy for the support of [241] schools in *Texas, and directing proceedings to recover the land against all adverse claims. Gen. Laws, 1897, chap. 72. Then this suit was brought. The defendant, among other things, set up that the state was attempting to impair the obligation of its grant.

The case was heard on agreed facts, and the state district court decided in favor of the state, on the ground that the general laws of Texas authorized patents to be issued to the counties of Texas only, and that therefore the patents were void. Another suit was brought against a purchaser from the *de facto* Texas county of a part of the land, in which the supreme court of the state decided that the purchaser got a good title, holding that the action of the state legislature still was conclusive on the court, notwithstanding the decision in *United States v. Texas*. *Cameron v. State*, 95 Tex. 545, 68 S. W. 508. The present cause was taken to the court of civil appeals, which distinguished *Cameron v. State*, and affirmed the judgment on the different ground that

the grant was for public school purposes within the state of Texas; and, as the defendant could not and would not use the land for such purposes, the state was entitled to have the patents canceled and to recover the land. 31 Tex. Civ. App. 223, 72 S. W. 104. Then a writ of error was obtained from this court to enforce the constitutional right alleged by the defendant, as stated above.

The decision below and in *Cameron v. Texas* suggest interesting questions, which it is not necessary to answer. It may be doubted how far any court can be bound by legislation after this court has declared such legislation beyond the power of the state, any more than it would be if the law had been held unconstitutional. It would be curious to consider whether the mutual mistake in a matter which, on the face of the transaction, obviously went to the root of the gift, was of such a nature as to warrant an avoidance when the mistake was discovered, including the question whether the mistake was one of law or fact. See *Bispham v. Price*, 15 How. 162, 170, 171, 14 L. ed. 644, 648; *Upton v. Tribilcock*, 91 U. S. 45, 23 L. ed. 203; *Snell v. Atlantic F. & M. Ins. Co.* 98 U. S. 85, 90-92, 25 L. ed. 52, 55; *Griswold v. Hazard*, 141 U. S. 260, 284, 35 L. ed. 678, 11 Sup. Ct. Rep. 972, 999; *Hirschfield v. *London, B. & S. C. R. Co. L.* [242] R. 2 Q. B. Div. 1. There is the further consideration whether the gift created a public charity, as contended by the plaintiff in error, and if so, or, whatever the nature of the trust, whether there is such a failure of the donee as to invalidate the gift and to destroy the legal title of the defendant, if otherwise good. See *Stratton v. Physio-Medical College*, 149 Mass. 505, 508, 5 L. R. A. 33, 14 Am. St. Rep. 442, 21 N. E. 874, and cases cited.

We shall consider none of these questions, because we are of opinion that the plaintiff in error must fail on the short ground that it is a stranger to the gift. The plaintiff in error treats the change brought about by the decision in 162 U. S. 1, 40 L. ed. 867, 16 Sup. Ct. Rep. 725, as if it had been a cession of territory, or mere transfer of sovereignty by that or other means. It was nothing of the sort. It was a discovery that the state of Texas never had had a title to the land known as Greer county. The United States found itself at liberty to do what it chose with that land. It could have done nothing. It could have subdivided it at will. It could have made it part of some existing county. The land and its inhabitants retained no legal personality, least of all that personality with which Texas had purported

to endow them. The United States, it is true, very properly did what it could to preserve the former condition of things. By § 1 of the act of May, 1896 (29 Stat. at L. 113, chap. 155), it provided that "all public buildings and property of every description heretofore belonging to Greer county, Texas, or used in the administration of the public business thereof, is hereby declared to be the property of said Greer county, Oklahoma;" and otherwise it did all in its power to keep up the legal continuity of the county with the supposed old one. But some things were not within its power, and one thing which it could not do was to make an artificial creation of its own successor to the title to lands in Texas, supposing that title to have been parted with, by its independent fiat. Without the consent of Texas no corporation created by another sovereignty could succeed to Texas lands.

[243] *Greer county, Oklahoma, being a corporation created by a different sovereignty from that which purported to create Greer county, Texas, is technically a different person. It can claim the legal title, which Texas purported to convey to a creation of its own, only by succession, or that feigned identity familiar in the cases of executor and heir. See *Day v. Worcester, N. & R. R. Co.* 151 Mass. 302, 307, 308, 23 N. E. 824; 2 Co. Litt. § 337; *North v. Butts*, 2 Dyer, 139b, 140a; *Oates v. Frith*, Hobart, 130a. But succession to land is governed wholly by the law of the place where the land lies. *De Vaughn v. Hutchinson*, 165 U. S. 566, 570, 41 L. ed. 827, 829, 17 Sup. Ct. Rep. 461. The land in controversy was no part of Greer county, but lies in Texas; and Texas, so far from having assented to the succession of the defendant, has assumed to deal with the land as its own, by legislation, and has directed this suit to be brought to recover it. The legal title of the state is clear; for, on the disappearance of the *de facto* county, the state took whatever title that county had. See *Meriwether v. Garrett*, 102 U. S. 472, 26 L. ed. 197. The legal title is what is in question before us, and the actual continuity of the inhabitants of the county could be recognized only by way of trust. But it would be wrong to encourage the notion that the title still may be charged with a trust in favor of schools in Greer county. The aim of the statute, under which the patents were made out, was the support of Texas schools. That was its dominant purpose. We think it unlikely that any court of equity would deem it equitable to direct the fund to any other trust.

Judgment affirmed.

197 U. S.

*EDWARD H. HARRIMAN, Winslow S. [244]
Pierce, Oregon Short Line Railroad Company, and the Equitable Trust Company of New York, Petitioners,

v.

NORTHERN SECURITIES COMPANY.

(See S. C. Reporter's ed. 244-299.)

Certiorari — finality of decree below — final disposition by direction to lower court — judgments — questions not determined by — stare decisis — evidence — sufficiency to establish trust or bailment — contracts — rescission for illegality — in pari delicto — laches and acquiescence.

1. The lack of finality in a decree reversing an order of a circuit court granting a preliminary injunction will not prevent a review in the Supreme Court of the United States by writ of certiorari issued to a circuit court of appeals, where the record presented the whole case to that court so that it might properly have been finally disposed of in terms by its decree.
2. The Supreme Court of the United States will, by its direction to the circuit court, finally dispose of a cause brought before it on writ of certiorari to a circuit court of appeals, where the record presented the whole case to that court so that it might properly have been finally disposed of by its decree, although it did nothing more than to reverse the decree of the circuit court granting a preliminary injunction.
3. The question whether a corporation organized pursuant to a combination of stockholders in two competing interstate railway companies to acquire a controlling interest in their capital stock holds the same as absolute owner, or as trustee or bailee, was not determined by a decree adjudging the combination to be illegal, enjoining the new corporation from acquiring any further stock, from voting such stock as it then held or might subsequently acquire, and from exercising any control over the railway companies by virtue of its holdings, and restraining the railway companies from permitting or suffering any such action on the part of the new corporation, and from paying any dividends on account of the stock held by it, and providing that nothing therein shall be construed as prohibiting the new corporation

NOTE.—On certiorari in the Federal courts—see notes to *Clark v. Hackett*, 17 L. ed. U. S. 69, and *Lau Ow Bew v. United States*, 1 C. C. A. 5.

On obiter dicta—see note to *Union P. R. Co. v. Mason City & Ft. D. R. Co.* 64 C. C. A. 361.

On the rights of parties in *in pari delicto*—see notes to *Austin v. Davis*, 12 L. R. A. 121; *Kirkpatrick v. Clark*, 8 L. R. A. 511; *Richardson v. Buhl*, 6 L. R. A. 458; and *McClintock v. Loiseau*, 2 L. R. A. 817.

As to laches as a defense—see notes to *Hammond v. Hopkins*, 36 L. ed. U. S. 135; *Felix v. Patrick*, 36 L. ed. U. S. 720; *Middletown v. Newport Hospital*, 1 L. R. A. 191; *Calhoun v. Dehl* & M. R. Co. 8 L. R. A. 248; and *Coffey v. Emigh*, 10 L. R. A. 125.

from returning the railway shares to the original stockholders, or to the holders and owners of its own stock issued in exchange for these shares.

4. General expressions in an opinion which are not essential to the disposition of the case cannot control the judgment in subsequent suits.
5. A clear preponderance of proof is essential to establish that the parties to a transaction by which a corporation, formed for the purpose, acquired, in exchange for its own capital stock, a controlling interest in the capital stock of two competing interstate railway companies, pursuant to a combination of the stockholders in those companies, agreed that the new corporation should hold such stock as trustee or bailee for the railway stockholders, where the transaction on its face was one of purchase and sale.
6. The rule that property delivered under an illegal contract cannot be recovered back by parties *in pari delicto* prevents the original stockholders in two competing interstate railway companies from reclaiming the specific shares of stock which they delivered to a stockholding corporation in exchange for its capital stock, pursuant to a combination subsequently adjudged illegal, under which the corporation was to acquire a controlling interest in the capital stock of each of such railway companies; and they must be content with the ratable distribution of the corporate assets resolved upon by the stockholding corporation.
7. Laches and acquiescence would themselves defeat any right of the original stockholders in two competing interstate railway companies to rescind the contract under which they had delivered their stock to a corporation formed in pursuance of a combination under which such corporation was to acquire a controlling interest in the capital stock of the railway companies in exchange for its own capital stock, where such stockholders stood upon their rights as shareholders in the new corporation until nearly a year after the Supreme Court of the United States had adjudged the combination to be illegal, and until the directors of the new corporation resolved upon a ratable distribution of its corporate assets, during which time stock in the new corporation had passed into many hands.
8. Parties to a transaction adjudged to violate the anti-trust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), are not exempt from the doctrine *in pari delicto* on the theory that they acted in good faith and without intent to violate the law, where, with knowledge of the facts and of the statute, they acted under the mistaken supposition that the statute would not be held applicable to the facts.

[No. 512.]

Argued March 1, 2, 1905. Decided March 6, 1905.

ON WRIT of certiorari to the United States Circuit Court of Appeals for the Third Circuit to review a judgment which

reversed an order of the Circuit Court for the District of New Jersey enjoining the Northern Securities Company from making the ratable distribution of its corporate assets resolved upon by its directors. *Affirmed*, and the cause remanded to the Circuit Court, with directions to dismiss the bill.

See same case below, 134 Fed. 331.

Statement by Mr. Chief Justice **Fuller**:
Edward H. Harriman, Winslow S. Pierce, Oregon Short *Line Railroad Company, and [246] the Equitable Trust Company of New York exhibited their bill against the Northern Securities Company in the circuit court of the United States for the district of New Jersey April 20, 1904, on which, with accompanying affidavits and exhibits, a restraining order was issued, pending an application for an injunction as prayed in the bill. April 26 an amended bill was filed, and the application for a preliminary injunction was heard May 20, 21, and 23 by Bradford, J., holding the circuit court.

On the 4th day of June a second amended bill was filed, and on July 15, 1904, Judge Bradford delivered an opinion sustaining the application. 132 Fed. 464.

The order for injunction was entered August 18, 1904, and an appeal therefrom was prosecuted to the circuit court of appeals for the third circuit, which, on January 3, 1905, reversed the order. 134 Fed. 331.

Thereupon complainants applied to this court for the writ of certiorari, which was granted January 30, and the matter advanced for hearing, and heard March 1 and 2. The affirmance of the decree of the circuit court of appeals was announced March 6, it being added that an opinion would be filed afterwards.

The Northern Pacific Railway Company was the successor, through reorganization, of the Northern Pacific Railroad Company, and by its charter it was provided that its capital stock might be increased from time to time by a vote of a majority of the stockholders, and that the company might, by a like vote, classify its stock into common and preferred, and might "make such preferred stock convertible into common stock upon such terms and conditions as may be fixed by the board of directors." On July 1, 1896, by the unanimous vote of its then stockholders, the capital stock was increased to \$155,000,000, divided into \$80,000,000 of common stock and \$75,000,000 of preferred stock, and it was resolved "that such preferred stock shall be issued upon the condition that, at its option, the company *may [247] retire the same, in whole or in part, at par, from time to time, on any 1st day of January prior to 1917." The plan of reorganiza-

tion which was adopted provided that, as to the new company, which it was contemplated should acquire the properties and franchises of the Northern Pacific Railroad Company, and the issue of preferred stock by it, "the right will be reserved by the new company to retire this stock, in whole or in part, at par, from time to time, upon any 1st day of January during the next twenty years."

All the certificates of stock, whether common or preferred, at that time or subsequently issued, contained this clause: "The company shall have the right, at its option, and in such manner as it shall determine, to retire the preferred stock, in whole or in part, at par, from time to time, upon any 1st day of January prior to 1917."

The reorganization had been managed by J. P. Morgan & Company, and the directory of the Northern Pacific Railway Company were friendly to that firm. During the same period the president of the Great Northern Railway Company was James J. Hill, and its directors were friendly to him.

The two companies were friendly to each other, and in April, 1901, acquired the shares of the Chicago, Burlington, & Quincy Railroad Company.

At this time the Union Pacific Railway system included the Union Pacific Railway, the railroad of the Oregon Short Line Railroad Company, and the railroad of the Oregon Railroad and Navigation Company. The Union Pacific Company was practically the owner of the entire capital stock of the Oregon Short Line Railroad Company, and the latter company was the owner of practically the entire capital stock of the Oregon Railway & Navigation Company. The interests in control of the Union Pacific system might properly be called the Harriman interests. Shortly thereafter, at the instance of the Union Pacific Railway Company and with money furnished by that company, the Oregon Short Line company purchased Northern Pacific preferred stock to [248] the amount of \$41,085,000, *and common stock to the amount of \$37,023,000, aggregating \$78,100,000 of stock, being a majority of the \$155,000,000, total capital stock of the Northern Pacific company as then outstanding. But the preferred stock was subject to retirement at par at the option of the company, and the 370,230 shares of common stock was less than a majority of the total common stock, which majority was held by the Morgan-Hill party.

In October, 1901, complainant Harriman was elected a member of the board of directors of the Northern Pacific Railway Company and James Stillman was re-elected. They were also directors of the Union Pacific Railway Company. They both
197 U. S.

attended a meeting of the Northern Pacific board on November 13, 1901, and Harriman was chosen a member of the executive committee. At this meeting resolutions were adopted providing for and resulting in the retirement of the preferred stock on January 1, 1902, by the payment of \$100 cash for each and every share to each and every holder of record on that day.

These resolutions declared that the company thereby determined to exercise its right to retire the preferred stock; provided that, for the purpose of raising the funds necessary to do so, the company should issue its negotiable bonds for \$75,000,000, convertible at par into shares of the common stock of the company at par; authorized the making of a contract for the sale of all of such bonds at par and accrued interest, the contract to contain a provision giving to the holder of every share of the common stock the opportunity to receive from the contract purchaser, at par and interest, such bonds to an amount equal to seventy-five eightieths of the par amount of said common stock at such time owned by such holder, and arranged for the retirement from and after December 31, 1901, of the \$75,000,000 preferred stock, by the payment to each and every holder of record thereof on January 1, 1902, of \$100 cash for each and every share.

On November 15, the executive committee of the Northern *Pacific company authorized [249] the execution of a contract with the Standard Trust Company of New York for the sale and delivery of the convertible certificates for \$75,000,000 provided for in the resolutions.

The preferred stock was subsequently taken up in accordance with the plan resolved upon.

The Northern Securities Company was incorporated under the laws of New Jersey in November, 1901, its articles of association having been filed at Trenton on the 13th day of that month, with a capital stock of \$400,000,000, divided into 4,000,000 shares of the par value of \$100 each, and its objects being certified to be:

"(1.) To acquire by purchase, subscription, or otherwise, and to hold as investment, any bonds or other securities or evidences of indebtedness, or any shares of capital stock created or issued by any other corporation or corporations, association, or associations, of the state of New Jersey, or of any other state, territory, or country.

"(2.) To purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of, any bonds or other securities or evidences of indebtedness created or issued by any other corporation or corporations, association or associations, of the state of New

Jersey, or of any other state, territory, or country, and, while owner thereof, to exercise all the rights, powers, and privileges of ownership.

"(3.) To purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of, shares of the capital stock of any other corporation or corporations, association or associations, of the state of New Jersey, or of any other state, territory, or country; and, while owner of such stock, to exercise all the rights, powers, and privileges of ownership, including the right to vote thereon.

"(4.) To aid in any manner any corporation or association of which any bonds or other securities or evidences of indebtedness or stock are held by the corporation; and to do any acts or things designed to protect, [250] preserve, improve, or enhance *the value of any such bonds or other securities or evidences of indebtedness or stock.

"(5.) To acquire, own, and hold such real and personal property as may be necessary or convenient for the transaction of its business.

"The business or purpose of the corporation is from time to time to do any one or more of the acts and things herein set forth.

"The corporation shall have power to conduct its business in other states and in foreign countries, and to have one or more offices out of this state and to hold, purchase, mortgage, and convey real and personal property out of this state."

On the 14th day of November, 1901, fifteen gentlemen, including complainant Harriman and two other directors of the Union Pacific, James J. Hill, president of the Great Northern, and two members of J. P. Morgan & Company, were elected directors of the Northern Securities Company. Complainant Harriman took his seat at the board, and an executive committee of five was elected, of which he was one.

November 15 resolutions were passed authorizing the purchase of the Northern Pacific stock held by Harriman and Pierce, as follows:

"The president stated that he now had an opportunity of acquiring \$37,023,000 par value of the common stock, and \$41,085,000 par value of the preferred stock, of the Northern Pacific Railway Company, at an aggregate price of \$91,407,500, payable, as to \$82,491,871, in the fully paid-up and non-assessable shares of this company at par, and, as to the remaining \$8,915,629, in cash.

"On motion, and by affirmative vote of all the directors present, it was—

"Resolved, That the president be, and hereby he is, authorized, in behalf of this company, to purchase said stock—namely, \$37,023,000 par value of the common stock,

and \$41,085,000 par value of the preferred stock of the Northern Pacific Railway Company—at an aggregate price of \$91,407,500, *payable, as to \$82,491,871 thereof, in the [251] fully paid-up and non-assessable shares of the capital stock of this company at par, and, as to \$8,915,629, in cash; and that the officers of this company be, and hereby they are, authorized to issue fully paid-up and non-assessable shares of stock of this company to the amount of \$82,491,871, and to pay \$8,915,629 in cash, in consideration of such \$37,023,000 of the common stock and \$41,085,000 of the preferred stock of the Northern Pacific Railway Company.

"Resolved, That the president be, and hereby he is, authorized at any time to retire at par, for cash, any and all preferred stock of the Northern Pacific Railway Company that may be acquired by this company, and in case such retirement shall be effected prior to January 1, 1902, to allow interest up to January 1, 1902, at the rate of 4 per cent per annum on the sum receivable for such preferred stock.

"Resolved, That the president be, and hereby he is, authorized in behalf of this company to purchase at their par value an amount of the convertible certificates of the Northern Pacific Railway Company, to be issued pursuant to the resolutions of the board of directors of the Northern Pacific Railway Company, passed November 13, 1901, equal to seventy-five eightieths of the par amount of any and all common stock of the Northern Pacific Railway Company that shall have been acquired by this company.

"Resolved, That the president be, and hereby he is, authorized, in case of the purchase by this company of any of the convertible certificates of the Northern Pacific Railway Company, to convert the same into common stock of the Northern Pacific Railway Company whenever such conversion may be effected.

"Resolved, That the president be, and hereby he is, authorized to borrow, on such terms as he may arrange, any moneys required for the purpose of carrying out the foregoing resolutions, and to make all financial arrangements, *and to do all acts and [252] things, which he may deem needful in the premises."

Complainant Harriman and his codirectors of the Union Pacific were not present at this meeting, but were present at the next meeting of the board on November 19, at which the minutes of the meeting of November 15 were read and on motion were approved.

At a subsequent meeting of the executive committee, in which Mr. Harriman participated, the form of the company's permanent

stock certificate, being the usual form, was unanimously approved.

In the meantime, and on November 18, Harriman and Pierce had delivered their Northern Pacific stock to the Northern Securities Company, and that company had delivered to them the 824,000 shares of its stock and \$8,915,629 in cash.

The Northern Pacific stock certificates received from Harriman and Pierce were surrendered by the Securities company to the Northern Pacific Railway Company. The certificates for the 370,230 shares of common stock were exchanged for 370,230 shares of common stock issued in the name of the Northern Securities Company. The certificates for the 410,580 shares of preferred stock were surrendered to the Northern Pacific Railway Company for retirement, and paid for and retired as provided, the transaction resulting in the receipt by the Northern Securities Company of certificates for 347,090 shares of new common stock. This made 717,320 shares, and the Securities company also acquired 820,270 shares, from a large number of separate individual owners. And from a large number of stockholders of the Great Northern 1,181,242 shares of the stock of the latter company.

At a meeting of the board of directors of the Northern Securities Company on January 22, 1903, at which complainant Harriman was present, the sale by the company of 75,000 shares of its own stock for cash was approved. The second amended bill says \$7,522,000 "was issued for cash used for the purchase of other property, and for corporate purposes."

[253] *From the organization of the Securities company until the affirmance of the decree in the government suit, hereafter mentioned, complainants continued to exercise the right of holders of 824,000 shares of stock in the Securities company; received their share of dividends, and gave their proxy to vote at the annual meetings of 1902 and 1903.

July 17, 1902, Harriman and Pierce and the Oregon Short Line Company pledged the 824,000 shares of Northern Securities Company stock to the Equitable Trust Company, the Short Line Company executing a trust indenture, which contained this clause: "The deposit and pledge hereunder of said shares of stock, or of any other securities which shall become subject to this indenture, shall not prevent the consolidation, union, or merger with any other corporation of the Securities company, or of any other corporation by which said securities shall have been issued, or the sale of its property or the distribution of its assets. In any such case the trustee shall receive such amounts of stock, bonds, or other secu-

rities, or money, or of either or all of them, as the holders of the pledged shares of stock of the Securities company, or other pledged securities, as the case may be, shall be entitled to receive, and, upon receipt thereof, shall surrender the deposited stock certificates or other securities."

March 10, 1902, a bill was exhibited in the circuit court of the United States for the district of Minnesota by the United States against the Northern Securities Company, the Northern Pacific Railway Company, the Great Northern Railway Company, James J. Hill, William P. Clough, D. Willis James, John S. Kennedy, J. Pierpont Morgan, Robert Bacon, George F. Baker, and Daniel S. Lamont, to restrain the violation of the act of Congress of July 2, 1890, 26 Stat. at L. 209, chap. 647 (U. S. Comp. Stat. 1901, p. 3200), entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," which resulted April 9, 1903, in a decision in favor of complainants (120 Fed. 721), and a decree as follows:

"That the defendants above named have heretofore entered *into a combination or [254] conspiracy in restraint of trade and commerce among the several states, such as an act of Congress, approved July 2, 1890, entitled 'An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies,' denounces as illegal; that all of the stock of the Northern Pacific Railway Company and all the stock of the Great Northern Railway Company, now claimed to be held and owned by the defendant, the Northern Securities Company, was acquired and is now held by it in virtue of such combination or conspiracy in restraint of trade and commerce among the several states; that the Northern Securities Company, its officers, agents, servants, and employees, be, and they are hereby, enjoined from acquiring, or attempting to acquire, further stock of either of the aforesaid railway companies; that the Northern Securities Company be enjoined from voting the aforesaid stock which it now holds or may acquire, and from attempting to vote it, at any meeting of the stockholders of either of the aforesaid railway companies, and from exercising, or attempting to exercise, any control, direction, supervision, or influence whatsoever over the acts and doings of said railway companies, or either of them, by virtue of its holding such stock therein; that the Northern Pacific Railway Company and the Great Northern Railway Company, their officers, directors, servants, and agents, be, and they are hereby, respectively and collectively enjoined from permitting the stock aforesaid to be voted by the Northern Securities Company, or in its behalf, by its at-

torneys or agents, at any corporate election for directors or officers of either of the aforesaid railway companies, and that they, together with their officers, directors, servants, and agents, be likewise enjoined and respectively restrained from paying any dividends to the Northern Securities Company on account of stock in either of the aforesaid railway companies which it now claims to own and hold; and that the aforesaid railway companies, their officers, directors, servants, and agents, be enjoined from permitting or suffering the Northern Securities Company, or *any of its officers or agents as such officers or agents, to exercise any control whatsoever over the corporate acts of either of the aforesaid railway companies. But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which said the Northern Securities Company may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies."

The case was brought to this court, and March 14, 1904, the decree was affirmed. 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436.

March 22, 1904, the board of directors of the Northern Securities Company adopted the following preamble and resolutions:

"Whereas, in the course of its business, this company has acquired, and now holds, 1,537,594 shares in the capital stock of the Northern Pacific Railway Company; and 1,181,242 shares in the capital stock of the Great Northern Railway Company; and

"Whereas, in a suit brought by the United States against this company, the said railway companies, and others, this company has been enjoined from voting upon the shares of either of the said railway companies, and each of the said railway companies has been enjoined from paying to this company any dividends upon any of the shares of such railway company held by this company; and

"Whereas, this company has issued, and there are now outstanding, 3,954,000 shares of its own capital stock; and

[256] "Whereas, this company desires and in-

tends to comply with the decree in the said suit, fully and unreservedly, and without delay:

"Resolved, In consideration of the premises, it is declared necessary and desirable for this company so to reduce its present stock as will enable it, without delay, in connection with such reduction, to distribute among its shareholders the shares of capital stock of said railroad companies held by it.

"Resolved, That the board of directors of this company hereby declares it advisable that article (4th) of this company's certificate of incorporation be amended, so as to read as follows:

"Fourth. The capital stock of this company is hereby reduced to three million nine hundred and fifty-four thousand dollars (\$3,954,000), and shall hereafter be three million nine hundred and fifty-four thousand dollars (\$3,954,000), divided into thirty-nine thousand five hundred forty (39,540) shares of one hundred dollars (\$100) each. Such reduction of capital stock shall be accomplished by each holder of outstanding shares of this company's stock surrendering to the company, for retirement, ninety-nine (99) per centum of the shares held by him.

"Upon the surrender to this company, by any shareholder, of the entire number of shares, and parts of shares, of this company's stock, which he is hereby required to surrender, this company will assign to him, for each share so surrendered, thirty-nine dollars and twenty-seven cents (\$39.27) of the stock of the Northern Pacific Railway Company, and thirty dollars and seventeen cents (\$30.17) of the preferred stock of the Great Northern Railway Company, and proportional amounts thereof for fractional shares of the stock of this company.

"The board of directors or executive committee from time to time shall make such rules and regulations as it shall deem necessary or convenient for carrying out the provisions hereof, and all matters pertaining to the surrender and retirement *of the stock [257] of this company, or to the assignment and transfer of the stocks of the said railway companies, hereby contemplated, shall be under the direction of the board. For the purposes hereof, the stockholders of this company, and the number of shares held by them, respectively, shall be determined from the stock transfer books of the company, which, for such determination, shall be closed at a day and hour to be determined by resolution of the board.

"Resolved, That a meeting of the stockholders of this company, for the purpose of taking action upon the said alteration of the certificate of incorporation of this com-

pany, and also upon such other business as may come before the meeting, be, and is hereby called, to be held at the general offices of this company in the city of Hoboken, county of Hudson, and state of New Jersey, at 11 o'clock A. M., on April 21, A. D. 1904."

Notice was accordingly given that the meeting of the stockholders would be held on April 21, and a copy of the resolutions and an explanatory letter were sent to the Attorney General of the United States. Early in April the three principal complainants in the present suit presented to the circuit court for the district of Minnesota their petition for leave to intervene in the suit of the United States against the Northern Securities Company, setting up substantially the same grounds as in this suit, and seeking similar relief. This application was heard at St. Paul April 12 and 13. The government appeared by the Attorney General, and filed a declaration that it was satisfied with the relief granted. April 19, 1904, the court rendered its decision, denying leave to intervene. 128 Fed. 808.

Up to April 18, 1904, the Securities Company had issued 86,945 certificates of stock and there had been 16,000 transfers registered on the books of the company. At the closing of the transfer books on that day there were 3,953,971 shares of stock outstanding in the hands of 2,531 separate holders.

[258] *The meeting of the stockholders of the Northern Securities Company was duly held April 21, 1904; and at that meeting the stock of the company was reduced 99 per cent, and the proposed *pro rata* distribution of the stock of the Northern Pacific Railway Company and of the preferred stock of the Great Northern Railway Company, to and amongst the shareholders of the Northern Securities Company, was assented to. Two million nine hundred and forty-four thousand seven hundred and forty shares were represented, and all voted for the plan adopted by the directors.

As has been stated, the second amended bill was filed after the hearing on the application for the preliminary injunction, and it was therein alleged, among other things, that the Northern Securities Company was incorporated and organized in pursuance of a combination in restraint of trade and commerce among the several states; that the said company was to "acquire and permanently hold a majority of the shares of the capital stock of said Great Northern and Northern Pacific companies and control the operation and management thereof in perpetuity, and that the then existing holders of such railway shares should deposit the same with said holding company and receive

in lieu thereof share certificates of said holding company upon the basis of \$180 par value of its stock for each share of Great Northern stock and \$115 par value of its stock for each share of Northern Pacific stock, and that said holding company should act as custodian, depository, or trustee of said railway shares on behalf of the existing stockholders of said railway companies and their assigns.

"That prior to the incorporation of said Northern Securities Company your orator Oregon Short Line Railroad Company had acquired, and at the time of the incorporation and organization of said Securities company owned, \$37,023,000 par value of the common stock and \$41,085,000 par value of the preferred stock of the defendant Northern Pacific Railway Company represented by certificates issued to and registered in the name of your orators Harriman and Pierce; and that after *the incor-[259] poration of the said Northern Securities Company had been resolved upon as aforesaid, your orators Harriman, Pierce, and Oregon Short Line Railroad Company agreed with the promoters and incorporators of said Northern Securities Company to transfer to and deposit with said Northern Securities Company, under the terms and conditions aforesaid, the said shares of said Northern Pacific Railway Company of the aggregate par value of \$78,108,000 owned by said Oregon Short Line Railroad Company as aforesaid, and to receive in exchange therefor certificates of said Northern Securities Company representing an interest therein of \$82,491,871 par value and \$8,915,629 in cash, and in pursuance of said agreement your orators Harriman and Pierce, acting for your orator Oregon Short Line Railroad Company, did, on or about the 18th day of November, 1901, transfer and deliver to said Northern Securities Company certificates for \$37,023,000 par value of the common stock and \$41,085,000 par value of the preferred stock of said Northern Pacific Railway Company owned by your said orator as aforesaid, and received in exchange therefor certificates of said Northern Securities Company representing an interest in \$82,491,871 par value and said cash. . . ."

"That at the time of such exchange, on said 18th of November, 1901, it was agreed between said Harriman and Pierce and said defendant, Northern Securities Company, that the said \$41,085,000 par value of said preferred stock of the said Northern Pacific Railway Company should be converted into common stock of said Northern Pacific Railway Company; that said preferred stock was subsequently and in or about the month of December, 1901, converted by said defend-

ant Northern Securities Company into common stock of said Northern Pacific Railway Company of the same par value; that certificates for \$34,709,062 par value of such common stock registered in its name on the books of said railway company were substituted in lieu and place of the certificates for said preferred stock; that said Northern Securities Company *caused said original common stock to be transferred into its name upon the books of said railway company, and that said Northern Securities Company now holds within the jurisdiction of this court certificates registered in its name on the books of the Northern Pacific Company for said common stock so originally received from your orators Harriman and Pierce, and for said common stock into which said preferred stock was so converted and certificates substituted as aforesaid.”

“Your orators are advised by counsel, and, therefore, aver, that the effect of said decree of April 9, 1903, as affirmed by the Supreme Court of the United States, was to adjudge that the Northern Securities Company was not a purchaser or owner, but simply a custodian, of the shares of stock of said railway company acquired and held by it as aforesaid; that it acquired and held possession thereof in violation of said anti-trust act; that it acquired no title thereto, and cannot transfer any rights in respect thereof; and that the legal and equitable owners of said shares of the stock of said railway companies were and are the several parties who originally exchanged the same for stock of the Northern Securities Company or their assigns.”

The prayer of the bill was “that it be decreed that said proposed plan of distribution is illegal and contrary to law and in violation of the rights and equities of your orators, and that the complainants are entitled to the return and transfer to them by the defendant Northern Securities Company of the shares of common stock of said Northern Pacific Railway Company which were so delivered by said Harriman and Pierce, and the shares of common stock into which the preferred stock of the Northern Pacific Railway Company, delivered by them, were converted, in exchange for the certificates of stock of the Northern Securities Company so issued to and now held by your orators, and such sum in cash as may be just; and that the said defendant, Northern Securities Company, its directors, officers, and agents, may be ordered and [261] directed to indorse *the certificates now held by it for said stock of the Northern Pacific Railway Company to your said orator Oregon Short Line Railroad Company or in blank, and deliver the same to your orator the Equitable Trust Company of New York

in exchange for the stock of the Northern Securities Company now held by it, to be held subject to its rights and lien as trustee aforesaid; and that the defendant Northern Securities Company, its directors, officers, agents, and employees, be perpetually enjoined and restrained from in any manner parting with, disposing of, transferring, assigning, or distributing, any part of said stock of the Northern Pacific Railway Company so received from your orators Harriman and Pierce as aforesaid, or any common stock into which the preferred stock received from them may have been converted, or the certificates now representing the same or any part thereof, except to return the same to your orators in exchange for its own stock so issued as aforesaid and said cash; and that your orators have such other or further or general relief against said Northern Securities Company as shall be proper and just under the circumstances of the case.

“Your orators further pray that the defendant, Northern Securities Company, may be enjoined and restrained from parting with, disposing of, transferring, assigning, or distributing, said stock of the Northern Pacific Railway Company, or any part thereof, during the pendency of this suit, or any certificates now representing the same.”

The proofs embraced the pleadings and decrees in the suit of *United States v. Northern Securities Company*; the *ex parte* affidavits of Harriman, Hill, and others; the deposition of Harriman taken before the Interstate Commerce Commission at Chicago in January, 1902; the deposition of Harriman taken in the suit of *Minnesota v. Northern Securities Company* in December, 1902; extracts from the minutes of proceedings of the board of directors of the Northern Pacific Railway Company, and of the executive committee and board of directors of the Northern Securities Company.

Messrs. William D. Guthrie and D. T. Watson argued the cause, and, with *Messrs. R. S. Lovett, Maxwell Evarts, John F. Dillon, R. V. Lindabury, and Bainbridge Colby*, filed a brief for petitioners:

The practice of granting an injunction to stay a threatened disposition of property *pendente lite*, which, if not restrained, would render a final judgment wholly ineffectual, is firmly established.

Georgia v. Brailsford, 2 Dall. 402, 1 L. ed. 433; *Glascott v. Lang*, 3 Mylne & C. 451; *Great Western R. Co. v. Birmingham & O. J. R. Co.* 2 Phill. Ch. 597; *Casey v. Cincinnati Typographical Union No. 3*, 12 L. R. A. 193, 45 Fed. 135; *Blount v. Societe Anonyme*, 3 C. C. A. 455, 6 U. S. App. 335, 53 Fed. 98;

Newton v. Levis, 25 C. C. A. 161, 49 U. S. App. 266, 79 Fed. 715; *Southern P. Co. v. Earl*, 27 C. C. A. 185, 48 U. S. App. 716, 82 Fed. 690; *Allison v. Corson*, 33 C. C. A. 12, 60 U. S. App. 387, 88 Fed. 581; *Denver & R. G. R. Co. v. United States*, 59 C. C. A. 579, 124 Fed. 156; *Atlanta, K. & N. R. Co. v. Southern R. Co.* 131 Fed. 657; *Harriman v. Northern Securities Co.* 132 Fed. 464; *Bloxam v. Metropolitan R. Co.* L. R. 3 Ch. 337; *Western U. Teleg. Co. v. Pennsylvania R. Co.* 120 Fed. 981; *Cartersville Light & P. Co. v. Cartersville*, 114 Fed. 699; *Utah, N. & C. R. Co. v. Utah & C. R. Co.* 110 Fed. 879; *Cohen v. Delavina*, 104 Fed. 946; *United States v. Duluth*, 1 Dill. 469, Fed. Cas. No. 15,001; *Andrae v. Redfield*, 12 Blatchf. 407, Fed. Cas. No. 367; *Charles v. Marion*, 98 Fed. 166; *Jensen v. Norton*, 12 C. C. A. 608, 29 U. S. App. 121, 64 Fed. 662.

The several circuit courts of appeals are justified in reversing orders of the circuit courts granting preliminary injunction, only when the discretion of the latter has been improperly exercised or abused.

Rahley v. Columbia Phonograph Co. 58 C. C. A. 639, 122 Fed. 623; *United States Gramophone Co. v. Seaman*, 51 C. C. A. 419, 113 Fed. 745; *Railroad Commission v. J. Rosenbaum Grain Co.* 64 C. C. A. 444, 130 Fed. 110; *Massie v. Buck*, 62 C. C. A. 535, 128 Fed. 27; *Kerr v. New Orleans*, 61 C. C. A. 450, 126 Fed. 920; *Workingmen's Amalgamated Council v. United States*, 6 C. C. A. 258, 13 U. S. App. 426, 57 Fed. 85; *Louisville Home Teleph. Co. v. Cumberland, Telcph. & Teleg. Co.* 49 C. C. A. 524, 111 Fed. 663; *Loew Filter Co. v. German-American Filter Co.* 47 C. C. A. 94, 107 Fed. 949; *Paris Medicine Co. v. W. H. Hill Co.* 42 C. C. A. 227, 102 Fed. 148; *Proctor & G. Co. v. Globe Ref. Co.* 34 C. C. A. 405, 92 Fed. 357; *Societe Anonyme v. Allen*, 33 C. C. A. 282, 61 U. S. App. 734, 90 Fed. 815; *Thomson-Houston Electric Co. v. Ohio Brass Co.* 26 C. C. A. 107, 54 U. S. App. 1, 80 Fed. 712; *Carrett v. T. H. Garrett & Co.* 24 C. C. A. 173, 47 U. S. App. 250, 78 Fed. 472; *Thompson v. Nelson*, 18 C. C. A. 137, 37 U. S. App. 478, 71 Fed. 339; *Duplex-Printing-Press Co. v. Campbell Printing-Press & Mfg. Co.* 16 C. C. A. 220, 37 U. S. App. 250, 69 Fed. 250; *New Albany Waterworks v. Louisville Bkg. Co.* 58 C. C. A. 576, 122 Fed. 776; *F. C. Austin Mfg. Co. v. American Wellworks*, 57 C. C. A. 330, 121 Fed. 76; *Chickering v. Chickering & Sons*, 56 C. C. A. 475, 120 Fed. 69; *Bartholomew v. Union Paper & Bag Co.* 51 C. C. A. 250, 113 Fed. 289; *Terre Haute v. Farmers' Loan & T. Co.* 40 C. C. A. 117, 99 Fed. 838; *Bradshaw v. Miners' Bank*, 23 C. C. A. 578, 46 U. S. App. 663, 77 Fed. 932; *Denver & R. G. R. Co. v. United States*, 59 C. C. A. 579, 124 Fed. 156; *Stearns-*
197 U. S.

Roger Mfg. Co. v. Brown, 52 C. C. A. 559, 114 Fed. 939; *Higginson v. Chicago, B. & Q. R. Co.* 42 C. C. A. 254, 102 Fed. 197; *Dimick v. Shaw*, 36 C. C. A. 347, 94 Fed. 266; *Newton v. Levis*, 25 C. C. A. 161, 49 U. S. App. 266, 79 Fed. 715; *Empire State-Idaho Min. & Developing Co. v. Bunker Hill & S. Min. & Concentrating Co.* 58 C. C. A. 311, 121 Fed. 973; *Murray v. Vender*, 48 C. C. A. 555, 109 Fed. 585; *Pacific Steam Whaling Co. v. Alaska Packers' Asso.* 40 C. C. A. 494, 100 Fed. 462; *Southern P. Co. v. Earl*, 27 C. C. A. 185, 48 U. S. App. 716, 82 Fed. 690; *Shea v. Nilima*, 133 Fed. 209.

The appellate tribunal will not assume the determination of the whole controversy without a proper prior adjudication by the court of first instance.

Webster v. Cooper, 10 How. 54, 55, 13 L. ed. 325, 326; *Jewell v. Knight*, 123 U. S. 426, 433, 31 L. ed. 190, 192, 8 Sup. Ct. Rep. 193; *Chicago, M. & St. P. R. Co. v. Tompkins*, 176 U. S. 167, 179, 44 L. ed. 417, 422, 20 Sup. Ct. Rep. 336.

Such a course of procedure would give a defendant an unfair and unwarranted advantage, and completely overturn the fundamental principles upon which the courts have heretofore proceeded in granting preliminary injunctions.

Brill v. Peckham Motor Truck & Wheel Co. 189 U. S. 57, 63, 47 L. ed. 706, 709, 23 Sup. Ct. Rep. 562.

The original contract being for an illegal purpose could confer no rights of ownership; and the corporation had no legal right or power to make the acquisition for any such illegal purpose. The whole transaction was illegal, *ultra vires*, and void from the beginning to the end.

Ashbury R. Carriage & Iron Co. v. Riche, L. R. 7 H. L. 653; *Thomas v. West Jersey R. Co.* 101 U. S. 71, 80, 83, 25 L. ed. 950, 951, 952; *Oregon R. & Nav. Co. v. Oregonian R. Co.* 130 U. S. 1, 22, 32 L. ed. 837, 840, 9 Sup. Ct. Rep. 409; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* 118 U. S. 290, 308, 317, 30 L. ed. 83, 91, 94, 6 Sup. Ct. Rep. 1194; *Jacksonville, M. P. R. & Nav. Co. v. Hooper*, 160 U. S. 514, 524, 40 L. ed. 515, 523, 16 Sup. Ct. Rep. 379; *Dwight v. Brewster*, 1 Pick. 50, 11 Am. Dec. 133.

The settled rule is that such a contract is wholly void and of no effect for any purpose. The objection is not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified or confirmed by the stockholders because it could not have been authorized by them. And no performance can give the unlawful agreement any validity by way of estoppel or otherwise, or be the foundation of any right.

Thomas v. West Jersey R. Co. 101 U. S.

71, 86, 25 L. ed. 950, 953; *Scovill v. Thayer*, 105 U. S. 143, 149, 26 L. ed. 968, 971; *Pennsylvania R. Co. v. St. Louis, A. & T. R. Co.* 118 U. S. 290, 310, 30 L. ed. 83, 92, 6 Sup. Ct. Rep. 1194; *Oregon R. & Nav. Co. v. Oregonian R. Co.* 130 U. S. 1, 38, 32 L. ed. 837, 846, 9 Sup. Ct. Rep. 409; *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 24, 60, 35 L. ed. 55, 68, 11 Sup. Ct. Rep. 478; *McCormick v. Market Nat. Bank*, 165 U. S. 538, 550, 41 L. ed. 817, 821, 17 Sup. Ct. Rep. 433; *California Nat. Bank v. Kennedy*, 167 U. S. 362, 368, 42 L. ed. 198, 200, 17 Sup. Ct. Rep. 831; *Pullman's Palace Car Co. v. Central Transp. Co.* 171 U. S. 138, 43 L. ed. 108, 18 Sup. Ct. Rep. 808.

It is also the settled doctrine of this court that any contract made in violation of a statute is void.

Gibbs v. Consolidated Gas Co. 130 U. S. 396, 410, 32 L. ed. 979, 984, 9 Sup. Ct. Rep. 553; *Miller v. Ammon*, 145 U. S. 421, 426, 36 L. ed. 759, 762, 12 Sup. Ct. Rep. 884; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 548, 46 L. ed. 679, 685, 22 Sup. Ct. Rep. 431.

No right can be acquired under such a contract.

Montgomery v. United States, 15 Wall. 395, 399, 21 L. ed. 97, 98. To the same effect, see *Dcsmare v. United States*, 93 U. S. 605, 612, 23 L. ed. 959, 960; *Sprott v. United States*, 20 Wall. 459, 461, 22 L. ed. 371; *United States v. Lapene*, 17 Wall. 601-603, 21 L. ed. 693, 694; *United States v. Grossmayer*, 9 Wall. 72, 76, 19 L. ed. 627, 629; *The Ouachita Cotton (Whitenbury v. United States)* 6 Wall. 521, 532, 18 L. ed. 935, 939; *Bank of United States v. Owens*, 2 Pet. 527, 541, 7 L. ed. 508, 513.

The law implies that when property is transferred for an illegal purpose which has been terminated, prevented, or abandoned, the holder will return the property on demand.

Chapman v. Douglas County, 107 U. S. 348, 355, 27 L. ed. 378, 381, 2 Sup. Ct. Rep. 62; *American Tube Works v. Boston Mach. Co.* 139 Mass. 5, 29 N. E. 63; *Louisiana v. Wood*, 102 U. S. 294, 299, 26 L. ed. 153, 155; *Parkersburg v. Brown*, 106 U. S. 487, 503, 27 L. ed. 238, 245, 1 Sup. Ct. Rep. 442; *Davis v. Old Colony R. Co.* 131 Mass. 258, 41 Am. Rep. 221; *White v. Franklin Bank*, 22 Pick. 181; *Lacaussade v. White*, 7 T. R. 535.

The present suit is in no sense whatever an action on an illegal contract, or to enforce an illegal agreement. On the contrary, it is brought on repudiation thereof by both parties.

National Bank & Loan Co. v. Petrie, 189 U. S. 423, 425, 47 L. ed. 879, 880, 23 Sup. Ct. Rep. 512.

No precedents in support of the right to

recover could be stronger than the series of decisions in the long controversy between the Pullman Palace Car Company and Central Transportation Company, where, although the contract was illegal and the parties *in pari delicto*, return of the property delivered under the illegal lease, or its value, was ultimately decreed.

Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478, 65 Fed. 158, 171 U. S. 138, 43 L. ed. 108, 18 Sup. Ct. Rep. 808.

The defense that a lessee could retain the leased property by pleading illegality after the illegal lease had come to an end by the expiration of the time fixed by the parties was interposed in the case of *Sittel v. Wright*, 58 C. C. A. 416, 122 Fed. 434, but it was overruled as utterly untenable.

See *Manchester & L. R. Co. v. Concord R. Corp.* 66 N. H. 100, 9 L. R. A. 689, 3 Inters. Com. Rep. 319, 49 Am. St. Rep. 582, 20 Atl. 383.

The settled rule as to the invalidity and nullity of contracts entered into in violation of statutes or public policy has been uniformly applied in analogous cases arising out of contracts relating to illegal combinations or trusts.

Langdon v. Central R. & Bkg. Co. 2 L. R. A. 120, 37 Fed. 449; *State ex rel. Watson v. Standard Oil Co.* 49 Ohio St. 137, 15 L. R. A. 145, 34 Am. St. Rep. 541, 30 N. E. 279; *People ex rel. Peabody v. Chicago Gas Trust Co.* 130 Ill. 268, 8 L. R. A. 497, 17 Am. St. Rep. 319, 22 N. E. 798; *People v. North River Sugar Ref. Co.* 121 N. Y. 582, 9 L. R. A. 33, 18 Am. St. Rep. 843, 24 N. E. 834; *Cameron v. Havemeyer*, 25 Abb. N. C. 438, 12 N. Y. Supp. 126; *Unckles v. Colgate*, 148 N. Y. 529, 43 N. E. 59; *State v. Nebraska Distilling Co.* 29 Neb. 700, 46 N. W. 155.

The cases holding that a bona fide purchaser may acquire a good title from one holding possession under an illegal contract are obviously distinguishable, because in such cases the doctrine of estoppel operates to prevent the real owner from asserting his title, or the right of the custodian as his agent, against the innocent third party, but not to affirm any title in the one having such illegal possession, or in anyone acquiring with full notice.

Cowdrey v. Vandenburg, 101 U. S. 572, 575, 576, 25 L. ed. 923, 924, 925; *Anderson v. Armstead*, 69 Ill. 452.

The ownership of the railroad stocks remains in the original depositors as the necessary and logical result of the adjudication that the Northern Securities Company had acquired and held property as a mere "holding" company, in violation of the act of Congress, and could return the stocks to the original stockholders of the respective rail-

way companies, because no performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it.

Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 24, 60, 35 L. ed. 55, 68, 11 Sup. Ct. Rep. 478.

The extent and effect of the decision of any court as *res judicata* or as a judicial precedent must be ascertained not merely from the decree or mandate, but also from the pleadings and the opinions delivered by the court. It is likewise proper to refer to the evidence before the court and to the arguments of counsel whenever necessary, in order to determine exactly what points the court has ruled upon. The court is always at liberty to refer to its own records.

Dimmick v. Tompkins, 194 U. S. 540, 548, 48 L. ed. 1110, 1113, 24 Sup. Ct. Rep. 780; *Bienville Water Supply Co. v. Mobile*, 186 U. S. 212, 217, 46 L. ed. 1132, 1134, 22 Sup. Ct. Rep. 820; *Butler v. Eaton*, 141 U. S. 240, 243, 35 L. ed. 713, 714, 11 Sup. Ct. Rep. 985.

Every question directly presented by the issues, and discussed and passed upon in the opinions, is as much a part of the decision and judgment of the court as if it had been expressly recited in its decree or mandate. So the mandate of this court is always to be read in the light of its opinion; and it has never been the practice to recite in the mandate any of the points decided, but simply to declare the ultimate conclusion of affirmation, reversal, dismissal, or qualification of the decree below.

Last Chance Min. Co. v. Tyler Min. Co. 157 U. S. 683, 690, 39 L. ed. 859, 862, 15 Sup. Ct. Rep. 733; *Re Sanford Fork & Tool Co.* 160 U. S. 247, 256, 40 L. ed. 414, 416, 16 Sup. Ct. Rep. 291; *Re Potts*, 166 U. S. 263, 265, 41 L. ed. 994, 995, 17 Sup. Ct. Rep. 520; *Baker v. Cummings*, 181 U. S. 117, 126, 45 L. ed. 776, 780, 21 Sup. Ct. Rep. 578; *National Foundry & Pipe Works v. Oconto Water Supply Co.* 183 U. S. 216, 234, 46 L. ed. 157, 169, 22 Sup. Ct. Rep. 111.

All identified in interest and in privity with one of the litigating parties are concluded by a judgment and entitled to invoke its effect.

New Orleans v. Citizens' Bank, 167 U. S. 371, 396, 42 L. ed. 202, 210, 17 Sup. Ct. Rep. 905.

Even if the decision in the government suit does not constitute *res judicata* in the strict technical sense which we earnestly claim it does, it undoubtedly should have been regarded as a controlling judicial precedent on the same facts sufficient to establish *prima facie* all that the complainants

were called upon to show on the motion for a preliminary injunction.

Brill v. Peckham Motor Truck & Wheel Co. 189 U. S. 57, 59-63, 47 L. ed. 706, 707-709, 23 Sup. Ct. Rep. 562; *American Bell Teleph. Co. v. National Improved Teleph. Co.* 27 Fed. 663; *Kerr v. New Orleans*, 61 C. C. A. 450, 126 Fed. 920.

A stockholder is so far an integral part of the corporation that he is considered privy to any legal proceedings touching its status and powers. His stock may not be fully paid up or issued for a legal consideration, but nevertheless he is a stockholder so long as he stands registered as such on the books of the company. The real parties in interest behind the corporations are always the stockholders. Thus if a corporation has been adjudged insolvent in legal proceedings, this adjudication of its status is binding upon every stockholder for reasons quite applicable to the question now being considered.

Sanger v. Upton, 91 U. S. 56, 59, 23 L. ed. 220, 221. See also *Hawkins v. Glenn*, 131 U. S. 319, 329, 33 L. ed. 184, 191, 9 Sup. Ct. Rep. 739; *Glenn v. Liggett*, 135 U. S. 533, 544, 34 L. ed. 262, 267, 10 Sup. Ct. Rep. 867; *Great Western Teleg. Co. v. Purdy*, 162 U. S. 329, 337, 40 L. ed. 986, 990, 16 Sup. Ct. Rep. 810; 3 Cook, Corp. 5th ed. § 750; *Herman, Estoppel & Res Adjudicata*, 154, 165; *Hale v. Hardon*, 37 C. C. A. 240, 95 Fed. 747; *Hendrickson v. Bradley*, 29 C. C. A. 303, 55 U. S. App. 715, 85 Fed. 508; *Wilson v. Seymour*, 22 C. C. A. 477, 40 U. S. App. 567, 76 Fed. 678; *National Foundry & Pipe Works v. Oconto Water Co.* 68 Fed. 1006; *Secor v. Singleton*, 41 Fed. 725.

Moreover, the Securities company, the custodian or trustee of the railway shares deposited with it, represented the complainants as *cestuis que trust*. It is a familiar rule that in suits respecting trust property all the *cestuis que trust* are fully represented by the trustee and bound by the decree. The reason is that through the trustee their rights are deemed to have been fully and effectually presented and protected.

Kerrison v. Stewart, 93 U. S. 155, 160, 23 L. ed. 843, 845; *Graham v. Boston, H. & E. R. Co.* 118 U. S. 161, 179, 30 L. ed. 196, 205, 6 Sup. Ct. Rep. 1009; *McCampbell v. Mason*, 151 Ill. 500, 38 N. E. 672; *McElrath v. Pittsburg & S. R. Co.* 68 Pa. 37.

Mr. Harriman's testimony in the government suit does not estop the complainants from showing the real facts, and operates to validate the contract and to vest legal title in the Securities company.

Sturm v. Boker, 150 U. S. 312, 336, 37 L. ed. 1093, 1102, 14 Sup. Ct. Rep. 99; *Mutual L. Ins. Co. v. Phinney*, 178 U. S. 327, 342,

343, 44 L. ed. 1088, 1095, 1096, 20 Sup. Ct. Rep. 906.

Whatever the parties may think, their legal relations are to be determined by the legal consequences of their acts.

Towle v. White, 29 L. T. N. S. 78.

This court has often pointed out that, although parties may industriously and repeatedly call a transaction what it is not, even in the most formal instruments, the words, as well as the form or the name, are of little account, but that it is the legal effect of the whole transaction which is to be sought for and gathered from the acts of the parties.

Heryford v. Davis, 102 U. S. 235, 243, 244, 246, 26 L. ed. 160, 162, 163; *Chicago R. Equipment Co. v. Merchants' Nat. Bank*, 136 U. S. 268, 280, 34 L. ed. 349, 352, 10 Sup. Ct. Rep. 999; *McGourkey v. Toledo & O. C. R. Co.* 146 U. S. 536, 569, 36 L. ed. 1079, 1091, 13 Sup. Ct. Rep. 170.

In a word, equity looks behind the mask at the true face; behind the form to the fact.

McNamara v. Culver, 22 Kan. 661; *Peugh v. Davis*, 96 U. S. 332, 336, 24 L. ed. 775, 776.

The failure of Mr. Hill and Mr. Clough to deny or controvert the fundamental material allegations of the bill as to the objects for which their company had been organized by them and their associates is equivalent to an admission of the truth of the allegations.

Young v. Grundy, 6 Craneh. 51, 3 L. ed. 149; *Agawan Woollen Co. v. Jordan*, 7 Wall. 583, 609, 19 L. ed. 177, 184; *Brown v. Pacific Mail S. S. Co.* 5 Blatchf. 525, 530, 532, Fed. Cas. No. 2,025; *Christensen v. Kellogg Switchboard & Supply Co.* 110 Ill. App. 61.

The suggestion that this court should treat as material the fact that the promoters and original holders have induced the public to buy or take some of their stock is answered by the verified allegation of the bill that every holder acquired the stock with full knowledge, and by the notorious facts of the case, as well as by the language of Mr. Justice Brown, speaking for the court in *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 691, 40 L. ed. 849, 856, 16 Sup. Ct. Rep. 714. See also *Scovill v. Thayer*, 105 U. S. 143, 151, 26 L. ed. 968, 972; *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 24, 60, 35 L. ed. 55, 68, 11 Sup. Ct. Rep. 478; *Tilton v. Cofield*, 93 U. S. 163, 168, 23 L. ed. 858, 859.

The fact that Mr. Harriman participated in any acts attending the issue of the stock to third parties, or ratified the sale of the cash stock, even if unexplained, would not estop him from showing the truth and that they all bought with notice. Illegal acts can-

not be given validity by assenting to them or acting under them, for otherwise persons or corporations could easily abrogate a statute by simply contracting to do and doing the prohibited act.

Thomas v. West Jersey R. Co. 101 U. S. 71, 86, 25 L. ed. 950, 953; *Scovill v. Thayer*, 105 U. S. 143, 149, 26 L. ed. 968, 971; *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 24, 60, 35 L. ed. 55, 68, 11 Sup. Ct. Rep. 478; *Veeder v. Mudgett*, 95 N. Y. 295.

The pendency of the government suit since early in 1902 constituted a full excuse for delay, and precludes the defense of laches.

Illinois Grand Trunk R. Co. v. Wade, 140 U. S. 65, 67-70, 35 L. ed. 342, 343, 344, 11 Sup. Ct. Rep. 709; *Boardman v. Lake Shore & M. S. R. Co.* 84 N. Y. 157; *Cox v. Stokes*, 156 N. Y. 491, 51 N. E. 316.

It is better to yield to the force of truth and conscience than to any reverence for maxims.

Northrop v. Graves, 19 Conn. 548, 50 Am. Dec. 264. See also *Yarmouth v. France*, L. R. 19 Q. B. Div. 647; 2 Stephen, History of Crim. Law, p. 4, note 1.

A person does not become an outlaw and lose all rights by doing an illegal act.

National Bank & Loan Co. v. Petrie, 189 U. S. 423, 425, 47 L. ed. 879, 880, 23 Sup. Ct. Rep. 512.

The rule as to parties *in pari delicto* contemplates the existence of a *delictum*, that is, a wrongful act knowingly done, an intentional "transgression against positive law." It cannot be reasonably said that parties are *in pari delicto* when there is concededly no intentional wrongdoing or crime. Even in criminal cases, satisfactory proof of a mistake of the law, honestly held in consequence of a reasonable, but erroneous, construction of a doubtful statute, often operates to prevent a conviction.

Queen v. Tolson, L. R. 23 Q. B. Div. 168; *Taylor v. Newman*, 4 Best & S. 89; *Reg. v. Allday*, 8 Car. & P. 136; *Reg. v. Twose*, 14 Cox, C. C. 327; *Reg. v. Sleep*, 8 Cox, C. C. 472; *Reg. v. Tinkler*, 1 Fost. & F. 513; *Rider v. Wood*, 2 El. & El. 338; *Buckmaster v. Reynolds*, 13 C. B. N. S. 62; *United States v. Conner*, 3 McLean, 573, Fed. Cas. No. 14,847; *United States v. Pearce*, 2 McLean, 14, Fed. Cas. No. 16,020; *Halsted v. State*, 41 N. J. L. 552, 32 Am. Rep. 247; *Cutter v. State*, 36 N. J. L. 125; *Stone v. United States*, 167 U. S. 178, 188, 42 L. ed. 127, 131, 17 Sup. Ct. Rep. 178; *Hedden v. Iselin*, 31 Fed. 266; *State v. Sheeley*, 15 Iowa, 404; *Com. v. Bradford*, 9 Met. 268; *State v. Hause*, 71 N. C. 518; *Dotson v. State*, 6 Coldw. 545.

It would be carrying the punishment be-

yond what any legislator would impose if it were now to be held that one party to a contract, which was subsequently held to be in violation of a statute, rendered himself not only liable to the punishment prescribed by the lawmakers, but, in addition, forfeited all his legal rights, however innocent he might have been of unlawful intent, and that the party in possession of property transferred under a mistake could retain it free from any accountability whatever, and thus enrich himself at the expense of an innocent man acting in good faith. No conceivable public policy could require or sanction such a monstrous result.

Congress & E. Spring Co. v. Knowlton, 103 U. S. 49, 26 L. ed. 347; *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.* 145 U. S. 393, 36 L. ed. 748, 12 Sup. Ct. Rep. 953; *Detroit v. Detroit City R. Co.* 60 Fed. 161; *Pullman Palace-Car Co. v. Central Transp. Co.* 65 Fed. 158.

The general rule need not be challenged that a mistake of law, stripped of all other circumstances and considerations, will not alone afford a ground for relief, but it has been established by innumerable decisions that relief will be granted from the consequences of a mistake of law, whenever the mistake is clearly proved or admitted, and, by reason of such mistake, the party against whom relief is sought would otherwise secure an unfair advantage. Such is the doctrine of the English cases extending back to the time of Lord Mansfield.

Moses v. Macferlan, 2 Burr. 1005; *Farmer v. Arundel*, 2 W. Bl. 824; *Bingham v. Bingham*, 1 Ves. Sr. 126, Belt's Supp. 79; *Bize v. Dickason*, 1 T. R. 285; *Beauchamp v. Winn*, L. R. 6 H. L. 223; *Re Saxon Life Assur. Soc.* 2 Johns. & H. 408; *Jones v. Clifford*, L. R. 3 Ch. Div. 779; *Allcard v. Walker* [1896] 2 Ch. 369.

This is also the established law in this country, and the right to relief from the consequences of a mistake of law under the principles above stated has been fully recognized by this court in—

Griswold v. Hazard, 141 U. S. 260, 284, 35 L. ed. 678, 688, 11 Sup. Ct. Rep. 972, 999; *Congress & E. Spring Co. v. Knowlton*, 103 U. S. 49, 60, 26 L. ed. 347, 350; *Snell v. Atlantic F. & M. Ins. Co.* 98 U. S. 85, 90, 91, 25 L. ed. 52, 54, 55; *Hunt v. Rousmanier*, 8 Wheat. 174, 215, 5 L. ed. 589, 599; *Hunt v. Rhodes*, 1 Pet. 1, 17, 7 L. ed. 27, 34. See also *State v. Paup*, 13 Ark. 129, 56 Am. Dec. 303; *Griffith v. Sebastian County*, 49 Ark. 24, 3 S. W. 886; *Northrop v. Graves*, 19 Conn. 548, 50 Am. Dec. 264; *Stedwell v. Anderson*, 21 Conn. 139; *Culbreath v. Culbreath*, 7 Ga. 64, 50 Am. Dec. 375; *Underwood v. Brockman*, 4 Dana, 309, 29 Am. Dec. 407; *Ray v. Bank of Kentucky*, 3 B. 197 U. S.

Mon. 510, 39 Am. Dec. 479; *Stockbridge Iron Co. v. Hudson Iron Co.* 102 Mass. 45; *Lowndes v. Chisolm*, 2 M'Cord, Eq. 455, 16 Am. Dec. 667; *Mortimer v. Pritchard*, Bail. Eq. 505; *Hopkins v. Mazyck*, 1 Hill, Eq. 242; *MacKay v. Smith*, 27 Wash. 442, 67 Pac. 982.

When an illegal contract is sought to be specifically enforced, or when damages are claimed for its breach, undoubtedly the sound rule is that the difference between *malum prohibitum* and *malum in se* is immaterial.

Gibbs v. Consolidated Gas Co. 130 U. S. 396, 412, 32 L. ed. 979, 985, 9 Sup. Ct. Rep. 553.

But the distinction between *malum prohibitum* and *malum in se* has been often recognized by the courts when considering the right to recover property transferred under an illegal contract, upon disaffirmance or termination of the illegal transaction, under circumstances which result in a failure of consideration.

Pratt v. Short, 79 N. Y. 437, 35 Am. Rep. 531; *Union Stock Yards Co. v. Chicago, B. & Q. R. Co.* 196 U. S. 217, ante, 453, 25 Sup. Ct. Rep. 226.

In the case at bar it is difficult to perceive how the defendant Securities company can consistently urge that the transaction involved moral turpitude and was therefore *malum in se*, in view of the conceded fact and its own declaration that the parties acted in good faith and in the full belief that they were not violating the law. The transaction clearly was not forbidden by the common law.

Re Greene, 52 Fed. 104; *Mogul S. S. Co. v. McGregor*, L. R. 23 Q. B. Div. 598 [1892] A. C. 25; *United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 334, 335, 41 L. ed. 1007, 1025, 1026, 17 Sup. Ct. Rep. 540; *United States v. Joint Traffic Asso.* 171 U. S. 505, 572, 573, 43 L. ed. 259, 288, 289, 19 Sup. Ct. Rep. 25.

It was also apparently legal according to the law of New Jersey, where it occurred.

Dill. Mun. Corp. pp. 88, 93; *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507, 46 L. R. A. 255, 78 Am. St. Rep. 612, 43 Atl. 723.

Except for the provisions of the Federal anti-trust act, there could have been no contention that the transaction was criminal in any sense, and the punishment provided by that act does not make a violation of its provisions an infamous crime.

Ansbros v. United States, 159 U. S. 695, 697, 40 L. ed. 310, 311, 16 Sup. Ct. Rep. 187.

The distinction between *malum prohibitum* and *malum in se*, when the action is brought to recover property or money after the illegal transaction has come to an end,

or has been put at an end by the parties or by the courts, has been often recognized by the Federal courts.

Congress & E. Spring Co. v. Knowlton, 103 U. S. 49, 26 L. ed. 347; *McCutcheon v. Merz Capsule Co.* 31 L. R. A. 415, 19 C. C. A. 108, 37 U. S. App. 586, 71 Fed. 787; *Parkersburg v. Brown*, 106 U. S. 487, 27 L. ed. 238, 1 Sup. Ct. Rep. 442; *Logan County Nat. Bank v. Townsend*, 139 U. S. 67, 75, 35 L. ed. 107, 111, 11 Sup. Ct. Rep. 496; *Central Transp. Co. v. Pullman's Palace-Car Co.* 139 U. S. 24, 60, 35 L. ed. 55, 68, 11 Sup. Ct. Rep. 478, 65 Fed. 158, 171 U. S. 138, 151, 43 L. ed. 108, 114, 18 Sup. Ct. Rep. 808; *Tappenden v. Randall*, 2 Bos. & P. 467; *Ex parte Bulmer*, 13 Ves. Jr. 313; *White v. Franklin Bank*, 22 Pick. 181; *Lowell v. Boston & L. R. Corp.* 23 Pick. 24, 34 Am. Dec. 33; *Washington Gaslight Co. v. District of Columbia*, 161 U. S. 316, 327, 328, 40 L. ed. 712, 718, 719, 16 Sup. Ct. Rep. 564; *Hanauer v. Doane*, 12 Wall. 342, 348, 20 L. ed. 439, 441; *Douglass v. Kavanaugh*, 33 C. C. A. 107, 62 U. S. App. 38, 90 Fed. 373.

There is a striking analogy between the case at bar and those cases where money or property has been deposited with a depositary, stakeholder, trustee, or agent, with authority to apply it to an illegal purpose, and the property remains in the hands of such depositary, stakeholder, trustee, or agent after the illegal purpose has come to an end, either by reason of enforced abandonment, voluntary repudiation, or failure to dispose of the property or money in consummation of the illegal purpose. In all such cases, it has been held that the maxim concerning parties *in pari delicto* does not apply at all, that the property or money legally belongs to the depositor and is held by the other without consideration, and that it best comports with sound principles of public policy, as well as natural justice, to compel restitution.

Dwight v. Brewster, 1 Pick. 50, 11 Am. Dec. 133; *Sampson v. Shaw*, 101 Mass. 145, 3 Am. Rep. 327; *Morgan v. Beaumont*, 121 Mass. 7; *Clarke v. Brown*, 77 Ga. 606, 4 Am. St. Rep. 98; *Shannon v. Baumer*, 10 Iowa, 210; *Taylor v. Bowers*, L. R. 1 Q. B. Div. 291; *Congress & E. Spring Co. v. Knowlton*, 103 U. S. 49, 57, 26 L. ed. 347, 349; *Re Cronmire* [1898] 2 Q. B. 383.

Courts of justice will not permit a mere custodian, depositary, trustee, or agent to take advantage of the alleged illegality of the transaction, but will compel him to return or account for the property to the owners. The books will be searched in vain for any authority tending to support the extraordinary contention that, after the courts have once expressly adjudicated that a custodian under an illegal contract might re-

turn to the original depositors or their assigns the property received by him from them, nevertheless, the custodian, when sued by a depositor, could interpose as a defense the maxim, *in pari delicto potior est conditio possidentis*, and therefore refuse to return the property.

Kinsman v. Parkhurst, 18 How. 289, 293, 15 L. ed. 385, 387; *Brooks v. Martin*, 2 Wall. 70, 80, 17 L. ed. 732, 735; *Planters' Bank v. Union Bank*, 16 Wall. 483, 500, 21 L. ed. 473, 480; *Block v. Darling*, 140 U. S. 234, 239, 35 L. ed. 476, 478, 11 Sup. Ct. Rep. 832; *Pointer v. Smith*, 7 Heisk. 137; *Manchester & L. R. Co. v. Concord R. Corp.* 66 N. H. 100, 9 L. R. A. 689, 3 Inters. Com. Rep. 319, 49 Am. St. Rep. 582, 20 Atl. 383; *Newbold v. Sims*, 2 Serg. & R. 317; *Jeffrey v. Ficklin*, 3 Ark. 227, 36 Am. Dec. 456; *Barrett v. Neill*, Wright (Ohio) 472; *Skinner v. Henderson*, 10 Mo. 205; *Walker v. Chapman*, Loft, 342; *Wassermann v. Sloss*, 117 Cal. 425, 38 L. R. A. 176, 59 Am. St. Rep. 209, 49 Pac. 566; *Morgan v. Groff*, 4 Barb. 524; *Bernard v. Taylor*, 23 Or. 416, 18 L. R. A. 859, 37 Am. St. Rep. 693, 31 Pac. 968; *Kiewert v. Rindskopf*, 46 Wis. 481, 32 Am. Rep. 731, 1 N. W. 163; *Douville v. Merrick*, 25 Wis. 688; *Bone v. Ekless*, 5 Hurlst. & N. 925; *Wright v. Stewart*, 130 Fed. 905; *Dauler v. Hartley*, 178 Pa. 23, 35 Atl. 857; *Mallory v. Hanaur Oil Works*, 86 Tenn. 598, 8 S. W. 396.

It is also a universally recognized exception to the rule concerning parties *in pari delicto*, that the courts will permit the recovery of property delivered and held under an illegal contract which has been terminated *in fieri*, when the public interests will be advanced thereby. In the case at bar, the public policy evidenced by the act of Congress in question requires that the Securities company shall not be permitted to retain in its possession "in one ownership" the railway shares, and that it shall not continue to hold the same. If this be so, then the rule denying relief to parties *in pari delicto* does not apply, for the superior interest or concern of the public is to break up such combinations, and not to permit them to continue in any form.

Starke v. Littlepage, 4 Rand. (Va.) 368; *O'Conner v. Ward*, 60 Miss. 1025; 5 Thomp. Corp. § 6410; 2 Pom. Eq. Jur. § 941; *Story's Eq. Jur.* § 298.

If it be held that complainants are not entitled to recover the Northern Pacific stock deposited by them and that such stock has become an asset of the Northern Securities Company as claimed by the defendant, or if for any reason the restoration of the *status quo* be found impracticable, which they deny, then the only lawful and equitable method is to sell the railroad shares

held by the Northern Securities Company, or such as may not be traceable, and thus convert the same into cash and distribute the proceeds ratably among the stockholders. Such is the settled law of this court, and such is the settled law of New Jersey.

Mason v. Pewabic Min. Co. 133 U. S. 50, 63, 33 L. ed. 524, 530, 10 Sup. Ct. Rep. 224; *Kean v. Johnson*, 9 N. J. Eq. 401; *Coler v. Tacoma R. & Power Co.* 64 N. J. Eq. 117, 53 Atl. 680, Reversed in 65 N. J. Eq. 347, 54 Atl. 413.

Mr. D. T. Watson also filed a separate brief for petitioners:

By the affirmance of this court the decree in the government case became the decree of the Supreme Court of the United States, and binding upon all parties and privies and other courts.

The meaning of the decree is to be ascertained from its words and the opinion of the Supreme Court, and the only liberty or authority any lower court has is "to proceed in the execution thereof."

Re Potts, 166 U. S. 265, 41 L. ed. 995, 17 Sup. Ct. Rep. 520; *Durant v. Essex Co.* (*Durant v. Storrow*) 101 U. S. 555, 25 L. ed. 961; *Re Sanford Fork & Tool Co.* 160 U. S. 247, 40 L. ed. 414, 16 Sup. Ct. Rep. 291.

The opinion of the Supreme Court is part of the record, and may be freely resorted to to determine what this court has decided.

Re Potts, 166 U. S. 265, 41 L. ed. 995, 17 Sup. Ct. Rep. 520; *National Foundry & Pipe Works v. Oconto Water Supply Co.* 183 U. S. 217, 46 L. ed. 158, 22 Sup. Ct. Rep. 111; *Baker v. Cummings*, 181 U. S. 124, 46 L. ed. 779, 21 Sup. Ct. Rep. 578; *Last Chance Min. Co. v. Tyler Min. Co.* 157 U. S. 683-690, 39 L. ed. 859-862, 15 Sup. Ct. Rep. 733; *Southern P. R. Co. v. United States*, 183 U. S. 519-532, 46 L. ed. 307-314, 22 Sup. Ct. Rep. 154; *United States ex rel. Coffman v. Norfolk & W. R. Co.* 114 Fed. 686; *Russell v. Russell*, 129 Fed. 434; *West v. Brashear*, 14 Pet. 52, 10 L. ed. 350; *De Sollar v. Hanscome*, 158 U. S. 221, 39 L. ed. 959, 15 Sup. Ct. Rep. 816; *Cromwell v. Sac County*, 94 U. S. 359, 24 L. ed. 200; *Strong v. Grant*, 2 Mackey, 222, 223; *Fulton v. Pomeroy*, 111 Wis. 668, 87 N. W. 831; *Barton*, Suit in Equity, p. 150; *Putnam v. Day*, 22 Wall. 66, 22 L. ed. 766.

The decree is *res judicata* in this case.

Cromwell v. Sac County, 94 U. S. 352, 24 L. ed. 197; *Mason Lumber Co. v. Buchtel*, 101 U. S. 638, 639, 25 L. ed. 1074; *Southern P. R. Co. v. United States*, 168 U. S. 48, 42 L. ed. 376, 18 Sup. Ct. Rep. 18; 2 Black, Judgm. § 610; *Burlen v. Shannon*, 99 Mass. 202, 96 Am. Dec. 733.

Even if the prior case was actually decided on another ground, which made unim-

portant the point or question passed on, yet this point or question raised by the pleadings and once passed on is conclusive.

Florida C. R. Co. v. Schutte, 103 U. S. 143, 26 L. ed. 336; 2 Black, Judgm. § 609.

The former decree is not conclusive of any matter which was merely incidentally cognizable in the former action or of any matter to be only inferred by argument.

Duchess of Kingston's Trial, 20 How. St. Tr. 538.

But it is conclusive, says the supreme court of Massachusetts, in *Burlen v. Shannon*, 99 Mass. 200, 96 Am. Dec. 733, on "all facts involved in it as necessary steps or the ground work upon which it was founded."

It is conclusive on whatever was the matter in issue or points in controversy upon the determination of which the finding or verdict was rendered.

Black, Judgm. § 614.

Whenever a final decree is entered, especially by the court of last resort, every party to that decree, whether plaintiff or defendant, whether personally present or merely by representation, is of right entitled to set up and plead that decree in all subsequent litigation between the same parties affecting the same property. The decree fixes and forever settles certain questions, and such judgment it is the right of each party or privy to set up as between himself and the plaintiff, and also between himself and any codefendant.

Story, Eq. Pl. § 372; 2 Dan. Ch. Pl. & Pr. p. *1539; *Winton's Appeal*, 97 Pa. 393; *Griffin v. Spence*, 69 Ala. 397.

It is not material whether the scope of the former action was wider or narrower than that of the present suit. The fact that additional stocks were involved in the former action does not affect the conclusiveness of the finding in the former action on the present Northern Pacific stock now in dispute and which was also in dispute in the former action.

Black, Judgm. ¶ 609, § 1.

The former judgment is still conclusive though the evidence in the subsequent case may be different. If the question was once in issue and was actually determined by a competent court, it cannot be further litigated, and it is equally conclusive when given in evidence as if it was specially pleaded by way of estoppel.

Black, Judgm. ¶ 609, § 2; *Last Chance Min. Co. v. Tyler Min. Co.* 157 U. S. 691, 39 L. ed. 863, 15 Sup. Ct. Rep. 733; *Southern P. R. Co. v. United States*, 168 U. S. 48, 42 L. ed. 376, 18 Sup. Ct. Rep. 18.

The only thing required is that the parties in the second litigation were parties to the litigation the decree in which is relied upon. If this were not so, the effect of a former re-

covery could always be avoided by adding a new party.

Thompson v. Roberts, 24 How. 240, 16 L. ed. 649; *Smith v. Kernochen*, 7 How. 217, 12 L. ed. 674; *Wilson v. Buell*, 117 Ind. 315, 20 N. E. 231; *Wells, Res Adjudicata & Stare Decisis*, § 35; *Lawrence v. Hunt*, 10 Wend. 80, 25 Am. Dec. 539.

This includes all persons who are privies and in whose interest the suit is brought or defended.

Freeman, Judgm. § 154; 1 Greenl. Ev. § 523.

It is immaterial that a different form or measure of relief is asked in the second action.

Green v. Bogue, 158 U. S. 478-502, 39 L. ed. 1061-1069, 15 Sup. Ct. Rep. 975.

Where there are several grounds of recovery or defense on which the decree may have been rested, said decree will be conclusive on the specific findings which led up to the proposition on which the court decided the case, and what that ground was may be determined by evidence *aliunde* if the decree itself is silent on it.

Russell v. Place, 94 U. S. 606, 24 L. ed. 214; *De Sollar v. Hanscome*, 158 U. S. 216, 221, 39 L. ed. 956, 959, 15 Sup. Ct. Rep. 816; *First Nat. Bank v. Covington*, 129 Fed. 798; *Hawes v. Contra Costa Water Co.* 5 Sawy. 287, Fed. Cas. No. 6,235.

The conclusions of this court in the government case were as conclusive between the codefendants—the stockholders of the Northern Securities Company and that company itself, as if these stockholders had individually been parties plaintiff or defendant to the litigation.

Corcoran v. Chesapeake & O. Canal Co. 94 U. S. 741-744, 24 L. ed. 190, 191.

The former opinion and decree of this court is conclusive even on this court when the same case comes back here, and certainly so where that former opinion and decree is set up as conclusive in another litigation where the parties are not all the same, and where the complainant in the former case, the United States, is not a party to the second.

Roberts v. Cooper, 20 How. 467-481, 15 L. ed. 969-973; *Barney v. Winona & St. P. R. Co.* 117 U. S. 231, 29 L. ed. 859, 6 Sup. Ct. Rep. 654; *United States v. Camou*, 184 U. S. 574, 46 L. ed. 695, 22 Sup. Ct. Rep. 515. To the same effect are *Thompson v. Maxwell Land Grant & R. Co.* 168 U. S. 456, 42 L. ed. 542, 18 Sup. Ct. Rep. 121; *Yazoo & M. Valley R. Co. v. Adams*, 180 U. S. 7, 45 L. ed. 401, 21 Sup. Ct. Rep. 240; *Great Western Teleg. Co. v. Burnham*, 162 U. S. 343, 41 L. ed. 993, 16 Sup. Ct. Rep. 850; *Chaffin v. Taylor*, 116 U. S. 567, 29 L. ed. 727, 6 Sup. Ct. Rep. 518; *Clark v.*

Keith, 106 U. S. 464, 27 L. ed. 302, 1 Sup. Ct. Rep. 568; *Wayne County v. Kennicott*, 94 U. S. 498, 24 L. ed. 260; *Tyler v. Magwire*, 17 Wall. 283, 21 L. ed. 583.

The complainants were by representation parties and privies in the government case, and therefore are in their own right entitled to set up the findings and conclusions of this court in that case as *res judicata* in any subsequent litigation between themselves and the Northern Securities Company so far as regards the issues raised and decided in that case.

Hendrickson v. Bradley, 29 C. C. A. 303, 55 U. S. App. 715, 85 Fed. 516; *National Foundry & Pipe Works v. Oconto Water Co.* 68 Fed. 1007; *Wilson v. Seymour*, 22 C. C. A. 477, 40 U. S. App. 567, 76 Fed. 681; *Herman, Estoppel & Res Adjudicata*, pp. 154-165; *Secor v. Singleton*, 41 Fed. 725; *Great Western Teleg. Co. v. Purdy*, 162 U. S. 329, 40 L. ed. 986, 16 Sup. Ct. Rep. 810; *Hawkins v. Glenn*, 131 U. S. 319, 33 L. ed. 184, 9 Sup. Ct. Rep. 739; *Glenn v. Williams*, 60 Md. 93; *Hancock Nat. Bank v. Farnum*, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 506; *Whitman v. National Bank*, 176 U. S. 560, 44 L. ed. 587, 20 Sup. Ct. Rep. 477; *Flash v. Conn*, 109 U. S. 371, 27 L. ed. 966, 3 Sup. Ct. Rep. 263; *Halc v. Hardon*, 37 C. C. A. 240, 95 Fed. 759; *Central Trust Co. v. Western N. C. R. Co.* 89 Fed. 24.

Even where one is a party only in one capacity, yet, if his interests in both capacities are before the court, the decree will bind him in both and can be pleaded in both. If this court in the government case had before it the rights of the Northern Securities Company, as trustee, and also of the Securities company as a corporation representing the stockholders, the decree would conclude and could be used by complainants both as *cestuis que trust* and as stockholders.

Black, Judgm. § 536; *Corcoran v. Chesapeake & O. Canal Co.* 94 U. S. 741, 24 L. ed. 190.

The Northern Securities Company in the government case was in court not only as a corporation, representing as such all its stockholders, but in addition as trustee, and the present complainants were in court as stockholders and as *cestuis que trust*, and they were represented in each capacity by the corporation.

McElrath v. Pittsburg & S. R. Co. 68 Pa. 40; *Shaw v. Little Rock & Ft. S. R. Co.* 100 U. S. 605, 25 L. ed. 757; *Kerrison v. Stewart*, 93 U. S. 160, 23 L. ed. 845; *Vetterlein v. Barnes*, 124 U. S. 169, 31 L. ed. 400, 8 Sup. Ct. Rep. 441; *Beals v. Illinois, M. & T. R. Co.* 133 U. S. 290, 33 L. ed. 608, 10 Sup. Ct. Rep. 314; *Kent v. Lake Superior Ship Canal R. & Iron Co.* 144 U. S. 90, 36 L. ed. 358, 12 Sup. Ct. Rep. 650; *Manson v. Dun-*

canon, 166 U. S. 542, 41 L. ed. 1108, 17 Sup. Ct. Rep. 647.

The reasoning in the familiar cases of litigation by or against property owners affected by special taxes or assessments is also pertinent to the question now before the court.

McIntosh v. Pittsburg, 112 Fed. 705.

The stockholders of a corporation upon dissolution cannot be compelled to accept a distribution of their share of the assets in kind.

Post v. Beacon Vacuum Pump & Electrical Co. 28 C. C. A. 431, 50 U. S. App. 271, 84 Fed. 371; *Mason v. Tewabic Min. Co.* 133 U. S. 50, 58, 33 L. ed. 524, 529, 10 Sup. Ct. Rep. 224.

Mr. Elihu Root argued the cause, and, with **Mr. Francis Lynde Stetson**, filed a brief for respondent:

The propriety of a review of the case as a whole is established by many decisions, but it is sufficient to refer by title to only a few.

Green v. Mills, 30 L. R. A. 90, 16 C. C. A. 516, 25 U. S. App. 383, 69 Fed. 852; *Knowlton v. Africa*, 23 C. C. A. 252, 47 U. S. App. 74, 246, 77 Fed. 501; *Smith v. Vulcan Iron Works*, 165 U. S. 518-525, 41 L. ed. 810-812, 17 Sup. Ct. Rep. 407; *Mast, F. & Co. v. Stover Mfg. Co.* 177 U. S. 485-494, 44 L. ed. 856-860, 20 Sup. Ct. Rep. 708; *Castner v. Coffman*, 178 U. S. 168, 183, 44 L. ed. 1021, 1027, 20 Sup. Ct. Rep. 842.

The decree in the statutory proceeding wherein the government was petitioner, and the Securities company, its organizers, and the two railway companies were respondents, could not adjudicate that the Securities company was a bailee or a trustee for the complainants in the present suit, since the complainants were not parties upon the record, nor yet by representation. Upon their theory, at all times as well as now, the particular rights and claims now asserted by them conflicted and could not harmonize with those of any defendant in the government proceeding, and therefore they could not have been represented by any such defendant.

Weidenfeld v. Northern P. R. Co. 129 Fed. 305.

Of course the decree of the circuit court as affirmed "is conclusive upon any matter directly in question before it, even when coming incidentally in question in another court for a different purpose between the same parties."

Duchess of Kingston's Trial, 20 How. St. Tr. 538, 2 Smith, Lead. Cas. 8th ed. 784.

But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any

matter to be inferred by argument from the judgment.

Hopkins v. Lee, 6 Wheat. 109, 5 L. ed. 218; *Coit v. Tracy*, 8 Conn. 268, 20 Am. Dec. 110; *Manny v. Harris*, 2 Johns. 24, 3 Am. Dec. 386; *People ex rel. Reilly v. Johnson*, 38 N. Y. 63, 97 Am. Dec. 770; *Stokes v. Foote*, 172 N. Y. 327, 65 N. E. 176.

Incidental and illustrative expressions in a court's opinion do not partake of the character of a judgment.

Carroll v. Carroll, 16 How. 275, 287, 14 L. ed. 936, 941; *Union P. R. Co. v. Mason City & Ft. D. R. Co.* 64 C. C. A. 348, 128 Fed. 230; *Cohen v. Virginia*, 6 Wheat. 264, 399, 5 L. ed. 257, 290.

Even though the contract were deemed to have been executory, it would be executory solely as to its continuing purpose. As alleged, such purpose was to continue to do something now finally enjoined. In such case, the effect of the court's decree would be to execute the contract by rendering impossible any executory results, and by concluding the term of the contract.

Jones v. Judd, 4 N. Y. 411; *Heine v. Meyer*, 61 N. Y. 171; *Lorillard v. Clyde*, 142 N. Y. 456, 24 L. R. A. 113, 37 N. E. 489.

The Securities company has not repudiated or abandoned any contract with the complainants.

2 *Parsons*, Contr. 674; *People v. Globe Mut. L. Ins. Co.* 91 N. Y. 174.

The complainants are estopped from asserting that the Securities company is a trustee or bailee. They have publicly held out the Securities company to be the owner of the railway stocks, and have induced innocent third persons to acquire interests in the corporation in reliance thereupon.

Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478; *Cranson v. Goss*, 107 Mass. 439, 9 Am. Rep. 45.

But whether the Securities company be a vendee or a custodian, the complainants are not entitled to recover the Northern Pacific stock. The transaction was in contravention of public policy and a penal statute, and their demand for the return of the stock by them delivered for such illegal purpose is barred by the rule *in pari delicto potior est conditio defendentis et possidentis*.

First. The complainants cannot avoid the bar of the rule, if the Securities company be regarded as vendee.

1. The complainants and the Securities company are *in pari delicto*.

Irwin v. Curie, 171 N. Y. 409, 58 L. R. A. 830, 64 N. E. 161; *Leonard v. Poole*, 114 N. Y. 371, 4 L. R. A. 728, 11 Am. St. Rep. 667, 21 N. E. 707; *White v. Hunter*, 23 N. H. 128; *Worcester v. Eaton*, 11 Mass. 368.

2. The complainants transferred property

to the Securities company for a purpose forbidden by law and in exchange received shares of stock and cash. The illegal contract has been executed in full, or in any event to such a degree as to bar this suit for its rescission and the recovery of the property transferred.

a. It is executed to such a degree as to bar rescission, even though the contractual obligations of the corporation to its stockholders be regarded as continuing.

St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co. 145 U. S. 393, 36 L. ed. 738, 12 Sup. Ct. Rep. 953; *McIntosh v. Wilson*, 81 Iowa, 339, 46 N. W. 1003; *Kearley v. Thomson*, L. R. 24 Q. B. Div. 742; *White v. Hunter*, 23 N. H. 128; *Miller v. Larson*, 19 Wis. 463; *Martin v. Wade*, 37 Cal. 168; *Worcester v. Eaton*, 11 Mass. 368; *Atwood v. Fisk*, 101 Mass. 363, 100 Am. Dec. 124; *Traders' Nat. Bank v. Steere*, 165 Mass. 389, 43 N. E. 187; *Adams v. Barrett*, 5 Ga. 405; *Rock v. Mathews*, 35 W. Va. 531, 14 L. R. A. 508, 14 S. E. 137; *Ward v. Hartley*, 178 Mo. 135, 77 S. W. 302.

b. It is executed to such a degree as to bar rescission, even though the decree in the government suit prevents the corporation from collecting moneys applicable to the payment of dividends to its stockholders.

McIntosh v. Wilson, 81 Iowa, 339, 46 N. W. 1003; *Re Great Berlin S. B. Co.* L. R. 26 Ch. Div. 616; *Shattuck v. Watson*, 53 Ark. 147, 7 L. R. A. 551, 13 S. W. 516; *Compton v. Bunker Hill Bank*, 96 Ill. 301, 36 Am. Rep. 147.

c. It is executed to such a degree as to bar rescission, even if the proposed *pro rata* distribution of corporate assets would violate some term of the contract between the corporation and the complainants, which, in fact, it would not.

Bruer v. Kansas Mut. L. Ins. Co. 100 Mo. App. 540, 75 S. W. 380; *Hooker v. De Palos*, 28 Ohio St. 251; *Scott v. Brown* [1892] 2 Q. B. 724; *Markley v. Mineral City*, 58 Ohio St. 430, 65 Am. St. Rep. 776, 51 N. E. 28; *Thompson v. Williams*, 58 N. H. 248; *Kinney v. McDermot*, 55 Iowa, 674, 39 Am. Rep. 191, 8 N. W. 656; *Smith v. Bean*, 15 N. H. 577; *Cohn v. Heimbauch*, 86 Wis. 176, 56 N. W. 638; *Linness v. Hesing*, 44 Ill. 113, 92 Am. Dec. 153; *Black v. Oliver*, 1 Ala. 449, 35 Am. Dec. 38; *St. Louis, J. & C. R. Co. v. Mathers*, 104 Ill. 259, 71 Ill. 592, 22 Am. Rep. 122; *Patterson v. Donner*, 48 Cal. 369.

Second. Neither can the complainants avoid the operation of the rule by treating the Securities company merely as custodian to hold a deposited stock, to collect dividends, etc.

1. The Securities company is *in pari delicto* with the complainants. It was an active party to the illegality.

Leonard v. Poole, 114 N. Y. 371, 4 L. R. A. 728, 11 Am. St. Rep. 667, 21 N. E. 707; *Harse v. Pearl Life Assur. Co.* [1904] 1 K. B. 558; *Gibbs v. Consolidated Gas Co.* 130 U. S. 396, 32 L. ed. 979, 9 Sup. Ct. Rep. 553; *Herman v. Jeuchner*, L. R. 15 Q. B. Div. 561; *Equitable Life Assur. Soc. use of Reilly v. Wetherill*, 62 C. C. A. 579, 127 Fed. 947; *McIntosh v. Wilson*, 81 Iowa, 339, 46 N. W. 1003; *Re Great Berlin S. B. Co.* L. R. 26 Ch. Div. 616; *White v. Hunter*, 23 N. H. 128; *St. Louis, J. & C. R. Co. v. Mathers*, 104 Ill. 259, 71 Ill. 592, 22 Am. Rep. 122; *Patterson v. Donner*, 48 Cal. 369; *Rock v. Mathews*, 35 W. Va. 531, 14 L. R. A. 508, 14 S. E. 137.

2. The complainants assisted in placing the control of the railway companies in the hands of the Securities company, and in maintaining that status until the decree in the government suit was affirmed by the Supreme Court. This executed the illegal purpose to such a degree as to bar the assertion of any right to withdraw the property deposited.

a. The assertion of any right to withdraw is barred, even though the decree in the government suit prevents profitable (or any) continuance of the holding of the railway stocks.

McIntosh v. Wilson, 81 Iowa, 339, 46 N. W. 1003; *Re Great Berlin S. B. Co.* L. R. 26 Ch. Div. 616; *Standard Furniture Co. v. Van Alstine*, 22 Wash. 670, 51 L. R. A. 889, 79 Am. St. Rep. 960, 62 Pac. 145.

b. The assertion of any right to withdraw is barred, even if the alleged purpose of the deposit has not been wholly accomplished, and even though it were the fact (which it is not) that the custodian still holds the deposit intact.

Herman v. Jeuchner, L. R. 15 Q. B. Div. 561; *Taylor v. Chester*, L. R. 4 Q. B. 309, 6 English Ruling Cases, 488; *Rock v. Mathews*, 35 W. Va. 531, 14 L. R. A. 508, 14 S. E. 137; *Griffin v. Piper*, 55 Ill. App. 213; *Re Great Berlin S. B. Co.* L. R. 26 Ch. Div. 616; *St. Louis, J. & C. R. Co. v. Mathers*, 104 Ill. 259, 71 Ill. 592, 22 Am. Rep. 122; *Patterson v. Donner*, 48 Cal. 369; *Sedalia Bd. of Trade v. Brady*, 78 Mo. App. 585; *Johnson v. Douglas*, 32 Wash. 293, 73 Pac. 374.

3. The deposit of the property in the hands of the alleged custodian was part of the illegality which distinguishes the present case from the stakeholder, agency, and third-party cases.

a. In the stakeholder cases the illegality consists in the wager, and not in any sense in the deposit subsequent to, though for the purpose of, the wager contract.

b. Likewise in the agency and third-party cases the holding by the agent or third party was perfectly lawful; the illegality lay in some precedent transaction from which arose

the fund in the defendant's hands. The relief given involved neither the enforcement nor the rescission of the unlawful contract.

McMullen v. Hoffman, 174 U. S. 639, 43 L. ed. 1117, 19 Sup. Ct. Rep. 839; *Smith v. Richmond*, 114 Ky. 303, 102 Am. St. Rep. 283, 70 S. W. 846.

c. Even in the stakeholder cases it is recognized that the depositor loses the right to recover after the stakeholder has paid over the fund. By selling shares of its stock, and issuing and reissuing certificates in the usual form—all being done with the assent of complainants—the Securities company has legally transferred vast interests in the railway shares to innocent third persons.

Ball v. Gilbert, 12 Met. 397; *Thornhill v. O'Rear*, 108 Ala. 299, 31 L. R. A. 792, 19 So. 382; *Nudd v. Burnett*, 14 Ind. 25.

d. And in agency or third-party cases the owner cannot obtain a return of the property if, to give such relief, the court would have to give effect to any part of the illegal contract. In seeking to recover certain of the shares of the Northern Pacific stock the complainants rely upon a material term of the agreement alleged by them though denied by defendant.

Leonard v. Poole, 114 N. Y. 371, 4 L. R. A. 728, 11 Am. St. Rep. 667, 21 N. E. 707.

The doctrine of an implied agreement to return property transferred under an illegal agreement is applicable only to cases wherein there exists under special considerations of public policy, equity or justice.

1. No public policy will be promoted by granting the prayer of complainants. Furthermore, considerations of public policy in the Northern Securities transaction can be invoked only by the Attorney General of the United States.

Minnesota v. Northern Securities Co. 194 U. S. 48, 48 L. ed. 870, 24 Sup. Ct. Rep. 598.

2. It is difficult to conceive of a case where equity and justice would require the implication of an agreement to return, except under circumstances such as existed in *Pullman's Palace Car Co. v. Central Transp. Co.* 171 U. S. 138, 43 L. ed. 108, 18 Sup. Ct. Rep. 808, or in the repudiated bond cases cited in *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478, or where stock paid for was not issued because *ultra vires* the corporation, as in *Congress & E. Spring Co. v. Knowlton*, 103 U. S. 49, 26 L. ed. 347. Certainly no such considerations prevail in the present instance.

Higgins v. McCrea, 116 U. S. 671, 29 L. ed. 764, 6 Sup. Ct. Rep. 557; *Re Great Berlin S. B. Co.* L. R. 26 Ch. Div. 616; *Chicago, I. & L. R. Co. v. Southern Indiana R. Co.* (Ind. App.) 70 N. E. 843.

But in any event any equitable rights of

the complainants have been lost through their laches and the acquisition by innocent third persons of interests adverse to their claim. *Locus pœnitentiæ* must be sought seasonably.

St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co. 145 U. S. 393, 36 L. ed. 738, 12 Sup. Ct. Rep. 953; *Union Trust Co. v. Illinois Midland R. Co.* 117 U. S. 434, 29 L. ed. 963, 6 Sup. Ct. Rep. 809; *Re Great Berlin S. B. Co.* L. R. 26 Ch. Div. 616.

No right of action accrues to complainants because the Securities company has been compelled to abandon the illegal project by force of the decree in the government suit.

Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478; *People v. Globe Mut. L. Ins. Co.* 91 N. Y. 174.

It is not understood that complainants contend that there was any contract on the part of the Securities company to return the stocks to the depositors. But if the complainants do so contend, the relief now asked for would be an enforcement of part of the contract. As well might a usury-exacting lender recover the principal of his loan by disaffirming the contract.

McMullen v. Hoffman, 174 U. S. 639, 43 L. ed. 1117, 19 Sup. Ct. Rep. 839; *Ellicott v. Chamberlain*, 38 N. J. Eq. 604, 48 Am. Rep. 327; *St. Louis, J. & C. R. Co. v. Mathers*, 104 Ill. 259, 71 Ill. 592, 22 Am. Rep. 122; *Patterson v. Donner*, 48 Cal. 369; *Black v. Oliver*, 1 Ala. 449, 35 Am. Dec. 38; *Singer Mfg. Co. v. Draper*, 103 Tenn. 262, 52 S. W. 879; *Standard Furniture Co. v. Van Alstine*, 22 Wash. 670, 51 L. R. A. 889, 79 Am. St. Rep. 960, 62 Pac. 145.

After delivery of the property for an accepted consideration, the contract has ceased to be executory, even though it was entered into with the expectation of a continuity of benefits no longer susceptible of complete realization.

Kearley v. Thomson, L. R. 24 Q. B. Div. 742; *Herman v. Jeuchner*, L. R. 15 Q. B. Div. 561; *Harse v. Pearl Life Assur. Co.* [1904] 1 K. B. 558; *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.* 145 U. S. 393, 36 L. ed. 738, 12 Sup. Ct. Rep. 953; *Equitable Life Assur. Soc. use of Reilly v. Wetherill*, 62 C. C. A. 579, 127 Fed. 947; *McIntosh v. Wilson*, 81 Iowa, 339, 46 N. W. 1003; *Atwood v. Fisk*, 101 Mass. 363, 100 Am. Dec. 124; *Bruer v. Kansas Mut. L. Ins. Co.* 100 Mo. App. 540, 75 S. W. 380; *Ellicott v. Chamberlain*, 38 N. J. Eq. 604, 48 Am. Rep. 327; *Pollock, Principles of Contract*, 4th ed. *pp. 253, 322-327, 329, 338.

The indisposition of the court to grant relief is not limited to the cases in which the plaintiff is endeavoring to enforce the contract; a party exhibiting the contract merely

to denounce it as illegal will be denied judicial assistance.

Taylor v. Chester, L. R. 4 Q. B. 309; *Brindley v. Lawton*, 53 N. J. Eq. 259, 31 Atl. 394; *Hope v. Linden Park Blood Horse Asso.* 58 N. J. L. 627, 55 Am. St. Rep. 614, 34 Atl. 1070; *Herman v. Juchner*, L. R. 15 Q. B. Div. 561; *Kearley v. Thomson*, L. R. 24 Q. B. Div. 742; *Harse v. Pearl Life Assur. Co.* [1904] 1 K. B. 558; *Hill v. Freeman*, 73 Ala. 200, 49 Am. Rep. 48; *Watkins v. Nugen*, 118 Ga. 372, 45 S. E. 262; *McIntosh v. Wilson*, 81 Iowa, 339, 46 N. W. 1003; *Atwood v. Fisk*, 101 Mass. 363, 100 Am. Dec. 124; *Myers v. Meinrath*, 101 Mass. 366, 3 Am. Rep. 368; *Bagg v. Jerome*, 7 Mich. 145; *Block v. McMurry*, 56 Miss. 217, 31 Am. Rep. 357; *White v. Hunter*, 23 N. H. 128; *Ellicott v. Chamberlin*, 38 N. J. Eq. 604, 48 Am. Rep. 327; *Markley v. Mineral City*, 58 Ohio St. 430, 65 Am. St. Rep. 776, 51 N. E. 28; *Moore v. Kendall*, 2 Pinney (Wis.) 99, 52 Am. Dec. 145; *Equitable Life Assur. Soc. use of Reilly v. Wetherill*, 62 C. C. A. 579, 127 Fed. 947.

In all such cases the defendant's possession is a sufficient answer to the plaintiff's demand; both (a) because such possession stands as the equivalent of a title in the defendant, and (b) because to discourage such transactions courts will be deaf to the clamor of a complainant *in pari delicto*.

Myers v. Meinrath, 101 Mass. 366, 3 Am. Rep. 368; *Horton v. Buffington*, 105 Mass. 399; *Bagg v. Jerome*, 7 Mich. 145; *Block v. McMurry*, 56 Miss. 217, 31 Am. Rep. 357; *Foster v. Wooten*, 67 Miss. 540, 7 So. 501; *Smith v. Bean*, 15 N. H. 577; *Watkins v. Nugen*, 118 Ga. 372, 45 S. E. 262; *McIntosh v. Wilson*, 81 Iowa, 339, 46 N. W. 1003; *Traders' Nat. Bank v. Steere*, 165 Mass. 389, 43 N. E. 187; *Harris*, Sunday Laws, § 169.

The condition of the possessor is so much better than that even of the original owner that the possessor can recover the property, not only from a stranger, but from such original owner, if by chance the latter has been able to repossess himself of the property.

Kinney v. McDermot, 55 Iowa, 674, 39 Am. Rep. 191, 8 N. W. 656; *Smith v. Bean*, 15 N. H. 577; *Thompson v. Williams*, 58 N. H. 248; *Cohn v. Heimbauch*, 86 Wis. 176, 56 N. W. 638.

The distinction between *mala in se* and *mala prohibita* has been abandoned, but, were this otherwise, there is authority for regarding as *malum in se* any act contravening public policy and a penal statute.

Irwin v. Curie, 171 N. Y. 409, 58 L. R. A. 830, 64 N. E. 161; *Gibbs v. Consolidated Gas Co.* 130 U. S. 396, 32 L. ed. 979, 9 Sup. Ct. Rep. 553; *McMullen v. Hoffman*, 174 U. S. 639, 43 L. ed. 1117, 19 Sup. Ct. Rep. 839; *Equitable Life Assur. Soc. use of Reilly v. Wetherill*, 62 C. C. A. 579, 127 Fed. 947.

The doctrine of *locus pœnitentiæ* is available only to those who seasonably seek to make restitution and to withdraw from their illegal executory contract. Laches is a fatal vice.

St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co. 145 U. S. 393, 36 L. ed. 738, 12 Sup. Ct. Rep. 953; *Union Trust Co. v. Illinois Midland R. Co.* 117 U. S. 434, 29 L. ed. 963, 6 Sup. Ct. Rep. 809; *Re Great Berlin S. B. Co.* L. R. 26 Ch. Div. 616. See also *Hardwood v. Cincinnati & C. Air-Line R. Co.* 17 Wall. 80, 21 L. ed. 558; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. ed. 328; *Grymes v. Sanders*, 93 U. S. 55, 23 L. ed. 798; *Hayward v. Eliot Nat. Bank*, 96 U. S. 611, 617, 24 L. ed. 855, 857; *McLean v. Clapp*, 141 U. S. 429, 432, 36 L. ed. 804, 806, 12 Sup. Ct. Rep. 29; *Hoyt v. Latham*, 143 U. S. 553, 567, 36 L. ed. 259, 264, 12 Sup. Ct. Rep. 568; *Townsend v. Vanderwerker*, 160 U. S. 171, 40 L. ed. 383, 16 Sup. Ct. Rep. 258; *Ward v. Sherman*, 192 U. S. 168, 48 L. ed. 391, 24 Sup. Ct. Rep. 227; *Rugan v. Sabin*, 10 U. S. App. 519, 53 Fed. 415; *Kinne v. Webb*, 4 C. C. A. 170, 12 U. S. App. 137, 54 Fed. 34; *Boston & P. R. Corp. v. New York & N. E. R. Co.* 13 R. I. 264; *Kitchen v. St. Louis, K. C. & N. R. Co.* 69 Mo. 224; *Peabody v. Flint*, 6 Allen, 56; *Dunphy v. Traveller Newspaper Asso.* 146 Mass. 495, 16 N. E. 426; *Graham v. Birkenhead, L. & C. J. R. Co.* 2 Macn. & G. 156.

The rigor of the rule against the complainant is never relaxed out of consideration for him, but only when necessary to promote equity and justice.

Pullman's Palace Car Co. v. Central Transp. Co. 171 U. S. 138, 43 L. ed. 108, 18 Sup. Ct. Rep. 808; *Congress & E. Spring Co. v. Knowlton*, 103 U. S. 49, 26 L. ed. 347.

In cases presenting no such special considerations of equity, justice, or public policy, a party even to an unexecuted illegal contract cannot recover back money paid or property delivered thereunder.

Scott v. Brown [1892] 2 Q. B. 724; *Re Great Berlin S. B. Co.* L. R. 26 Ch. Div. 616; *McIntosh v. Wilson*, 81 Iowa, 339, 46 N. W. 1003; *Bruer v. Kansas Mut. L. Ins. Co.* 100 Mo. App. 540, 75 S. W. 380; *Markley v. Mineral City*, 58 Ohio St. 430, 65 Am. St. Rep. 776, 51 N. E. 28; *Storz v. Finklestein*, 46 Neb. 577, 30 L. R. A. 644, 65 N. W. 195; *Thompson v. Williams*, 58 N. H. 248.

Mr. John G. Johnson also argued the cause, and, with Messrs. John W. Griggs and W. P. Clough, filed a brief for respondent:

The right to grant an injunction is always dominated by the nature of the case disclosed by the motion papers. It is elementary law that a plaintiff cannot have a special injunction where, on the face of the motion papers,

it appears he will not succeed in finally establishing the claim he asserts.

1 High, Inj. 3d ed. § 7.

If, nevertheless, the injunction be granted on such a showing, and be appealed from, not only is it the duty of the appellate court to vacate the injunction, but it may properly include in its mandate to the lower court a direction to dismiss the bill. The appellate court is charged with doing what the court below should have done in the first instance.

Knoxville v. Africa, 23 C. C. A. 252, 47 U. S. App. 74, 77 Fed. 501; *Mast F. & Co. v. Stover Mfg. Co.* 177 U. S. 485, 494, 495, 44 L. ed. 856, 860, 861, 20 Sup. Ct. Rep. 708.

The fact that ratable distribution of the Northern Pacific stock among all stockholders of the Securities company will leave a majority of the total Northern Pacific stock in the ownership of those who will at the same time become distributees of a majority of the Great Northern stock forms no legal objection to the *pro rata* plan. After *pro rata* distribution has been effected, the stocks of both railway companies will be held separately by the individuals who have thereby received them.

Pearsall v. Great Northern R. Co. 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. Rep. 705; *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714.

Where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions—which undertakes, without consent of the state, to transfer to others the rights and powers conferred by the charter, and to relieve the grantee of the burden it imposes—is a violation of the contract with the state, and is void as against public policy.

Thomas v. West Jersey R. Co. 101 U. S. 71, 25 L. ed. 950.

The *Vandalia Case* and the *Sleeping Car Cases* established these propositions:

1. A transfer of property or money made contrary to law and public policy is irrevocable by the transferrer, after execution by him, as long as the promises made by the transferee in consideration of the transfer are kept by him.

2. An illegal contract of transfer is executed within the meaning of the foregoing rule, when the transferrer has delivered possession of the subject of the contract to the transferee, *i. e.*, to the party to whom the title is ultimately intended to go, regardless of whether, under the contract, anything remains to be done by the latter. In other words, although the illegal contract remains wholly executory on the part of the trans-

feree, the transferrer is bound from the time of execution on his part, and remains bound until repudiation by the transferee.

3. None of the executory features of an illegal contract are enforceable in the courts, in favor of either party.

See also *Gilbert v. American Surety Co.* 61 L. R. A. 253, 57 C. C. A. 619, 121 Fed. 499.

Mr. Thomas Thacher also filed a brief for respondent:

It is the approved practice on appeals from injunction orders, not only to consider the merits, but to dismiss the bill if the court can see that the complainant is not entitled to final decree.

Smith v. Vulcan Iron Works, 165 U. S. 518, 41 L. ed. 810, 17 Sup. Ct. Rep. 407; *Mast F. & Co. v. Stover Co.* 177 U. S. 485, 44 L. ed. 856, 20 Sup. Ct. Rep. 708; *Castner v. Coffman*, 178 U. S. 168, 44 L. ed. 1021, 20 Sup. Ct. Rep. 842; *Knoxville v. Africa*, 23 C. C. A. 252, 47 U. S. App. 74, 246, 77 Fed. 501; *Bissell Carpet-Sweeper Co. v. Goshen Sweeper Co.* 19 C. C. A. 25, 43 U. S. App. 47, 72 Fed. 545.

The transaction was not void because illegal.

Harris v. Runnels, 12 How. 79, 13 L. ed. 901; *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 96 U. S. 641, 24 L. ed. 649; *Union Nat. Bank v. Matthews*, 98 U. S. 621, 25 L. ed. 188; *National Bank v. Whitney*, 103 U. S. 99, 26 L. ed. 443; *Logan County Nat. Bank v. Townsend*, 139 U. S. 67, 76, 35 L. ed. 107, 111, 11 Sup. Ct. Rep. 496; *Thompson v. St. Nicholas Nat. Bank*, 146 U. S. 240, 36 L. ed. 956, 13 Sup. Ct. Rep. 66; *Scott v. Deweese*, 181 U. S. 202, 211, 45 L. ed. 822, 827. See also *Burck v. Taylor*, 152 U. S. 634, 648, 38 L. ed. 578, 583, 14 Sup. Ct. Rep. 696; *Fritts v. Palmer*, 132 U. S. 282, 33 L. ed. 317, 10 Sup. Ct. Rep. 93; *McBroom v. Scottish Mortg. & Land Invest. Co.* 153 U. S. 318, 38 L. ed. 729, 14 Sup. Ct. Rep. 852; *Jarvis-Conklin Mortg. Trust Co. v. Willhoit*, 84 Fed. 514; *Central Trust Co. v. Columbus, H. V. & T. R. Co.* 87 Fed. 815; *Sioux City Terminal R. & Warehouse Co. v. Trust Co. of N. A.* 82 Fed. 134; *Chattanooga, R. & C. R. Co. v. Evans*, 14 C. C. A. 116, 31 U. S. App. 432, 66 Fed. 809.

The transaction was not void because *ultra vires*.

Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478; *Camden & A. R. Co. v. May's Land-ing & E. H. City R. Co.* 48 N. J. L. 530, 7 Atl. 523; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 20 Am. Rep. 504; *Woodruff v. Erie R. Co.* 93 N. Y. 609; *Rider Life Raft Co. v. Roach*, 97 N. Y. 378; *Bath Gaslight Co. v. Claffy*, 151 N. Y. 24, 36 L. R. A. 664, 45 N. E. 390; *Vought v. Eastern Bldg. & L. Asso.*

172 N. Y. 508, 92 Am. St. Rep. 761, 65 N. E. 496.

Even if the transactions in which the Oregon Short Line Railroad Company parted with the stock were void because illegal or *ultra vires*, nevertheless the complainants could not recover.

Equitable Life Assur. Soc. use of Reilly v. Wetherill, 62 C. C. A. 579, 127 Fed. 947; *Smith v. Bean*, 15 N. H. 577; *Myers v. Meinrath*, 101 Mass. 366, 3 Am. Rep. 368; *St. Louis, V. & T. H. R. Co. v. Terre Haute & C. R. Co.* 145 U. S. 393, 36 L. ed. 738, 12 Sup. Ct. Rep. 953; *Higgins v. McCrea*, 116 U. S. 671, 29 L. ed. 764, 6 Sup. Ct. Rep. 557; *White v. Barber*, 123 U. S. 392, 31 L. ed. 243, 8 Sup. Ct. Rep. 221; *Horton v. Buffington*, 105 Mass. 399.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

In applying to this court for the writ of certiorari counsel for complainants insisted that the circuit court of appeals had practically disposed of the entire controversy [287] on the *merits, although its decree only reversed the order of the circuit court granting the preliminary injunction. We accepted that view and granted the writ, in the circumstances, notwithstanding the decree was not final. In our opinion the record presented the whole case to that court in such wise that it might properly have been finally disposed of in terms by its decree, in accordance with the well-settled rule upon that subject. *Mast, F. & Co. v. Stover Mfg. Co.* 177 U. S. 495, 44 L. ed. 860, 20 Sup. Ct. Rep. 708; *Castner v. Coffman*, 178 U. S. 183, 44 L. ed. 1027, 20 Sup. Ct. Rep. 842; *Knoxville v. Africa*, 77 Fed. 501.

In *Western U. Teleg. Co. v. Pennsylvania R. Co.* 195 U. S. 540, 547, *ante*, 312, 315, 25 Sup. Ct. Rep. 133, the circuit court had granted a preliminary injunction (120 Fed. 981), which was reversed by the circuit court of appeals. 59 C. C. A. 113, 123 Fed. 33. The telegraph company moved that the decree be modified so as to direct the dismissal of the bill. The motion was denied, and the telegraph company took an appeal to this court. Subsequently the circuit court *sua sponte* entered an order dismissing the bill, and the telegraph company appealed therefrom to the circuit court of appeals. 195 U. S. 547, *ante*, 315, 25 Sup. Ct. Rep. 133. We then granted a certiorari, and, considering both appeals together, affirmed the decree of dismissal.

In the present case we granted the certiorari, at the instance of complainants, before the case had gone back to the circuit court, and shall do what the circuit court of appeals might have done,—that is, finally

dispose of the case by our direction to the circuit court.

Complainants deny that the Securities company became the owner of the Northern Pacific Railway shares, and assert, to the contrary, that the company held the shares as a trustee or a bailee for complainants.

And the principal ground on which this contention is rested is that it was so adjudicated by the circuit court for the district of Minnesota in the government suit, by the decree of April 9, 1903, affirmed by this court.

It may be said in passing that complainants were not parties *of record to that suit, [288] and that they were not parties by representation, if the effect of the transfers as between the parties thereto had been in issue and the vital conflict between complainants and the corporation, now set up, then existed which would destroy the community of interest on which the rule of representation is founded. And, on the other hand, in that suit the Northern Securities Company, at a time when complainant Harriman was a director, answered that "every share of the Great Northern company and the Northern Pacific company, acquired by this defendant, has been, and so long as it remains the property of the defendant will continue to be, held and owned by it in its own right, and not under any agreement, promise, or understanding on its part, or on the part of its stockholders and officers, that the same shall be held, owned, or kept, by it for any period of time whatever, or under any agreement that in any manner restricts or controls to any extent any use of the same which might lawfully be exercised by any other owner of said stocks."

But we are of opinion that the circuit court did not determine the quality of the transfer as between the defendants themselves, nor was that the purpose of the government proceedings.

The decree of April 9, 1903, adjudged that defendants had theretofore entered into a combination or conspiracy in restraint of trade and commerce; that all stock of either of the railway companies then held or owned by the Securities company was acquired and held in virtue of such combination; and enjoined the Securities company and the two railway companies from receiving, or permitting the exercise of, any control by the Securities company over either railway, or any exercise of the voting power of the railway shares, and the payment or reception of dividends upon the railway shares held by the Securities company; and the Securities company was forbidden from acquiring further stock of either of the railway companies.

And it was provided that nothing should

[289] be construed as *prohibiting the Securities company from returning and transferring the railway shares to the original railway stockholders who had delivered their shares to the Securities company for shares of its stock; or to such person or persons as might be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the railway companies.

This did not involve a decision that any original vendor of the railway shares was entitled to a judicial restitution thereof, and such was the view of the circuit court itself, for in its opinion of April 19, 1904, the court said:

"The decree was wholly prohibitory. It enjoined the doing of certain threatened acts, and so long as these acts are not done it enforces itself, and no further action looking to its enforcement is deemed essential. In its bill of complaint the United States prayed, among other things, for a mandatory injunction against the Securities company requiring it to recall and cancel the certificates of stock which it had issued, and to surrender the stock of the two railway companies in exchange for which its stock had been issued. This prayer for relief was denied. The court doubted its power to compel stockholders of the Securities company, who had not been served with process, and were not before the court otherwise than by representation (if, indeed, they were present by representation), to surrender stock which was in their possession, and to take other stock in lieu thereof. It accordingly contented itself with an order which rendered the stock of the two railway companies, so long as it was in the hands of the Securities company, valueless for the purpose of carrying out the objects of the unlawful combination in restraint of interstate trade. The government was satisfied with the relief obtained, and expresses itself as fully satisfied therewith at the present time. When the decree was entered it was assumed by the court that when the stock was thus rendered valueless in the hands of the Securities company the stockholders of

[290] that *company would be able, and likewise disposed, to make a disposition of the stock which, under all the circumstances of the case, would be fair and just, and would restore it to the markets of the world, where it would have some value, instead of being a worthless commodity. It was thought that the duty of thus disposing of it could be safely left to the stockholders of the Securities company, and that, if any controversy arose in the discharge of this function, in view of the situation that had been created by the decree, it would be a controversy that would properly form the subject-

197 U. S. U. S., Book 49.

matter of an independent suit between the parties immediately interested. It is true that the decree contained a provision, in substance, that nothing therein contained should be construed as prohibiting the Securities company from returning to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company any and all shares of stock in either of said railway companies which the Northern Securities Company had acquired in exchange for its own stock, and that nothing therein contained should be construed as prohibiting the Securities company from making such transfer of the stock aforesaid to such person or persons as had become owners of its own stock originally issued in exchange for the stock in the two railway companies; but this provision was purely permissive. It did not command that the stock should be so returned or to exclude other methods of disposition of it that, in view of all the circumstances, might appear to be more equitable. The fact that the directors of the Securities company have proposed to its stockholders a plan of distributing the stock of the two railway companies in a manner somewhat different from that which was tentatively suggested by the decree, but not commanded, cannot be regarded as a failure to obey the decree. It was said in argument that one purpose of the intervention is to have that clause of the decree which is now merely permissive made mandatory. But this would be to modify the provisions of a decree which has become final by affirmance, and make an *order [291] which we expressly and on full consideration declined to make when the decree was entered. This we must decline to do."

The decree of April 9, 1903, was affirmed by the judgment of this court, which, of course, went no further than the decree itself. We did, indeed, by our judgment leave the circuit court at liberty "to proceed in the execution of its decree as the circumstances may require," but this did not operate to change the decree, or import a power to do so not otherwise possessed.

Counsel argue, however, that certain expressions in the opinion of Mr. Justice Harlan so enlarged the scope of the decree as to give it the effect now attributed to it by complainants.

This suggestion is inconsistent with the settled rule that general expressions in an opinion, which are not essential to dispose of a case, are not permitted to control the judgment in subsequent suits. *Cohen v. Virginia*, 6 Wheat. 399, 5 L. ed. 290; *Carroll v. Carroll*, 16 How. 279, 14 L. ed. 938. But we do not think that the opinion of Mr. Justice Harlan is open to the construction put upon it. In speaking of the situation

as between the government and the defendants, the Securities company is sometimes referred to as the custodian of the shares and sometimes as the absolute owner, but in the sense that in either view the combination was illegal. For the purposes of that suit it was enough that in any capacity the Securities company had the power to vote the railway shares and to receive the dividends thereon. The objection was that the exercise of its powers, whether those of owner or of trustee, would tend to prevent competition, and thus to restrain commerce.

Some of our number thought that, as the Securities company owned the stock, the relief sought could not be granted; but the conclusion was that the possession of the power, which, if exercised, would prevent competition, brought the case within the statute, no matter what the tenure of title was.

[292] *Treating the question as an open one, it seems to us indisputable that, as between these parties, the transaction was one of purchase and sale. The situation is thus well put by Dallas, J.:

"The resolution which authorized the acquisition of the railway stock on behalf of the Securities company was adopted by its board of directors at a meeting at which Mr. Harriman was present as a member of the board, and the only authority it conferred was 'to purchase said stock . . . at an aggregate price of \$91,407,500, payable, as to \$82,491,871 thereof, in the fully paid-up and non-assessable shares of the capital stock of this company at par, and, as to \$8,915,629, in cash.' It is obvious that this resolution contemplated a 'purchase,' and not a bailment or trust; and that it accurately stated the nature and terms of the contract which was actually made by and with the Securities company is unequivocally shown by what was done in pursuance of it. The railway shares were unconditionally assigned to that company. The price specified in the resolution was paid by it, and this payment was made partly in cash and partly in shares of its own stock, for which corporate certificates in the ordinary form were delivered and accepted. . . . The complainants received dividends upon the stock that was issued to them, which were paid out of the general funds of the Securities company; and by its indenture to the Equitable Trust Company of New York the Oregon Short Line Railroad Company irrefutably asserted its ownership of the Securities company stock which it thereby pledged."

And the Securities company sold 75,000 shares of its stock for \$7,522,000 cash, "used," as stated in the bill, "for the pur-

chase of other property and for corporate purposes."

But, assuming that the transaction was in form, and at least prima facie in substance, one of purchase and sale, it is denied that the equitable title vested, because, as alleged in the second amended bill, there was an agreement by the promoters of the Securities company, carried out by that *company, that the latter should "acquire[293] and hold the shares of said railway stocks, as aforesaid, as custodian, depository, or trustee, and to issue in exchange therefor its own share certificates upon said agreed basis." And here, again, we concur in the views of the circuit court of appeals as expressed by Judge Dallas.

"The agreement thus set up is not in accord with the documentary evidence which has been referred to, and to establish its existence a clear preponderance of proof should at least be required; whereas, in our opinion it conclusively appears that no such agreement was ever made. Mr. Harriman himself has distinctly testified that the Northern Pacific stock in question was sold; that the transaction was not an exchange; that he, principally, negotiated the sale; and that there was not attached to the negotiations any condition except as to price. And to the same effect is his affidavit in this case, in which he deposed that he was urged by Messrs. Morgan & Company to dispose of the Northern Pacific stock held by the Oregon Short Line Company, and that 'they further stated that, upon the organization of the proposed holding company,' not that it would take as custodian or trustee, but that 'they would be prepared to purchase the holdings of stock of the Northern Pacific owned by the Oregon Short Line, and pay therefor in the stock of the holding company.' These statements of that one of the complainants, having most knowledge of the subject, confirmed, as they are, by the other evidence, make it quite impossible to believe that the railway stock was received by the Securities company merely as a custodian or depository. The only agreement upon which it was transferred was an unqualified agreement of sale, and the fact that the design with which the Securities company was organized has been compulsorily abandoned has not divested, or in any way affected, the absolute title which, by executed contract of purchase, it acquired. Undoubtedly, it was anticipated by the complainants, as by all concerned, that the rights ordinarily incident to the ownership of stock, including the right to vote and *to[294] receive dividends, would be exercisable as to this stock by the Securities company. But expectation is not contract, and therefore the frustration of this anticipation cannot

be said to have occasioned a failure of consideration. The only consideration agreed upon was payment of the price, and admittedly that payment was made."

Complainants' counsel say, in respect of Mr. Harriman's testimony that the transaction was an unconditional purchase and sale, that he only swore to his opinion on a question of law. This will hardly do when applied to testimony as to what was said and done in conference with the alleged promoters of the Securities company. When Mr. Harriman testified that he attached to his negotiations in the sale of Northern Pacific stock no other condition than that of the price, and that the transaction was completed, how can complainants be permitted to deny that this was a statement of fact? And how can the establishment of the contract and its terms as embodied in the resolutions of November 15, 1901, approved at the succeeding meeting by the vote of Mr. Harriman, and which appeared to be, and were testified to by Mr. Hill, president of the Securities company, as constituting, the only contract which was made and authorized, be overthrown in the absence of any evidence to the contrary?

The consideration received by complainants consisted of money and Northern Securities stock certificates. Those certificates were in common form, and each was a muniment of the holder's title to a proportionate interest in the corporate estate vested in the corporation. By the provisions of the corporation act of New Jersey, and its certificate of incorporation, the Securities company had power to acquire and to hold, and at any time to sell, the shares of other corporations. And under that act it had power, in the discretion of its directors and of the holders of two thirds of its capital stock, at any time, on notice, to dissolve and to wind up the corporation and distribute its assets. Complainants subjected themselves to this power in [295] accepting the shares of the *Northern Securities Company, and their unqualified transfer of their railway stock was inconsistent with any obligation of the Securities company to retain the railway shares for any particular period.

In acquiring the Securities stock, complainants acquired the ordinary rights of stockholders in New Jersey business corporations, including the right to receive dividends, and to share in the distribution of the assets of the corporation on its dissolution, or of any surplus of assets on reduction of its capital stock. In view of the decree of the circuit court for the district of Minnesota in the government's suit the continued ownership of the railway shares became useless to the stockholders of the Se-

curities company, and accordingly the directors decided to reduce the capital stock and distribute the surplus of assets created by that reduction, and the resolutions to that end were ratified by a vote of more than two thirds of the Securities shares.

By the transfer of the Northern Pacific shares and the payment therefor as agreed the contract was executed, and the implied obligations resulting from the relation of corporation and stockholder alone remained executory. And when the Securities company resolved to distribute these railway shares ratably among all its stockholders, it did this in performance of its contract with them, and not in repudiation of it. It is the complainants who are seeking the termination and repudiation of the contract. Their final contention in that regard is that they are entitled to a decree rescinding the contract of purchase and sale, and directing the return of the railway shares parted with by them thereunder, because of the illegality of the transaction as adjudged in the Federal courts.

And this in defiance of the settled rule that property delivered under an illegal contract cannot be recovered back by any party *in pari delicto*. "The general rule, in equity, as at law," said Mr. Justice Gray in *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. *R. Co.* 145 U. S. 393, 36 L. ed. [296] 748, 12 Sup. Ct. Rep. 953, "is, *In pari delicto potior est conditio defendentis*; and therefore neither party to an illegal contract will be aided by the court, whether to enforce it or to set it aside. If the contract is illegal, affirmative relief against it will not be granted, at law or in equity, unless the contract remains executory, or unless the parties are considered not in equal fault, as where the law violated is intended for the coercion of the one party, and the protection of the other, or where there has been fraud or oppression on the part of the defendant. *Thomas v. Richmond*, 12 Wall. 349, 355, 20 L. ed. 453, 456; *Congress & E. Spring Co. v. Knowlton*, 103 U. S. 49, 26 L. ed. 347; Story Eq. Jur. § 298. . . . When the parties are *in pari delicto*, and the contract has been fully executed on the part of the plaintiff, by the conveyance of property, or by the payment of money, and has not been repudiated by the defendant, it is now equally well settled that neither a court of law nor a court of equity will assist the plaintiff to recover back the property conveyed or money paid under the contract. *Thomas v. Richmond*, 12 Wall. 349, 355, 20 L. ed. 453, 456; *Ayerst v. Jenkins*, L. R. 16 Eq. 275, 284."

That was a suit in equity by the maker of an unauthorized lease of a railway and

franchises, against the lessee, to enforce an attempted repudiation of the lease by the former, on the ground of the illegality. The lease was for nine hundred and ninety-nine years, of which but a few years had elapsed at the date of the attempted rescission.

The illegality of the lease and the consequent breach of public duty were manifest, but the right of the lessor, therefore, to maintain the suit was denied by this court.

In the present case complainants seek the return of property delivered to the Securities company pursuant to an executed contract of sale on the ground of the illegality of that contract, but the record discloses no special considerations of equity, justice, or public policy, which would justify the courts in relaxing the rigor of the rule which bars a recovery.

[297] The circuit court decrees put at rest any question that the *ratable distribution resolved upon was in violation of public policy.

And it is clear enough that the delivery to complainants of a majority of the total Northern Pacific stock and a ratable distribution of the remaining assets to the other Securities stockholders would not only be in itself inequitable, but would directly contravene the object of the Sherman law and the purposes of the government suit.

The Northern Pacific system, taken in connection with the Burlington system, is competitive with the Union Pacific system, and it seems obvious to us, the entire record considered, that the decree sought by complainants would tend to smother that competition.

While the superior equities, as against complainants' present claim, of the many holders of Securities shares who purchased in reliance on the belief that they thereby acquired a ratable interest in all of the assets of the Securities company, are too plain to be ignored.

The illegal contract could not be made legal by estoppel, but the ownership of the assets, unaffected by a special interest in complainants, could be placed beyond dispute on their part by their conduct in holding the Securities company out to the world as unconditional owner.

And, without repeating in detail what has been already set out, it is plain that right of rescission of the executed contract of November 18, 1901, even if rescission could have otherwise been sustained, had been lost by acquiescence and laches at the time this bill was filed.

Since the transfer of that date Securities stock had passed into the hands of more than 2,500 holders, many of them in Great Britain, France, and other parts of Europe; nearly a year after the filing of the govern-

ment bill 75,000 shares were sold for cash, complainant Harriman concurring; some months after, Harriman and Pierce and the Oregon Short Line Company pledged their 824,000 shares to the Equitable Trust Company; notwithstanding the decree of April 9, 1903, they *stood upon their rights as [298] shareholders; and it was not until after March 22, 1904, when defendant's board of directors resolved upon a ratable distribution, that complainants undertook to change an election already so pronounced as to be irrevocable in itself in view of the rights of others.

We regard the contention that complainants are exempt from the doctrine *in pari delicto* because the parties acted in good faith and without intention to violate the law as without merit. With knowledge of the facts and of the statute, the parties turned out to be mistaken in supposing that the statute would not be held applicable to the facts. Neither can plead ignorance of the law as against the other, and defendant secured no unfair advantage in retaining the consideration voluntarily delivered for the price agreed.

Perhaps it should be noticed that the bill sought the return of two parcels of Northern Pacific common stock, the 370,230 shares delivered to the Securities company, November 18, 1901, and the 347,090 shares received December 27, 1901, from the Northern Pacific company on the retirement of preferred stock.

Early in 1901 the Hill-Morgan party held a majority of the common stock, and had asserted the intention to retire the preferred stock, "without," as Mr. Harriman testified, "affording the holders of the preferred stock the right to participate in any new securities that might be issued."

With full knowledge of that intention, the proceedings of the two companies followed in November, 1901, and the absolute and unconditional sale and purchase, as we hold the transaction to have been.

We find no evidence of any express agreement that complainants should be entitled to the new common stock, and it was certainly not the natural increase of the old stock, but the result of the exercise of the right of subscription. The purchase by the Securities company was on its own account, and not in trust, and cannot be disturbed because of illegal purpose at the clamor of parties *in pari delicto*. And there is *here [299] no offer of the restoration of the *status quo*, if that were practicable.

Doubtless it became the duty of the Securities company to end a situation that had been adjudged unlawful, and this could be effected by sale and distribution in cash, or by distribution in kind, and the latter meth-

od was adopted, and wisely adopted, as we think, for the forced sale of several hundred millions of stock would have manifestly involved disastrous results.

In fine, the title to these stocks having intentionally been passed, the former owners, or part of them, cannot reclaim the specific shares, and must be content with their ratable proportion of the corporate assets.

Decree affirmed; cause remanded to Circuit Court with a direction to dismiss the bill.

WESTERN ELECTRICAL SUPPLY COMPANY, *Plff. in Err.*,

v.

ABBEVILLE ELECTRIC LIGHT & POWER COMPANY.

(See S. C. Reporter's ed. 299-303.)

Error to state court—Federal question—how raised and decided.

The highest court of a state may decline to reopen, on a second appeal, a question of the validity of the service of summons, which it had upheld on the first appeal, without thereby making a case for a writ of error from the Supreme Court of the United States, where the claim that such service was invalid under the Federal Constitution was first set up on the second hearing in the trial court.

[No. 178.]

Argued and submitted March 14, 1905. Decided April 3, 1905.

IN ERROR to the Supreme Court of the State of South Carolina to review a judgment which, on a second appeal, affirmed a judgment of the Circuit Court of Abbeville County, in that state, sustaining the validity of the service of the summons and complaint on an agent of a non-resident corporation. *Dismissed for want of jurisdiction.*

See same case below, 66 S. C. 328, 44 S. E. 952.

The facts are stated in the opinion.

Mr. Lee W. Grant submitted the cause for plaintiff in error. *Messrs. Ralston & Siddons* were on the brief.

Mr. William N. Graydon argued the cause and filed a brief for defendant in error.

Mr. Chief Justice Fuller delivered the opinion of the court:

The Abbeville Electric Light & Power Company, a corporation of South Carolina, brought this action in the circuit court of Abbeville county, South Carolina, against the Western Electrical Supply Company, a corporation of Missouri, by service of summons and complaint on one George F. Schminke, as agent of the defendant. The complaint alleged that "the cause of action set forth herein arose in this state," and set up the breach of a contract of guaranty in respect of a machine for generating electricity, sold by defendant to plaintiff. Defendant appeared specially, and moved "to set aside the service of the summons herein on the ground that the party served with the summons and complaint herein on the seventh day of November, 1900, was not an agent of the defendant." The motion was heard on affidavits at the February term, 1901, of the circuit court, the service set aside, and the case dismissed for want of jurisdiction.

The circuit judge was of opinion that Schminke was not "an agent in the sense in which 'any agent' is used in the Code." The case was then carried by appeal to the supreme court of South Carolina, and the judgment below was reversed, and the cause remanded for further proceedings. 61 S. C. 361, 55 L. R. A. 146, 85 Am. St. Rep. 890, 39 S. E. 559.

The court held, speaking through Mr. Chief Justice McIver, that under the second paragraph of § 155 of the Code, *as [302] amended by an act approved March 2, 1899, the facts being considered in connection with § 1466 of the Revised Statutes of 1893, as amended by an act of 1897, the service was good and valid.

In this view the court said: "The case must be regarded as a case in which a domestic corporation, having, as it supposed, a claim against a foreign corporation doing business in this state, arising out of a contract made and to be performed in this state, has undertaken to commence its action against such foreign corporation by serving, personally, within the limits of this state, an agent of such foreign corporation with a copy of the summons; and in such a case we do not think that any authority has been or can be cited, which

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Kipley v. Illinois*, 42 L. ed. U. S. 998; and *Re Buchanan*, 39 L. ed. U. S. 884.

On what adjudications of state courts can be brought up for review in the Supreme Court 197 U. S.

of the United States by writ of error to those courts—see note to *Apex Transp. Co. v. Garbade*, 62 L. R. A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to *Mutual L. Ins. Co. v. McGrew*, 63 L. R. A. 33.

holds that the state court had not thereby acquired jurisdiction of the foreign corporation."

On the other hand, the court held that if the case were one in which the plaintiff, a domestic corporation, had brought its action on a contract not made, and not to be performed, in the state, against the defendant, a foreign corporation, and had undertaken to obtain jurisdiction by the personal service of the defendant's agent within the limits of the state, even then, as it appeared upon the facts that the agent was a representative of the defendant corporation in respect of the transaction out of which the suit arose, and was served while within the state for the purpose of attending to the business of the corporation, the service was a good service.

[303] The case having gone back to the circuit court, defendant, by demurrer, renewed its objection to the jurisdiction, this time "on the ground that subd. 1 of § 155 of the Code, providing for service upon a foreign corporation, and the act of the general assembly of South Carolina amending the said section of the Code by striking out the word 'resident,' approved 2nd March, 1899, are in contravention of the 5th and 14th Amendments to the Constitution of the United States, and on the further ground that the act of the general assembly of South Carolina, entitled 'An Act to *Further Prescribe the Terms and Conditions upon which Foreign Corporations May Do Business within this State,' approved the 2nd day of March, A. D. 1897, is in contravention of the 5th and 14th Amendments to the Constitution of the United States."

The demurrer was overruled, and the case went to verdict and judgment on the merits, whereupon it was again taken by appeal to the supreme court. That court declined to express any opinion on the constitutional questions, and affirmed the judgment. 66 S. C. 328, 44 S. E. 952. The court held the question of jurisdiction had already been determined, and that it was not bound to re-examine it. This was, of course, a ground broad enough to sustain the judgment, and as the objection that the state statutes were inconsistent with the Federal Constitution was not raised until the case came on for the second hearing, it is plain that the supreme court could, in its discretion, treat it as coming too late to call for decision. Had that objection been raised in the first instance, and been disposed of, then, inasmuch as the judgment of the circuit court was, at that time, reversed on plaintiff's appeal, the adherence by the supreme court to its prior adjudication as the law of the

case, on defendant's appeal, would not, in itself, have cut off consideration of the Federal questions; but it was not so raised, and, as the case stands, we are of opinion that our jurisdiction cannot be maintained.

Writ of error dismissed.

*WALTER S. McMICHAEL, Lillian M. Harris, Lulu F. McGee, *et al.*, *Plffs. in Err. and Appts.*,

v.

SAMUEL MURPHY, Louisa Murphy, His Wife, Ferdinand Batchelder, *et al.*

(See S. C. Reporter's ed. 304-313.)

Public lands—effect of uncanceled prima facie valid entry.

A homestead entry on land in Oklahoma territory, which is valid upon its face, although made by one in fact personally disqualified to make a valid entry, prevents the initiation of homestead rights by another while it remains uncanceled of record by some direct action of the Land Office or by relinquishment.

[No. 166.]

Submitted March 7, 1905. Decided April 3, 1905.

IN ERROR to and Appeal from the Supreme Court of the Territory of Oklahoma to review a judgment which affirmed the dismissal on demurrer in the District Court of Oklahoma County of a petition to have the patentee of public lands declared to hold the legal title in trust for plaintiffs' use and benefit. *Affirmed.*

See lower court report, 12 Okla. 155, 70 Pac. 189.

The facts are stated in the opinion.

Messrs. Joseph K. McCammon and James H. Hayden submitted the cause for plaintiffs in error and appellants. *Mr. Frank Clark* was on the brief:

By his settlement and residence upon the land in dispute, McMichael acquired preferential rights therein, and his applications to enter the said land were entitled to priority over the application of the defendant Murphy.

Marks v. Bray, 1 Land Dec. 424; *Banks v. Smith*, 2 Land Dec. 44; *Ward v. Gann*, 2 Land Dec. 630; *Meisner's Case*, 8 Land Dec. 227.

If McMichael had, in fact, been absent from the land at the time of White's relinquishment and Murphy's entry, he would

NOTE.—On rights acquired by homestead settlements and entries on public lands of the United States—see note to *McCune v. Essig*, 59 C. C. A. 434.

nevertheless have been entitled to priority over Murphy by virtue of his settlement and residence.

Dorgan v. Pitt, 6 Land Dec. 616; *Fister v. Boyer*, 19 Land Dec. 178; *Arnold v. Cooley*, 10 Land Dec. 551; *Smith v. Place*, 13 Land Dec. 214; *Reedhead v. Hauenstine*, 15 Land Dec. 554; *Kinman v. Appleby*, 32 Land Dec. 526.

This court in recent opinions has reviewed the homestead laws, considering their purpose and policy. Several of these deal with the rights of bona fide settlers as against those of mere entrymen, even such as Murphy. They show that McMichael gained the right to enter and acquire the land, and of that right was wrongfully deprived.

Moss v. Dowman, 176 U. S. 413, 44 L. ed. 526, 20 Sup. Ct. Rep. 429; *Bohall v. Dilla*, 114 U. S. 47, 29 L. ed. 61, 5 Sup. Ct. Rep. 782; *Quinby v. Conlan*, 104 U. S. 420, 26 L. ed. 800; *Stone v. Cowles*, 14 Land Dec. 90; *Hunter v. Blodgett*, 20 Land Dec. 452; *Rickers v. Tisher*, 19 Land Dec. 421.

The acceptance of Murphy's entry, contemporaneously with the filing of White's relinquishment, amounted to a total disregard of the preferential rights which McMichael had acquired.

McClung v. Penny, 189 U. S. 143, 147, 47 L. ed. 751, 754, 23 Sup. Ct. Rep. 589.

McMichael's remedy was by petition to a court of equity for the securing and protection of his rights which were not cognizable by a court of law. He was entitled (1) to have it adjudged that Murphy and his grantees took title as trustees for him, (2) to a decree compelling the defendants to convey the land to him, and (3) to an injunction restraining the execution of the judgments of ejectment.

Johnson v. Towsley, 13 Wall. 72, 20 L. ed. 485; *Moore v. Robbins*, 96 U. S. 530, 24 L. ed. 848; *Warren v. Van Brunt*, 19 Wall. 646, 22 L. ed. 219; *Re Emblen*, 161 U. S. 52, 40 L. ed. 613, 16 Sup. Ct. Rep. 487; *Stark v. Starr*, 6 Wall. 402, 18 L. ed. 925; *Lytle v. Arkansas*, 22 How. 193, 16 L. ed. 306; *Garland v. Wynn*, 20 How. 6, 15 L. ed. 801; *Lindsey v. Hawes*, 2 Black. 554, 17 L. ed. 265; *Brush v. Ware*, 15 Pet. 93, 10 L. ed. 672; *Bodley v. Taylor*, 5 Cranch. 191, 3 L. ed. 75; *Polk v. Wendell*, 5 Wheat. 293, 5 L. ed. 92; *Maxwell Land Grant Case (United States v. Maxwell Land-Grant Co.)* 121 U. S. 325, 30 L. ed. 949, 7 Sup. Ct. Rep. 1015; *Sanford v. Sanford*, 139 U. S. 642, 35 L. ed. 290, 11 Sup. Ct. Rep. 666.

Frauds such as those specifically disclosed by the petition vitiate all transactions based thereon, and destroy any asserted title to property, no matter in what form the evidence of such title may exist, even though

the same be a patent issued by the United States.

United States v. Steenerson, 1 C. C. A. 552, 4 U. S. App. 332, 50 Fed. 507; *American Mortg. Co. v. Hopper*, 12 C. C. A. 293, 29 U. S. App. 12, 64 Fed. 558.

A patent procured by perjury such as that of the defendant Murphy when he falsely declared that he had resided upon and improved the land, and so complied with the homestead laws, is sufficient ground for the vacation and annulling of his patent in the manner prayed by McMichael.

United States v. Minor, 114 U. S. 233, 29 L. ed. 110, 5 Sup. Ct. Rep. 836.

Mr. J. H. Everest submitted the cause for defendants in error and appellees:

The facts as found by the Secretary in the proceeding before the Interior Department are final, conclusive, and binding upon the parties, and the courts will not undertake to retry such questions of fact.

Lee v. Johnson, 116 U. S. 48, 29 L. ed. 570, 6 Sup. Ct. Rep. 249; *Johnson v. Towsley*, 13 Wall. 72, 20 L. ed. 485; *Marquez v. Frisbie*, 101 U. S. 473, 25 L. ed. 800; *Quinby v. Conlan*, 104 U. S. 420, 26 L. ed. 800; *Baldwin v. Stark*, 107 U. S. 463, 27 L. ed. 526, 2 Sup. Ct. Rep. 473.

Homestead entry once made on public lands of the United States under the provisions of §§ 2289 and 2290 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, pp. 1388, 2290) segregates such lands until finally canceled, and unless the act of March 2, 1889, operates to change the ordinary rule with respect to the effect of a homestead entry, these decisions by this court apply to the case at bar.

Chotard v. Pope, 12 Wheat. 586, 6 L. ed. 737; *Wilcox v. Jackson*, 13 Pet. 498, 10 L. ed. 264; *Carroll v. Safford*, 3 How. 441, 11 L. ed. 671; *Witherspoon v. Duncan*, 4 Wall. 210, 18 L. ed. 339; *Kansas P. R. Co. v. Dunmeyer*, 113 U. S. 629, 28 L. ed. 1122, 5 Sup. Ct. Rep. 566; *Hastings & D. R. Co. v. Whitney*, 132 U. S. 357, 33 L. ed. 363, 10 Sup. Ct. Rep. 112; *Sturr v. Beck*, 133 U. S. 541, 33 L. ed. 761, 10 Sup. Ct. Rep. 350; *Sioux City & I. F. Town Lot & Land Co. v. Griffey*, 143 U. S. 40, 36 L. ed. 66, 12 Sup. Ct. Rep. 362; *Whitney v. Taylor*, 158 U. S. 85, 39 L. ed. 906, 15 Sup. Ct. Rep. 796.

The Land Department of the United States has repeatedly passed upon the same question, and has in all cases held that a homestead entry prima facie valid segregates the tract of land therein described, until such entry is canceled, either by relinquishment or by the government.

Graham v. Hastings & D. R. Co. 1 Land Dec. 362; *Whitney v. Maxwell*, 2 Land Dec. 98; *Leary v. Manucl*, 12 Land Dec. 345;

Vidal v. Bennis, 22 Land Dec. 124; *Cowles v. Huff*, 24 Land Dec. 81.

In *Hodges v. Colcord*, 193 U. S. 192, 193, 48 L. ed. 677, 678, 24 Sup. Ct. Rep. 433, this court passes squarely upon this identical proposition.

One who makes settlement on a tract of land while it is covered by the homestead entry of another is a mere intruder,—a naked, unlawful trespasser,—and no right either in law or equity can be founded thereon.

Atherton v. Fowler, 96 U. S. 513-520, 24 L. ed. 732-734.

A settlement cannot be made upon public land already occupied. As against existing occupants the settlement of another is ineffectual to establish a pre-emptive right.

Quinby v. Conlan, 104 U. S. 420-427, 26 L. ed. 800-802; *Hudson v. Docking*, 4 Land Dec. 501; *Turner v. Bumgardner*, 5 Land Dec. 377; *Dutcher v. Tillinghast*, 13 Land Dec. 209; *Lewis v. Nuckolls*, 18 Land Dec. 326; *Tustin v. Adams*, 22 Land Dec. 266.

To entitle a party to relief in equity against a patent of the government, he must show a better right to the land than the patentee. It must appear by the law properly administered that title should have been awarded to the claimant.

Sparks v. Pierce, 115 U. S. 408, 29 L. ed. 428, 6 Sup. Ct. Rep. 102; *Bohall v. Dilla*, 114 U. S. 47, 29 L. ed. 61, 5 Sup. Ct. Rep. 782; *Lee v. Johnson*, 116 U. S. 48, 29 L. ed. 570, 6 Sup. Ct. Rep. 249.

The filing of a contest confers no vested interest in the land involved.

Parker v. Lynch, 7 Okla. 634, 56 Pac. 1082; *Emblen v. Lincoln Land Co.* 184 U. S. 661-663, 46 L. ed. 736, 737, 22 Sup. Ct. Rep. 523.

Mr. Justice **Harlan** delivered the opinion of the court:

The facts in this case may be summarized as follows:

On April 23d, April 24th, and May 1st, 1889, White, Blanchard, and Cook, respectively and in the order named, applied, at the United States land office in Guthrie, Oklahoma territory, to make a homestead entry on certain lands, being part of the southwest $\frac{1}{4}$ of section 27, township 12, north of range 3 west. The applications of Blanchard and Cook were each rejected, as being in conflict with White's entry. On April the 27th, 1889, Blanchard filed his affidavit of contest, charging that White entered the territory prior to 12 o'clock noon of April the 22d, 1889, in violation of the act of Congress approved March 2d, 1889 (25 Stat. at L. 1004, chap. 412), and the President's proclamation issued under that act. 26 Stat. at L. 1544. On May 1st, 1889,

Cook also filed an affidavit of contest against White, alleging the latter's disqualification, as above stated, to enter the land, and also that Blanchard was also disqualified upon the same grounds as those alleged in reference to White.

The contest having been tried before the local land office,—each party charging that the other two had entered the territory *prior to noon of April 22d, 1889,—the register and receiver recommended the cancellation of White's entry, and dismissed the contest of both Blanchard and Cook. From this decision all parties appealed to the Commissioner of the General Land Office, and on March 7th, 1890, the decision of the local office was affirmed. An appeal was then taken to the Secretary of the Interior. While the case was pending before that officer, namely, on November 29th, 1890, White relinquished of record his entry, and Murphy, the defendant, on the same day, entered the land. The Secretary of the Interior, July 21st, 1891, affirmed the decision of the Commissioner of the General Land Office. *Blanchard v. White*, 13 Land Dec. 66.

On or about June 3d, 1889, White's homestead entry *being still intact, of record*, McMichael entered upon the land with a view of establishing his residence thereon and initiating a homestead right to it; and on July 21st, 1889, he made application to the local office to enter the land, tendering the required fees; but his application was rejected by the local office as being in conflict with White's entry. From that order no appeal was taken.

On August 31st, 1889, McMichael again tendered his application to the local office, with the required fees. That application was received, but it was suspended pending the contest of White, Blanchard and Cook. On the day last named McMichael filed a contest or protest, alleging that he had made settlement on the land on June 3d, 1889, had lived there in a tent with his family until August 2d, 1889, when, at the instance of White, he was forcibly removed therefrom by the military authorities; that his rights were superior to those of White, Blanchard, and Cook, all of whom, he alleged, were disqualified by reason of having entered the territory during the period prohibited by law; that his application of June 3d was rejected because it conflicted with White's interests, although he was the only qualified settler on the tract entitled to make entry. The case, as between McMichael and Murphy, having been heard on February 15th, 1892, a decision was rendered in favor *of the latter. There-
upon McMichael appealed to the General Land Office, which, on January 18th, 1893,

affirmed the decision of the local office. He then appealed to the Secretary of the Interior, and that officer, on February 25th, 1895, affirmed the decision of the Land Office. *McMichael v. Murphy*, 20 Land Dec. 147.

A patent was issued to Murphy for the land; whereupon the present action was brought in the district court of Oklahoma county by McMichael against Murphy and his grantees, the relief asked being a decree declaring the legal title to be held in trust for the use and benefit of McMichael. Murphy demurred on the ground that the petition did not state facts sufficient to constitute a cause of action; McMichael's claim being that the Secretary of the Interior had misconstrued and misapplied the law. The demurrer was sustained, and, the plaintiff having elected to stand on his petition, the court dismissed the case. From that decree the plaintiff brings the case here for review.

After the cause was entered in the supreme court of the territory McMichael died, and the cause was revived in the name of his heirs.

The particular question involved in this case is whether a settlement or entry on public land already covered of record by another entry, valid upon its face, gives the second entryman any right in the land, notwithstanding the first entry may subsequently be relinquished or be ascertained to be invalid by reason of facts *dehors* the record of such entry.

By virtue of the authority vested in him by acts of Congress, particularly by the Indian appropriation act of March 2d, 1889 (25 Stat. at L. 1004, chap. 412), the President by proclamation dated March 23d, 1889, declared that certain lands theretofore obtained from Indians (among which were those in dispute) would "at and after the hour of 12 o'clock, noon, of the twenty-second day of April, next, and not before, be open for settlement, under the terms of, and subject to, all the conditions, limitations, and restrictions" contained in the above act and in the laws of the United States applicable thereto. 26 *Stat. at L. 1544. That proclamation contains the following clause: "Warning is hereby again expressly given, that no person entering upon and occupying said lands before said hour of 12 o'clock, noon, of the twenty-second day of April, A. D. eighteen hundred and eighty-nine, hereinbefore fixed, will ever be permitted to enter any of said lands or acquire any rights thereto; and that the officers of the United States will be required to strictly enforce the provision of the act of Congress to the above effect." 26 Stat. at L. 1544-1546.

It may be assumed, for the purpose of

this case, that White entered the territory and occupied the land before noon of April 22d, 1889, in violation of the act of Congress and the proclamation of the President. But his entry did not, on its face or in the papers connected therewith, disclose the fact of his personal disqualification to make a valid entry. While the entry remained uncanceled of record by any direct action of the Land Office or by relinquishment, could another person, by making an entry, acquire a right in the land upon which a patent could be based? If not, then McMichael acquired no right by his entry or application to enter.

The supreme court of the territory held that White's homestead entry was *prima facie* valid, and that, so long as White's entry remained uncanceled of record, it segregated the tract of land from the mass of the public domain, and precluded McMichael from acquiring an inceptive right thereto by virtue of his alleged settlement.

We are of opinion that there was no error in this ruling. It is supported by the adjudged cases. *Kansas P. R. Co. v. Dunmeyer*, 113 U. S. 629, 28 L. ed. 1122, 5 Sup. Ct. Rep. 566; *Hastings & D. R. Co. v. Whitney*, 132 U. S. 357, 361, 362, 33 L. ed. 363, 365, 366, 10 Sup. Ct. Rep. 112; *Sioux City & I. F. Town Lot & Land Co. v. Griffey*, 143 U. S. 32, 38, 36 L. ed. 64, 65, 12 Sup. Ct. Rep. 362; *Whitney v. Taylor*, 158 U. S. 85, 91-94, 39 L. ed. 906, 908, 909, 15 Sup. Ct. Rep. 796; *Northern P. R. Co. v. Sanders*, 166 U. S. 620, 631, 632, 41 L. ed. 1139, 1143, 17 Sup. Ct. Rep. 671; *Northern P. R. Co. v. De Lacey*, 174 U. S. 622, 634, 635, 43 L. ed. 1111, 1115, 1116, 19 Sup. Ct. Rep. 791; and *Hodges v. Colcord*, 193 U. S. 192, 194-196, 48 L. ed. 677-679, 24 Sup. Ct. Rep. 433.

In the last-named case the question now before us was directly presented and decided. It was there alleged that one *Gay-[312] man, who had made a homestead entry, was disqualified by reason of his having entered the territory of Oklahoma in violation of the above act of Congress and the proclamation of the President. The court said: "Gayman's homestead entry was *prima facie* valid. There was nothing on the face of the record to show that he had entered the territory prior to the time fixed for the opening thereof for settlement, or that he had in any manner violated the statute or the proclamation of the President. This *prima facie* valid entry removed the land, temporarily at least, out of the public domain, and beyond the reach of other homestead entries. . . . Generally, a homestead entry while it remains uncanceled withdraws the land from subsequent entry. Such has been the ruling of the Land Department. . . . The entry

of Gayman, though ineffectual to vest any rights in him, and therefore void as to him, was such an entry as prevented the acquisition of homestead rights by another until it had been set aside."

Following the adjudged cases, we hold that White's original entry was prima facie valid, that is, valid on the face of the record, and McMichael's entry, having been made at a time when White's entry remained uncanceled, or not relinquished, of record, conferred no right upon him, for the reason that White's entry, so long as it remained undisturbed of record, had the effect to segregate the lands from the public domain and make them not subject to entry. Upon White's relinquishment they again became public lands, subject to the entry made by Murphy.

In addition, it may be observed that the action of the Land Department under the statutes relating to the public lands has been in line with the above views. This appears from the decision in *Hodges v. Colcord*, and from the opinion of the Secretary of the Interior in *McMichael v. Murphy*, 20 Land Dec. 147. It is our duty not to overrule the construction of a statute upon which the Land Department has uniformly proceeded in its administration of the public lands, except for cogent reasons. *United States v. Johnston*, 124 U. S. 236, 31 L. ed. 389, 8 Sup. Ct. Rep. 446; *United States v. Alabama G. S. R. Co.* 142 U. S. 615, 35 L. ed. 1134, 12 Sup. Ct. Rep. 306; *United States v. Philbrick*, 120 U. S. 52, 30 L. ed. 559, 7 Sup. Ct. Rep. 413; *United States v. Hcaley*, 160 U. S. 138, 141, 40 L. ed. 370, 371, 16 Sup. Ct. Rep. 247.

The judgment is affirmed.

A. Y. CHRISMAN and H. T. Chrisman,
Plffs. in Err.,

v.

E. O. MILLER and the Home Oil Company.

(See S. C. Reporter's ed. 313-323.)

Error to state court—conclusiveness of findings of fact—mining claims—discovery.

1. Findings of fact are conclusive on the Supreme Court of the United States in cases coming up from a state court.
2. Even as between rival mineral claimants to petroleum lands, there must have been such a discovery, in order to sustain a location, as would justify a prudent person in the

expenditure of money and labor in exploitation for petroleum.

[No. 171.]

Argued March 8, 1905. Decided April 3, 1905.

IN ERROR to the Supreme Court of the State of California to review a judgment which affirmed a judgment of the Superior Court of Fresno County in that state in favor of plaintiffs in an action to quiet title to mineral lands. *Affirmed.*

See same case below, 140 Cal. 440, 98 Am. St. Rep. 63, 73 Pac. 1083, 74 Pac. 444.

Statement by Mr. Justice **Brewer**:

This was an action in the superior court of Fresno county, California, to quiet title to certain lands in that county. The complaint by Miller and the Home Oil Company was filed October 14, 1898. The case was tried by the court without a jury, findings of fact were made, and a decree entered in favor of the plaintiffs. On appeal to the supreme court of the state this decree was affirmed, September 13, 1903. 140 Cal. 440, 98 Am. St. Rep. 63, 73 Pac. 1083, 74 Pac. 444. Thereafter the case was brought to this court on writ of error. The dispute between the parties was as to the validity of respective locations of the land under the mineral laws of the United States. The mineral found therein, and on account of which the locations were made, was petroleum. From the findings it appears that on June 14, 1895, eight persons, one Barieau being of the number, attempted to make a mineral location upon the tract in controversy, the same being an entire quarter section. Whatever interest they thus acquired was, on December 24, 1896, conveyed to E. O. Miller. On December 31, 1896, Miller by his written declaration abandoned and relinquished all rights which he had acquired by this conveyance. On the same day and about four hours thereafter Miller and seven others, duly qualified to make entries, made a mineral location of the entire tract. Subsequently all interests obtained thereby were vested in the plaintiffs. On January 1, 1897, the defendants attempted to make a location of certain portions of the tract. The tenth, eleventh, fifteenth, seventeenth and eighteenth findings are as follows:

"10. That immediately after going into possession of said northeast quarter of said section 20, the said plaintiff, Home Oil Company, commenced digging, boring, and excavating thereon for petroleum and other fluid products, and has expended in such work the sum of more than \$30,000, and by means of such digging, boring, and excavat-

197 U. S.

NOTE.—On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to *Missouri ex rel. Hill v. Dockery*, 63 L. R. A. 571.

ing discovered large quantities of petroleum therein; and there now exists, and did at the commencement of this action, wells of great depth, sunk and excavated upon said property by said Home Oil Company, from which there is a daily flow of large quantities of petroleum of great value.

315] "11. That ever since the 17th day of September, 1897, the said plaintiff, Home Oil Company, has been and is now *in the sole and exclusive possession of all of said real property, and engaged in working, developing, and mining the same, and extracting petroleum and other fluid products therefrom.

"15. That said defendant A. Y. Chrisman never at any time discovered a seepage of petroleum or other mineral oil upon said land or any part thereof, and the defendant H. T. Chrisman never discovered a seepage of petroleum or other mineral oil upon said land or upon any part thereof, and that the only discovery of petroleum or any other fluid produce upon said lands or upon any part thereof is the discovery made by the plaintiff Home Oil Company as in these findings before stated.

"17. That on the said 1st day of January, 1897, no part of the said northeast quarter of section 20 was vacant public mineral land or open to exploration or location for mining purposes, but, on the contrary, the whole of said northeast quarter of said section 20 was then in the possession of J. A. Hannah, E. O. Miller, W. F. Hall, D. G. Overall, L. E. Hall, Harry Levinson, R. B. Biddle, and Charles H. Smith, under and by virtue of their location of said land hereinbefore mentioned.

"18. That the said defendants, A. Y. Chrisman and H. T. Chrisman, did not make the location for mining purposes hereinbefore mentioned in good faith, and did not, nor did either of them, enter into the possession thereof or any part of the same for the purpose of working and mining thereon on the 1st day of January, 1897, or upon any other date; and said defendants have not and neither of them has since the 1st day of January, 1897, or since any day whatever, done and performed upon said land or any part thereof such work and labor or made improvements thereon as is required by the laws of the United States or of the state of California; and that the said defendants have not been and neither of them has been in the exclusive possession of said tracts of land so claimed by them; and said defendants are not, and neither of them is, in the possession of said 316] tracts of land so claimed by them or *either of them, or any part thereof; and the said 197 U. S.

defendants ever since the said 1st day of January, 1897, or since any day whatever or at all have not been nor are they or either of them now entitled to the exclusive or any possession of the tracts of land claimed by them or any part thereof, nor are said defendants entitled, nor is either of them entitled, to the exclusive or any possession whatever of any part of said northeast quarter of said section 20, in township 19 south, range 15 east, Mt. Diablo base and meridian."

Mr. William H. Metson argued the cause, and, with Messrs. Joseph C. Campbell, Frank C. Drew, and Philip Mansfield, filed a brief for plaintiffs in error:

The value of a mineral deposit is a matter into which the government does not inquire as between two mineral claimants. Inquiries of this character are confined to controversies between mineral and agricultural claimants.

1 Lindley, Mines, 2d ed. p. 609; *Tam v. Story*, 21 Land Dec. 440.

In a case of contest between mineral claimants on one side and parties holding town-site patents on the other, this court has repeatedly declared that in order to except mines or mineral lands from the operation of a town-site patent it is not sufficient that the lands do in fact contain minerals, or even valuable minerals, when the town-site patent takes effect, but they must at that time contain mineral of such extent and value as to justify expenditures for the purpose of extracting them.

Deffeback v. Hawke, 115 U. S. 392, 29 L. ed. 423, 6 Sup. Ct. Rep. 95; *Davis v. Weibbold*, 139 U. S. 507, 35 L. ed. 238, 11 Sup. Ct. Rep. 628; *Dover v. Richards*, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452; *Migeon v. Montana R. Co.* 23 C. C. A. 156, 44 U. S. App. 724, 77 Fed. 249.

Between two placer claimants the rule is different.

1 Lindley, Mines, 2d ed. p. 606.

Seepages of oil, when discovered upon government land, constitute a discovery of oil.

Book v. Justice Min. Co. 58 Fed. 106; *McShane v. Kenkle*, 18 Mont. 208, 33 L. R. A. 851, 56 Am. St. Rep. 578, 44 Pac. 979; *Montana C. R. Co. v. Migeon*, 68 Fed. 811, 23 C. C. A. 156, 44 U. S. App. 724, 77 Fed. 249; *Erhardt v. Boaro*, 113 U. S. 527, 28 L. ed. 1113, 5 Sup. Ct. Rep. 560; *Donahue, Petroleum & Gas*, 1902, p. 233; *Nevada Sierra Oil Co. v. Home Oil Co.* 98 Fed. 673; 1 Lindley, Mines, p. 779.

Messrs. William H. Metson and Joseph C. Campbell filed a separate brief for plaintiffs in error:

The Supreme Court of the United States will look into the case and see what is the real substance and effect of the decision. Accident, fraud, or mistake cannot deprive it of its right to review.

McCullough v. Virginia, 172 U. S. 116, 117, 43 L. ed. 387, 388, 19 Sup. Ct. Rep. 134.

Discovery is a matter of law as much as certain marks upon the ground.

McKinley Creek Min. Co. v. Alaska United Min. Co. 183 U. S. 563, 570, 46 L. ed. 331, 334, 22 Sup. Ct. Rep. 84.

Mr. L. L. Cory argued the cause and filed a brief for defendants in error:

The findings of fact of the trial court, affirmed by the supreme court, are conclusive and final, and all the facts so found will be taken as true upon this hearing.

Minneapolis & St. L. R. Co. v. Minnesota, 193 U. S. 53, 48 L. ed. 614, 24 Sup. Ct. Rep. 396; *Clipper Min. Co. v. Eli Min. & Land Co.* 194 U. S. 220, 48 L. ed. 944, 24 Sup. Ct. Rep. 632; *Thayer v. Spratt*, 189 U. S. 346, 47 L. ed. 845, 23 Sup. Ct. Rep. 576; *Jenkins v. Neff*, 186 U. S. 230, 46 L. ed. 1140, 22 Sup. Ct. Rep. 905; *E. Bement & Sons v. National Harrow Co.* 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747; *Egan v. Hart*, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300.

A mineral discovery sufficient to warrant the location of a mining claim may be regarded as proven, where mineral is found, and the evidence shows that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine.

Harrington v. Chambers, 3 Utah, 94, 1 Pac. 362; *Shreve v. Copper Bell Min. Co.* 11 Mont. 309, 28 Pac. 315.

It is the finding of the mineral in rock in place as distinguished from float rock that constitutes the discovery, and warrants the prospectors in making a location of a mining claim.

Book v. Justice Min. Co. 58 Fed. 106.

Mere discovery of fragments of mineral bearing ore not in lode formation will not form the basis of a valid location of a lode claim.

Waterloo Min. Co. v. Doe, 56 Fed. 685.

Locations existing simply upon a conjecture or imaginary existence of a vein or lode within their limits shall not be permitted. A location can only rest upon an actual discovery of the vein or lode.

King v. Amy & S. Consol. Min. Co. 152 U. S. 227, 38 L. ed. 421, 14 Sup. Ct. Rep. 510; 1 Lindley, Mines, § 336, p. 436.

There is no evidence that the "indications" discovered by Barieau were of such a character as the miners in that district would

follow, and there is no evidence that these "indications" would justify miners in working the claim, and there is no evidence that practical miners ever had or ever would attach any significance to these indications, and there is no evidence that indications of similar character had ever been followed up by any persons whatever, or had ever resulted in the finding or development of a petroleum claim.

See *Shoshone Min. Co. v. Rutter*, 31 C. C. A. 223, 59 U. S. App. 538, 87 Fed. 801.

Mr. Justice Brewer delivered the opinion of the court:

In cases coming from a state court we do not review questions of fact, but accept the conclusions of the state tribunals as final. *Clipper Min. Co. v. Eli Min. & Land Co.* 194 U. S. 220, 48 L. ed. 944, 24 Sup. Ct. Rep. 632, and cases cited in the opinion; *Kaufman v. Tredway*, 195 U. S. 271, ante, 190, 25 Sup. Ct. Rep. 33; *Smiley v. Kansas*, 196 U. S. 447, ante, 546, 25 Sup. Ct. Rep. 289.

By the findings of the trial court the Chrismans, plaintiffs in error, never made any discovery of petroleum or other mineral oil, did not make the attempted location in good faith, and never did any work on the tract. These findings were of date June 24, 1899, nearly two years and a half after their attempted location. It would seem from these facts that they had no pretense of right to the premises.

It is contended, however, that the supreme court, in its opinion, practically set aside these findings in one respect, and that is the discovery of petroleum. We do not so understand that opinion. The only reference made to the matter is in these words: "The alleged discovery of defendants under their location may be disposed of in a single sentence. It amounted to no more than the pretended discovery by Barieau;" and in reference to Barieau's alleged discovery the court said:

"Upon the question of discovery the sole evidence is that of Barieau himself. Giving fullest weight to that testimony, it amounts to no more than this, that Barieau had walked over the land at the time he posted his notice, and had discovered 'indications' of petrolcum. Specifically, he says that he saw a spring, and 'the oil comes out and floats over the water in the summer time, when it is hot. In June, 1895, there was a little water with oil and a little oil with water coming out. It was dripping over a rock about 2 feet high. There was no pool; it was just dripping a little water and oil, not much *'water.' This is all the [320] 'discovery' which it is even pretended was made under the Barieau location."

There is nothing in this language from

which it can be inferred that the supreme court of the state set aside the finding of the trial court. All that it said was in answer to the contention of the defendants that they had made a discovery, and that contention the supreme court repudiated, leaving the finding of fact to stand as it was made by the trial court.

It is further contended that the location made by Barieau and his associates, and conveyed by them to Miller, did not lapse until midnight of December 31, 1896; that then it lapsed by reason of the failure to do the annual work required by statute; that Miller could not prior thereto abandon and relinquish that location, and at the same time make a new one, as he attempted to do on the afternoon of December 31, because the effect of such action would be to continue a possessory right to the tracts without compliance with the statutory requirement of work. Hence, as contended, the only valid location was that made on January 1, 1897, by the defendants. It may be doubted whether, in view of their want of good faith, the defendant's can avail themselves of their contention, and, indeed, also doubted whether they could uphold their location by proof of a discovery by some other party. But it has no foundation in fact, for, as found by the trial and held by the supreme court of the state, the attempted location by Barieau and his associates in June, 1895, was a failure by reason of a lack of discovery. We have already quoted the declaration of the supreme court. The testimony referred to in that quotation, even if true, does not overthrow the finding. It does not establish a discovery. It only suggests a possibility of mineral of sufficient amount and value to justify further exploration.

By 29 Stat. at L. p. 526, chap. 216, U. S. Comp. Stat. 1901, p. 1434, "lands containing petroleum or other mineral oils, and chiefly valuable therefor," may be entered and patented "under the provisions of the laws relating to placer mineral claims." By § 2329, Rev. Stat. U. S. Comp. Stat. 1901, p. 1432, *placer claims are "subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims." By § 2320, Rev. Stat. U. S. Comp. Stat. 1901, p. 1424, "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located."

What is necessary to constitute a discovery of mineral is not prescribed by statute, but there have been frequent judicial declarations in respect thereto. In *United States v. Iron Silver Min. Co.* 128 U. S. 197 U. S.

673, 32 L. ed. 571, 9 Sup. Ct. Rep. 195, a suit brought by the United States to set aside placer patents on the charge that the patented tracts were not placer mining ground, but land containing mineral veins or lodes of great value, as was well known to the patentee on his application for the patents, we said (p. 683, L. ed. p. 575, Sup. Ct. Rep. p. 199):

"It appears very clearly from the evidence that no lodes or veins were discovered by the excavations of Sawyer in his prospecting work, and that his lode locations were made upon an erroneous opinion, and not upon knowledge, that lodes bearing metal were disclosed by them. It is not enough that there may have been some indications, by outcroppings on the surface, of the existence of lodes or veins of rock in place bearing gold or silver or other metal, to justify their designation as 'known' veins or lodes. To meet that designation the lodes or veins must be clearly ascertained, and be of such extent as to render the land more valuable on that account, and justify the exploitation. Although pits and shafts had been sunk in various places, and what are termed in mining cross-cuts had been run, only loose gold and small nuggets had been found, mingled with earth, sand, and gravel. Lodes and veins in quartz or other rock in place bearing gold or silver or other metal were not disclosed when the application for the patents were made."

This definition was accepted as correct in *Iron Silver Min. Co. v. Mike & S. Gold & Silver Min. Co.* 143 U. S. 394, 36 L. ed. 201, 12 Sup. Ct. Rep. 543, though in that case there was a vigorous dissent upon questions of fact, in *which Mr. Justice Field, [322] speaking for the minority, said (p. 412, L. ed. p. 207, Sup. Ct. Rep. p. 548): "The mere indication or presence of gold or silver is not sufficient to establish the existence of a lode. The mineral must exist in such quantities as to justify expenditure of money for the development of the mine and the extraction of the mineral." And again (p. 424, L. ed. p. 211, Sup. Ct. Rep. p. 552): "It is not every vein or lode which may show traces of gold or silver that is exempted from sale or patent of the ground embracing it, but those only which possess these metals in such quantity as to enhance the value of the land and invite the expenditure of time and money for their development. No purpose or policy would be subserved by excepting from sale and patent veins and lodes yielding no remunerative return for labor expended upon them."

By the Land Department this rule has been laid down (*Castle v. Womble*, 19 Land Dec. 455, 457):

"Where minerals have been found, and the

evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met. To hold otherwise would tend to make of little avail, if not entirely nugatory, that provision of the law whereby 'all valuable mineral deposits in lands belonging to the United States . . . are . . . declared to be free and open to exploration and purchase.' "

Some cases have held that a mere willingness on the part of the locator to further expend his labor and means was a fair criterion. In respect to this *Lindley on Mines*, 1st ed. § 336, says:

"But it would seem that the question should not be left to the arbitrary will of the locator. Willingness, unless evidenced by actual exploitation, would be a mere mental state which could not be satisfactorily proved. The facts which are within the observation of the discoverer, and which induce him to locate, should be such as would [323] justify a man of ordinary *prudence, not necessarily a skilled miner, in the expenditure of his time and money in the development of the property."

It is true that, when the controversy is between two mineral claimants, the rule respecting the sufficiency of a discovery of mineral is more liberal than when it is between a mineral claimant and one seeking to make an agricultural entry, for the reason that where land is sought to be taken out of the category of agricultural lands the evidence of its mineral character should be reasonably clear, while in respect to mineral lands, in a controversy between claimants, the question is simply which is entitled to priority. That, it is true, is the case before us. But even in such a case, as shown by the authorities we have cited, there must be such a discovery of mineral as gives reasonable evidence of the fact, either that there is a vein or lode carrying the precious mineral, or, if it be claimed as placer ground, that it is valuable for such mining.

Giving full weight to the testimony of Barieau, we should not be justified, even in a case coming from a Federal court, in overthrowing the finding that he made no discovery. There was not enough in what he claims to have seen to have justified a prudent person in the expenditure of money and labor in exploitation for petroleum. It merely suggested a possibility that the ground contained oil sufficient to make it "chiefly valuable therefor." If that be true were the case one coming from a Federal court, *a fortiori* must it be true when the

case comes to us from a state court, whose findings of fact we have so often held to be conclusive.

The judgment of the Supreme Court of California is affirmed.

*IN THE MATTER OF MORRIS [324]
STRAUSS.

(See S. C. Reporter's ed. 324-334.)

Extradition—complaint before committing magistrate is a charge of crime.

A person against whom a complaint for a felony has been filed before a committing magistrate, who can only charge or hold for trial before another tribunal, is "charged" with the crime within the meaning of U. S. Const. art. 4, § 2, subd. 2, and of U. S. Rev. Stat. § 5278 (U. S. Comp. Stat. 1901, p. 3597), providing for the extradition of persons charged with treason, felony, or other crime.

[No. 186.]

Argued and submitted March 16, 1905. Decided April 3, 1905.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Second Circuit presenting the questions whether extradition of a person against whom a complaint of felony is filed before a committing magistrate is authorized by the Federal Constitution, and whether the congressional legislation providing for such extradition is unconstitutional. The first question answered in the affirmative and the second in the negative.

Statement by Mr. Justice **Brewer**:

The petitioner was charged by affidavit before a justice of the peace of Youngstown township, Ohio, with the crime of obtaining \$400 worth of jewelry at Youngstown, Ohio, by false pretenses, contrary to the law of that state. He was arrested as a fugitive from justice and brought before a magistrate of the city of New York, August 11, 1902. The governor of New York, after a hearing, at which the accused was represented by counsel, issued his warrant, dated August 22, 1902, directed to the police commissioner of New York city, directing him to arrest the accused and deliver him to the duly accredited agent of Ohio, to be taken to that state.

The warrant recites that it has been represented by the *governor of Ohio that the [325] accused stands charged in that state of the crime of securing property by false pretenses, which is a crime under its law, and that he has fled from that state. It also recites that the requisition was accompanied by

affidavits and other papers, duly certified by the governor of Ohio to be authentic, charging the accused with having committed the said crime, and with having fled from Ohio and taken refuge in the state of New York.

On the 29th of August, after the arrest of the petitioner, a writ of habeas corpus was allowed by the district court. The police commissioner made return that he held the accused by virtue of the governor's warrant. On September 16, 1902, the district court discharged the writ and remanded the accused to the custody of the police commissioner. This order was taken on appeal to the circuit court of appeals of the second circuit, which certified the following questions:

"First. Whether the delivery up of an alleged fugitive from justice against whom a complaint for the crime of securing property by false pretenses has been sworn to and is pending before a justice of the peace of Ohio, having the jurisdiction conferred upon him by the laws of that state, is authorized in view of the provisions of article 4, § 2, subd. 2, of the Constitution?

"Second. Is § 5278 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3597), in as far as it authorizes the delivery up of an alleged fugitive from justice upon an affidavit of complaint pending before a justice of the peace in Ohio for the crime of securing property by false pretenses, which said justice of the peace has the jurisdiction conferred upon him by the laws of the said state, violative of article 4, § 2, subd. 2, of the Constitution?"

Article 4, § 2, subd. 2, of the Constitution reads:

"A person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime."

[326] *Revised Statutes, § 5278, so far as is material, is:

"Whenever the executive authority of any state or territory demands any person as a fugitive from justice, of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the ar-

rest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear."

Mr. Max J. Kohler argued the cause, and, with Mr. Moses H. Grossman, filed a brief for Strauss:

The executive authority of the state was not authorized to make the demand unless the party was charged in the regular course of judicial proceedings.

Kentucky v. Dennison, 24 How. 66, 16 L. ed. 717.

The Constitution contemplates a charge in a court where there can be a trial and conviction, and not simply a decision whether the accused shall give bond for his appearance in another court to answer a charge that may or may not be preferred against him.

3 Crim. Law Mag. p. 787.

This precisely accords with the holding of this court as to the nature of preliminary proceedings, made under the statute governing removal to the Federal courts of prosecutions against persons claiming to have acted under Federal authority.

Virginia v. Paul, 148 U. S. 107, 119, 37 L. ed. 386, 390, 13 Sup. Ct. Rep. 536; *Com. v. Artman*, 5 Phila. 304, Fed. Cas. No. 10,952; *Virginia v. Felts*, 133 Fed. 85.

Of course, if the cause be triable before the justice of the peace, and he is not sitting merely as a committing magistrate, a different rule obtains.

Virginia v. Bingham, 88 Fed. 561.

Historically, it is certainly true that these preliminary proceedings were merely a melioration of the practice of arresting without warrants for crime, to secure presence on indictment to be found.

Stephen, *History of Crim. Law* 1, 190, 192; 3 Crim. Law Mag. *The Preliminary Investigation of Crime*, p. 297; 16 Enc. Pl. & Pr. *Preliminary Examination*, p. 820.

The English common-law practice authorized removal only after indictment found.

Re Dana, 68 Fed. 886.

Oppressive removals to the mother country for trial for alleged crime was one of the grievances specifically set forth in the Declaration of Independence.

Friedenwald, *The Declaration of Independence* (1904) pp. 249, 250; 6 Winsor, *Narrative & Critical History of America*, p. 53; 6 Bancroft, *History of United States*, 1857 ed. 417, 418, 441, 450, 451.

It seems quite unreasonable to suppose that the colonists intended to open the door to such oppressive removals as would be involved in rendition on mere complaints to

distant states, to answer indictments that might never be found.

Jack v. Martin, 14 Wend. 507.

The constitutional provision requires actual physical surrender and removal, and bail is not authorized after an unreviewed warrant of extradition has been issued.

Ex parte Erwin, 7 Tex. App. 288; *Re Foye*, 21 Wash. 250, 57 Pac. 825.

Of course, bail is authorized while proceedings superseding or delaying surrender are actually pending in the remanding state.

State v. Hufford, 23 Iowa, 579; *Roberts v. Reilly*, 116 U. S. 80, 90, 29 L. ed. 544, 6 Sup. Ct. Rep. 291; *Hawley*, International Extradition, p. 59; *Wright v. Henkel*, 190 U. S. 40, 47 L. ed. 948, 23 Sup. Ct. Rep. 781; *Re Ah Tai*, 125 Fed. 795.

The English common law made most ample provision for bailing in the county of arrest, even where an indictment was found in another county.

Rex v. Bomaster, 1 Wm. Bl. 233; *Rex v. Jones*, 1 Barn. & Ald. 209; *Rex v. Braithwaite*, 2 Lewin, C. C. 55; *Rex v. Booker*, 2 Dowl. P. C. 446.

Where gross oppression must result, removal on mere complaint before a committing magistrate was not designed by the framers of the Constitution.

This is a singular contrast to the methods of Federal removal for crime against the United States.

Price v. McCarty, 32 C. C. A. 162, 59 U. S. App. 578, 89 Fed. 84; *Beavers v. Henkel*, 194 U. S. 73, 83, 48 L. ed. 882, 886, 24 Sup. Ct. Rep. 605.

Rendition on mere complaints for indictable offenses is unnecessary, and answers no useful purpose, but, on the contrary, creates gross hardship and oppression.

People ex rel. Lawrence v. Brady, 56 N. Y. 186; *People ex rel. Corkran v. Hyatt*, 172 N. Y. 176, 60 L. R. A. 774, 92 Am. St. Rep. 706, 64 N. E. 825.

All our states provide methods of arrest and detention of fugitives from justice before the governor's warrant of extradition issues.

Re Mohr, 73 Ala. 503, 49 Am. Rep. 63; *Robinson v. Flanders*, 29 Ind. 10; *Com. v. Tracy*, 5 Met. 536; *Ex parte Ammons*, 34 Ohio St. 518; *Ex parte Cubreth*, 49 Cal. 436; *Ex parte Rosenblat*, 51 Cal. 285; *Kurtz v. State*, 22 Fla. 36, 1 Am. St. Rep. 173; *Ex parte White*, 49 Cal. 433; *Holmes v. Jennison*, 14 Pet. 540, 547, 10 L. ed. 579, 583; *Re Strauss*, 63 C. C. A. 99, 126 Fed. 327; *Moore v. Illinois*, 14 How. 13, 14 L. ed. 306; *Prigg v. Pennsylvania*, 16 Pet. 539, 10 L. ed. 1060; 12 Am. & Eng. Enc. Law, 2d ed. p. 607.

The words "charged with treason, felony, or other crime" were used by the framers

of the Constitution in the same sense as that in which analogous words are elsewhere used in the same instrument concerning criminal proceedings, and are inapplicable to preliminary examinations.

Ex parte Milligan, 4 Wall. 2, 18 L. ed. 281; *Ex parte Wilson*, 114 U. S. 417, 29 L. ed. 89, 5 Sup. Ct. Rep. 935; *Ex parte Bain*, 121 U. S. 1, 30 L. ed. 849, 7 Sup. Ct. Rep. 781; *Re Dana*, 7 Ben. 1, Fed. Cas. No. 3,554.

It is well settled that there need be no jury trial in preliminary proceedings; that they are not the basis of the plea of *res judicata*, but that successive proceedings on the same claim are authorized, and that they are required to be held in the district of arrest, and not in the place where the crime is claimed to have been committed, and that they do not constitute a "trial."

16 Enc. Pl. & Pr. p. 821; *Price v. McCarty*, 32 C. C. A. 162, 59 U. S. App. 578, 89 Fed. 84; *Re Dana*, 68 Fed. 886; *United States v. Lumsden*, 1 Bond, 15, Fed. Cas. No. 15,641; *French v. People*, 3 Park. Crim. Rep. 114; 1 Bishop's New Crim. Proc. § 239a; *Re Garst*, 10 Neb. 78, 4 N. W. 511; *Latimer v. State*, 55 Neb. 609, 70 Am. St. Rep. 403, 76 N. W. 207; *Hamilton v. People*, 29 Mich. 173; *Cox v. Coleridge*, 1 Barn. & C. 37; *Ex parte Porter*, 16 Tex. App. 321; *State, Duffy, Prosecutor, v. Britton*, 47 N. J. L. 251; *State v. Powell*, 44 Mo. App. 21.

Preliminary proceedings not being essential to a prosecution for crime, it is submitted that they do not constitute such charge of crime "in the regular course of judicial proceedings," as this court, speaking by Chief Justice Taney, in *Kentucky v. Denison*, said must underlie the demand under this very article of the Constitution.

Benson v. McMahon, 127 U. S. 457, 32 L. ed. 234, 8 Sup. Ct. Rep. 1240; *Thiede v. Utah*, 159 U. S. 510, 513, 40 L. ed. 237, 239, 16 Sup. Ct. Rep. 62; *United States v. King*, 147 U. S. 676, 685, 37 L. ed. 328, 331, 13 Sup. Ct. Rep. 439.

Criminal proceedings do not begin when preliminary proceedings are instituted.

Virginia v. Paul, 148 U. S. 107, 37 L. ed. 386, 13 Sup. Ct. Rep. 536.

The only exception recognized by the authorities deals with the question whether their institution bars the running of the statute of limitations. As to that question, it must be conceded that the authorities are conflicting, though the weight of authority is to the effect that they do not, especially not under the Federal statute.

Com. v. Haas, 57 Pa. 443; *Re Griffith*, 35 Kan. 377, 11 Pac. 174; *Pilot Grove v. McCormick*, 56 Mo. App. 530; *Boughn v. State*, 44 Neb. 889, 62 N. W. 1094; *Vondersmith's Case*, Wharton, Crim. Law, 6th ed. § 436, note; *Re Lacey*, 6 Okla. 4, 37 Pac. 1095.

The word "charge," in article 4, § 2, subd. 2, where it is connected with the phrase "to be removed to the state having jurisdiction of the crime," is used in the same sense in which the framers of the Constitution, in article 3, defined "cases" within the judicial power of the United States, and should be construed in the same manner by excluding mere preliminary examinations before mere committing magistrates acting as conservators of the peace.

Robertson v. Baldwin, 165 U. S. 275, 278-280, 41 L. ed. 715, 716, 717, 17 Sup. Ct. Rep. 326; *Todd v. United States*, 158 U. S. 278, 39 L. ed. 982, 15 Sup. Ct. Rep. 889.

The words "indictment" and "affidavit," charging crime, in U. S. Rev. Stat. § 5278 (U. S. Comp. Stat. 1901, p. 3597), are used distributively, just as they are used in the similar provisions of the judiciary act of 1790, as to statutes of limitations for crimes.

Mackin v. United States, 117 U. S. 348, 29 L. ed. 909, 6 Sup. Ct. Rep. 777.

Removal should not be authorized where the pending proceeding does not provide for jury trial in cases where that is a right, even though trial *de novo* after conviction, before a jury in another court, be provided for; and the circumstance that Federal removal, as distinguished from interstate rendition, was there involved, is immaterial.

Re Dana, 7 Ben. 1, Fed. Cas. No. 3,554; *Callan v. Wilson*, 127 U. S. 540, 32 L. ed. 223, 8 Sup. Ct. Rep. 1301.

Charges must be made "in the regular course of judicial proceedings."

State v. Hufford, 28 Iowa, 391; *Ex parte Powell*, 20 Fla. 807; *State ex rel. Stundahl v. Richardson*, 34 Minn. 115, 24 N. W. 354; *Ex parte Pearce*, 32 Tex. Crim. App. 301, 23 S. W. 15.

Mr. Howard S. Gans submitted the cause for respondent. Mr. William Travers Jerome was on the brief:

A reading of a statute or constitution which leads to absurd or noxious results will be rejected, unless the plain language of the instrument leaves no room for escape from that construction.

Prigg v. Pennsylvania, 16 Pet. 539, 612, 10 L. ed. 1060, 1088; *Re Chapman*, 166 U. S. 661, 667, 41 L. ed. 1154, 1158, 17 Sup. Ct. Rep. 677; *Lau Ow Bew v. United States*, 144 U. S. 47, 59, 36 L. ed. 340, 344, 12 Sup. Ct. Rep. 517; *Church of Holy Trinity v. United States*, 143 U. S. 457, 461, 36 L. ed. 227, 228, 12 Sup. Ct. Rep. 511; *Jarrold v. Moberly*, 103 U. S. 580, 586, 26 L. ed. 492, 494.

The Constitution imposed no limitation upon the states as to the method in which criminal actions should be commenced or criminal charges should be made.

197 U. S. U. S., Book 49.

Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292.

The universal recognition that it is easier to challenge the sufficiency of proof by affidavit than to find any defect in an indictment has led to the common use of indictments by prosecuting officers as the final basis of interstate rendition, even in cases where the fugitive has first been held upon the basis of magistrate's papers, though, of course, renditions upon the basis of affidavits have not been uncommon.

Re Clark, 9 Wend. 212; *Kingsbury's Case*, 106 Mass. 223; *Re Burke*, 19 Alb. L. J. 509, Fed. Cas. No. 2,158; *Kurtz v. State*, 22 Fla. 36, 1 Am. St. Rep. 173; *Re Manchester*, 5 Cal. 237; *Re White*, 5 C. C. A. 29, 14 U. S. App. 87, 55 Fed. 54; *Re Keller*, 36 Fed. 681; *State ex rel. Stundahl v. Richardson*, 34 Minn. 115, 24 N. W. 354; *Re Hooper*, 52 Wis. 699.

The word "charged," in its ordinary acceptance, while doubtless sufficiently technical to exclude the idle gossip of the neighborhood, or any informal accusation, is also sufficiently inclusive to embrace any formal accusation made before a judicial officer in the regular course of a criminal proceeding.

Kentucky v. Dennison, 24 How. 104, 16 L. ed. 728.

Manifestly, it was thus that the Congress construed it in 1793, when Washington, the President of the Constitutional Convention, was President of the United States, and when many of the delegates to that Convention were members of the Congress that enacted the law; and concededly this construction is entitled to, and will be accorded, the greatest weight.

Prigg v. Pennsylvania, 16 Pet. 621, 10 L. ed. 1091; *Kentucky v. Dennison*, 24 How. 104, 16 L. ed. 728.

And this construction has been followed and sanctioned in practice from the early years to the present time without question as to its validity.

2 Moore, Extradition, § 546, p. 871; Spear, Extradition, p. 266.

And manifestly this is the sense in which the word "charged" is commonly used in the law.

Bouvier, Law Dict.

The constitutional provision has never heretofore been construed in any such spirit of narrowness or technicality as is involved in the contentions of the relator, for otherwise it could never have been held that a person became a "fugitive" merely by departing from a state in which he had committed a crime, though his departure were unaccompanied by evidences of haste or evasion (*Ex parte Reggel*, 114 U. S. 642, 29 L. ed. 250, 5 Sup. Ct. Rep. 1148), or that the delivery up to the state "having jurisdiction of the

crime" warranted a delivery up to that state for prosecution for any other crime, without even an attempt to prosecute for the crime upon which the extradition proceeding was founded.

Lascelles v. Georgia, 148 U. S. 537, 37 L. ed. 549, 13 Sup. Ct. Rep. 687.

Interstate rendition is no new thing. There was inter-colonial rendition by treaty between the New England colonies as early as 1643. A similar practice obtained among the other colonies, even in the absence of express provision of law, the basis of the rendition being the certificate of a judicial officer.

Kentucky v. Dennison, 24 How. 100, 101, 16 L. ed. 726, 727; 13 Am. Law Rev. 188; 2 Moore, Extradition, § 518.

The practice was continued under the "Articles of Confederation, which limited the obligation to surrender to cases of treason, felony, and high misdemeanors," and required the demand of the executive of the pursuing state; and concurrently with the rendition under that provision it was not unusual to surrender fugitives under the old methods without requiring the intervention of the executive.

2 Moore, Extradition, § 519; 13 Am. Law Rev. 189, 190.

Mr. Justice **Brewer** delivered the opinion of the court:

The Constitution provides for the surrender of a person charged with treason, felony, or other crime. The statute prescribes the evidence of the charge to be produced, to wit: "A copy of an indictment found or an affidavit made before a magistrate . . . charging . . . treason, felony, or other crime." The offense for which extradition was sought is, under the Ohio statute, a felony (*Bates' Anno. Stat. Ohio 4th ed. § [330] 7076*), and subject to trial only upon an "indictment" (Ohio Const. art. 1, § 10, Bill of Rights), the proceedings in such a case before a justice of the peace being only preliminary and for the purpose of securing arrest and detention. It is contended that the constitutional provision for the extradition of persons "charged with treason, felony, or other crime" requires that the charge must be pending in a court that can try the defendant, and does not include one before a committing magistrate, who can only discharge or hold for trial before another tribunal.

But why should the word "charged" be given a restricted interpretation? It is found in the Constitution, and ordinarily words in such an instrument do not receive a narrow, contracted meaning, but are presumed to have been used in a broad sense, with a view of covering all contingencies.

In *M'Culloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579, one question discussed was as to the meaning of the word "necessary," as found in the clause of the Constitution giving to Congress power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof." Chief Justice Marshall, speaking for the court, said (p. 415, L. ed. p. 603):

"This word, then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view.

"Let this be done in the case under consideration. The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confining the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a Constitution intended to endure for ages to come, and, consequently, *to be adapted to the various crises of hu-[331] man affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change entirely the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances."

Under the Constitution each state was left with full control over its criminal procedure. No one could have anticipated what changes any state might make therein, and doubtless the word "charged" was used in its broad signification, to cover any proceeding which a state might see fit to adopt by which a formal accusation was made against an alleged criminal. In the strictest sense of the term a party is charged with crime when an affidavit is filed, alleging the commission of the offense, and a warrant is issued for his arrest; and this is true whether a final trial may or may not be had upon such charge. It may be, and is, true,

that in many of the states some further proceeding is, in the higher grade of offenses at least, necessary before the party can be put upon trial, and that the proceedings before an examining magistrate are preliminary, and only with a view to the arrest and detention of the alleged criminal; but extradition is a mere proceeding in securing arrest and detention. An extradited defendant is not put on trial upon any writ which is issued for the purposes of extradition, any more than he is upon the warrant which is issued by the justice of the peace directing his arrest.

Cases are referred to, such as *Virginia v. Paul*, 148 U. S. 107, 37 L. ed. 386, 13 Sup. Ct. Rep. 536, in which a distinction is made between the preliminary proceedings look-
[332]ing to the arrest and detention of the *defendant, and those final proceedings upon which the trial is had. That was a removal case, and, discussing the question, Mr. Justice Gray, speaking for the court, said (p. 119, L. ed. p. 390, Sup. Ct. Rep. p. 540): "By the terms of § 643 (U. S. Comp. Stat. 1901, p. 521), it is only after 'any civil suit or criminal prosecution is commenced in any court of a state,' and 'before the trial or final hearing thereof,' that it can 'be removed for trial into the circuit court next to be holden in the district where the same is pending,' and 'shall proceed as a cause originally commenced in that court.'"

"Proceedings before a magistrate to commit a person to jail, or to hold him to bail, in order to secure his appearance to answer for a crime or offense, which the magistrate has no jurisdiction himself to try, before the court in which he may be prosecuted and tried, are but preliminary to the prosecution, and are no more a commencement of the prosecution than is an arrest by an officer without a warrant for a felony committed in his presence."

But such decisions, instead of making against the use in this constitutional section of the word "charged" in its broad sense, make in its favor, because, as we have noticed, an extradition is simply one step in securing the arrest and detention of the defendant. And these preliminary proceedings are not completed until the party is brought before the court in which the trial may be had. Why should the state be put to the expense of a grand jury and an indictment before securing possession of the party to be tried? It may be true, as counsel urge, that persons are sometimes wrongfully extradited, particularly in cases like the present; that a creditor may wantonly swear to an affidavit charging a debtor with obtaining goods under false pretenses. But it is also true that a prosecuting officer may

either wantonly or ignorantly file an information charging a like offense. But who would doubt that an information, where that is the statutory pleading for purposes of trial, is sufficient to justify an extradition? Such *possibilities as these cannot be
[333] guarded against. While courts will always endeavor to see that no such attempted wrong is successful, on the other hand care must be taken that the process of extradition be not so burdened as to make it practically valueless. It is but one step in securing the presence of the defendant in the court in which he may be tried, and in no manner determines the question of guilt.

While perhaps more pertinent as illustration than argument, the practice which obtains in extradition cases between this and other nations is worthy of notice. Sections 5270 to 5277, Rev. Stat. (U. S. Comp. Stat. 1901, pp. 3591 to 3597), inclusive, provide for this matter. In none of these sections or in subsequent amendments or additions thereto is there any stipulation for an indictment as a prerequisite to extradition. On the contrary, the proceedings assimilate very closely those commenced in any state for the arrest and detention of an alleged criminal. They go upon the theory that extradition is but a mere step in securing the presence of the defendant in the court in which he may lawfully be tried. In the memorandum issued by the Department of State in May, 1890, in reference to the extradition of fugitives from the United States in British jurisdiction, is this statement (1 Moore, Extradition, p. 335):

"It is stipulated in the treaties with Great Britain that extradition shall only be granted on such evidence of criminality as, according to the laws of the place where the fugitive or person charged shall be found, would justify his apprehension and commitment for trial if the crime or offense had there been committed.

"It is admissible, as constituting such evidence, to produce a properly certified copy of an indictment found against the fugitive by a grand jury, or of any information made before an examining magistrate, accompanied by one or more depositions setting forth as fully as possible the circumstances of the crime."

And this is in general harmony with the thought underlying extradition.

*Entertaining these views, we answer the
[334] first question in the affirmative and the second in the negative.

Mr. Justice Harlan did not hear the argument and took no part in the decision of this case.

JOSHUA BISHOP, *Appt.*,

v.

UNITED STATES.

(See S. C. Reporter's ed. 334-343.)

Court-martial—prior punishment for offense charged—notice of charges—objection to number of judges—waiver—confirmation of sentence—by officer convening court—by President.

1. The suspension of a naval officer charged with drunkenness and neglect of duty, from morning until evening of the same day, when he was restored to duty to give "time to investigate the case," is not such a punishment for the offense as precludes, under the Navy Regulations of 1865, ¶ 1205, further proceedings against him by court-martial, but must be deemed simply a temporary precaution for the preservation of good order and discipline.
2. The copy of charges against a naval officer, which, together with the specifications, must be served, under the Navy regulation act of April 23, 1800, art. 38 (2 Stat. at L. 50, 51, chap. 33), on a person sought to be court-martialed, "at the time he is put under arrest," need not be served when he is placed under arrest as a temporary precaution for the preservation of good order and for further investigation, but the service is in time, where he has been released from such arrest and returned to duty, conformably to the Navy Regulations of 1865, ¶ 1202, when made on the day of his rearrest.
3. The expressed satisfaction of the accused with the court-martial as constituted precludes collateral attack on its judgment on the ground that as many officers as could be convened without injury to the service were not summoned, as the act of July 17, 1862, art. 11 (12 Stat. at L. 603, chap. 204), requires.
4. Confirmation of the sentence of a court-martial by the officer convening it was not required by the act of July 17, 1862, arts. 19, 20 (12 Stat. at L. 605, chap. 204), where the sentence extended to dismissal from the service, since under the first of such articles such a sentence must be approved by the President.
5. The confirmation by the President of the sentence of a court-martial sufficiently appears from the statement to that effect in a letter from the Secretary of the Navy notifying the accused that he was dismissed from the service, and the President's signed approval of the brief of the findings of the court-martial submitted to him by the Navy Department for his action.

[No. 92.]

*Argued and submitted March 2, 3, 1905.
Decided April 3, 1905.*

APPEAL from the Court of Claims to review the dismissal of a petition for pay

NOTE.—On naval court-martials—see note to Wilkes v. Dinsman, 12 L. ed. U. S. 618.

as an officer in the Navy between the date of his dismissal from the service pursuant to the sentence of a court-martial and his reinstatement by Congress. *Affirmed.*

See same case below, 38 Ct. Cl. 473.

Statement by Mr. Justice **Brown**:

This is a petition for pay as a lieutenant commander from February 8, 1868, when defendant was dismissed from the naval service pursuant to the sentence of a general court-martial, until March 9, 1871, when he was reinstated by special act of Congress. The court of claims made a finding of facts, the material parts of which are incorporated in the opinion, and dismissed the petition. 38 Ct. Cl. 473.

Mr. Irvin W. Schultz argued the cause and filed a brief for appellant:

Statutory regulations governing the proceedings of a court-martial must be complied with.

Brown v. Keene, 8 Pet. 112, 8 L. ed. 885.

The judgment of a court-martial may be collaterally attacked.

Ex parte Watkins, 3 Pet. 207, 7 L. ed. 654.

There is no averment why more than the seven officers, as members, to the number of thirteen, could not have been convened without injury to the service. The omission of such an averment; or the omission of an averment to the effect that only the officers as members who were convened were all that could be summoned without injury to the service; or the omission of an averment that no other officers than those named could be summoned without injury to the service,—is jurisdictional and fatal to the jurisdiction of that court.

Mills v. Martin, 19 Johns. 29; *Runkle v. United States*, 122 U. S. 543, 30 L. ed. 1167, 7 Sup. Ct. Rep. 1141; *Brown v. Keene*, 8 Pet. 115, 8 L. ed. 886.

Where power is given by permissive language to do certain things, the language used will be regarded as peremptory when the public interests or individual rights require that it should be done.

Rock Island County v. United States, 4 Wall. 446, 18 L. ed. 422.

When the statutory conditions as to the constitution of the jurisdiction of the court are not observed, there is no tribunal authorized by law to render the judgment.

Keyes v. United States, 109 U. S. 336, 27 L. ed. 954, 3 Sup. Ct. Rep. 202; Wells, Jurisdiction of Courts, ed. 1880, §§ 15-17, pp. 11, 12.

The action of inferior courts must be confined strictly within the prescribed limits; and this must appear on the face of the proceedings, which must also show the facts

and ground of jurisdiction. A general averment of jurisdiction amounts to nothing; the facts upon which it depends must specifically appear. Nor is it sufficient that jurisdiction may be inferred argumentatively from the averments, but the jurisdiction must be positively averred, and the facts upon which it depends must be expressly set forth: every fact essential to the jurisdiction should appear on the record.

Wells, *Jurisdiction of Courts*, ed. 1880, §§ 40-42, pp. 19, 30.

Whether the record recites the jurisdictional facts or not, the judgments of courts of limited and inferior jurisdiction are open to impeachment by extrinsic evidence showing want of jurisdiction.

People ex rel. Frey v. County Jail, 100 N. Y. 26, 2 N. E. 870.

Whether an accused can waive an objection to the jurisdiction of the court is questionable.

Brooks v. Davis, 17 Pick. 148; *Brooks v. Daniels*, 22 Pick. 498.

Consent cannot give jurisdiction in a criminal case where the indictment is for a subject-matter out of the jurisdiction, not even if the prisoner enter of record a waiver of "all objections" to an irregularity in finding of indictment and to jurisdiction, or where the law imperatively requires twelve jurors, and by consent the case is tried by six only, etc.

Wells, *Jurisdiction of Courts*, § 66, pp. 47, 48.

The proceedings of the court-martial are not definite, but merely in the nature of an inquest, to inform the conscience of the commanding officer.

Mills v. Martin, 19 Johns. 30.

That the President must confirm such sentence; that his approval must be authenticated in a way to show otherwise than argumentatively that his approval is the result of his own judgment, and not a mere departmental order, which may or may not have attracted his attention, and the fact that the order was his own, and not left to inference only; that the action required of the President is judicial, and not administrative,—is clearly laid down in the case of *Runkle v. United States*, 122 U. S. 543, 30 L. ed. 1167, 7 Sup. Ct. Rep. 1141.

Assistant Attorney General Pradt and *Mr. Felix Brannigan* submitted the cause for appellee:

The officer who convened the court-martial was the sole and exclusive judge of the question as to whether the court could be composed of a lesser number of officers than thirteen "without injury to the service." Nothing in the act of Congress requires the appointing officer to state that conclusion in his prescript or elsewhere.

197 U. S.

Martin v. Mott, 12 Wheat. 19, 31, 6 L. ed. 537, 541; *Mullan v. United States*, 140 U. S. 240, 245, 35 L. ed. 489, 491, 11 Sup. Ct. Rep. 788.

The sentence of dismissal was approved by the President of the United States. As to the manner of the approval, the statute gives no directions. The approval may be oral or in writing, or in any other manner that the President in his discretion pleases.

United States v. Page, 137 U. S. 673, 679, 34 L. ed. 828, 830, 11 Sup. Ct. Rep. 219; *United States v. Fletcher*, 148 U. S. 84, 37 L. ed. 378, 13 Sup. Ct. Rep. 552.

Assistant Attorney General Pradt also filed a separate brief for appellee:

The presumption must be that the Secretary and the President performed the duties devolved upon them in the premises.

United States v. Fletcher, 148 U. S. 84, 37 L. ed. 378, 13 Sup. Ct. Rep. 552.

Mr. Justice **Brown** delivered the opinion of the court:

This case depends upon the validity of the findings and sentence of the court-martial, and is brought under an act of Congress approved June 6, 1900 (31 Stat. at L. 1612, chap. 839), nearly thirty years after petitioner was recommissioned as a lieutenant commander, which enacted "that the claim of Joshua Bishop for alleged items of pay, due and unpaid to him for services as a lieutenant commander . . . be, and the same is hereby, referred to the court of claims. Jurisdiction is hereby conferred on said court to try said cause,—the statute of limitations shall not apply thereto,—and to render final judgment therein, subject to the right of appeal by either party." Claimant insisted in the court below that this statute was not a mere waiver of limitations, but a recognition that claimant was a lieutenant commander during the time referred to in the act; but as this point is not made in the briefs filed in this court, it may be considered as abandoned.

The action of the court-martial in dismissing the petitioner from the service is attacked upon the following grounds:

1. That the court had no jurisdiction over him, because he had already been punished for the offenses charged against him, *viz.*, drunkenness and neglect of duty.

It appears from the findings that Bishop was a lieutenant commander in the naval service, attached to the steamer Wyoming, then lying in the harbor of Nagasaki, Japan; that he was ordered by his commanding officer to have his ship ready for sea by daylight on the morning of the 31st *of May, 1867, but that he went ashore and [337] did not return until after daylight. On

May 31 the following entries appear on the log:

From 4 to 8 A. M.

Lieutenant Commander Joshua Bishop was suspended from duty by order of Lt. Commander C. C. Carpenter.

George B. Glidden, Master.

From 6 to 8 P. M.

At 6.40 Lt. Comdr. Joshua Bishop was restored to duty by order of Rear Admiral H. H. Bell.

George B. Glidden, Master.

Upon being placed on trial before the court-martial Bishop pleaded that he was placed under arrest for the offenses specified (drunkenness and neglect of duty), but was ordered released from arrest by Rear Admiral Bell; and in this connection refers the court to § 1205, Navy Regulations of 1865, then in force, as follows:

"An offense committed at any one time, for which a person in the Navy shall have been placed under arrest, suspension, or confinement, and subsequently entirely discharged therefrom by competent authority, or for which he shall have been otherwise fully punished, is to be regarded as expiated, and no further martial proceedings against him for the offense itself are ever afterwards to take place." etc.

Conceding that the petitioner was within the letter of the regulations, inasmuch as he was suspended from duty in the morning of May 31 and restored to duty on the evening of the same day, we do not think the case is within its real meaning, which looks to a *punishment* of the offense by such suspension. As it appears that Bishop was intoxicated during the preceding day, and went ashore and failed to report at daylight on the next morning, it would naturally be inferred that his suspension from duty was not intended as a punishment, but as a reasonable precaution for the maintenance of good order and discipline aboard.

[338] *That this was the understanding of the rear admiral is evidenced from the following letter restoring him to duty:

U. S. Flagship Hartford,

Nagasaki, Japan, May 31, 1867.

Lieut. Comm'd'r C. C. Carpenter,

Comm'd'g U. S. S. Wyoming, Nagasaki.

Sir:—

Your communication of this date, reporting Lieutenant Commander Bishop to me, is received.

You will restore Lieutenant Commander

Bishop to duty to *await an opportunity for time to investigate the case.*

I am, sir, very respectfully,

H. H. Bell,

Rear Admiral, Commanding

U. S. Asiatic Squadron.

It is quite evident that the words "arrest, suspension, or confinement," in § 1205, contemplate an action in the nature of a punishment, upon the infliction of which the offense is to be regarded as expiated; but as the order restoring Bishop to duty was on its face merely to give "time to investigate the case," we do not think the order of suspension could have been intended as a punishment in itself, or as an expiation of the previous offense, nor did the order of Admiral Bell "entirely discharge" the accused within the meaning of § 1205 of the Navy Regulations.

2. No further proceedings appear to have been taken until June 21, 1867, when charges and specifications were preferred by Rear Admiral Bell, and on September 5, 1867, the following entry appears upon the log:

From 4 to 8 A. M.

Lt. Comdr. Joshua Bishop *placed under arrest* to await trial by court-martial, and *served with copy of charges*, by order of Rear Admiral H. H. Bell, comdg. U. S. Asiatic Squadron.

E. F. Crawford, Mate.

The petitioner cites in this connection article 38 of the laws regulating the Navy, approved April 23, 1800 (2 Stat. at L. 50, 51, chap. 33), providing that "all charges on which an application *for a general[399] court-martial is founded shall be exhibited in writing to the proper officer, and the person demanding the court shall take care that the person accused be furnished with a true copy of the charges, with the specifications, *at the time he is put under arrest*," and insists in this connection that he should have been served with a copy of the charges and specifications on May 31, 1867, when he was suspended. The objection is unfounded.

As already indicated, the first arrest was a temporary precaution for the preservation of good order and for further investigation. There was no opportunity for the preparation of charges and specifications, and evidently this was not the arrest contemplated by the above act.

It is true that § 1202 of the Navy Regulations of 1865 provides that offenders shall be brought to trial within thirty days after notice to the proper authority, empowered to convene such court, or shall be released

from arrest and returned to duty, and so remain until a court-martial can be convened to try him, "when he shall be again arrested on the day before the court is convened, so as to undergo his trial before it." As petitioner had been "released from arrest and returned to duty" on May 31, and so remained until September 5, when he was "again arrested" on the day before the court-martial was ordered to convene; and as he was served with a copy of the charges and specifications on the day he was arrested,—we see nothing in these proceedings of which he is entitled to complain. The point is completely covered by *Johnson v. Sayre*, 158 U. S. 109, 117, 39 L. ed. 914, 917, 15 Sup. Ct. Rep. 773.

3. Petitioner's contention that the court-martial was illegally constituted rests upon article 11 of the act of July 17, 1862 (12 Stat. at L. 603, chap. 204), providing that "no general court-martial shall consist of more than thirteen nor less than five commissioned officers as members; and as many officers shall be summoned on every such court as can be convened without injury to the service, so as not to exceed thirteen; and the senior officer shall always preside, the [340] others taking place *according to their rank; and in no case, where it can be avoided without injury to the service, shall more than one half the members, exclusive of the president, be junior to the officer to be tried."

The argument is that, as the court-martial consisted of only seven officers, it had not power or authority to try and sentence petitioner without showing affirmatively that no more could be convened without injury to the service. As the court-martial consisted of more than five commissioned officers, viz., seven, all of whom were of equal or superior rank to the petitioner, it was a question for the officer convening the court to determine whether more could be convened without injury to the service; and we do not think his action or nonaction in this particular can be collaterally attacked. The regulations have been recently amended in that particular. As the accused when arraigned said he had no objection to any member of the court, and knew of no reason why the court should not proceed with his trial, it is manifestly too late to raise the objection, in view of our decision in *Mullan v. United States*, 140 U. S. 240, 35 L. ed. 489, 11 Sup. Ct. Rep. 788, in which we held that when the commander-in-chief of a squadron not in the waters of the United States convenes a court-martial, more than one half of whose members are juniors in rank to the accused, the courts of the United States will assume, when his action is attacked collaterally, that he properly exercised his discretion, and the trial

of the accused by such a court could not be avoided without inconvenience to the service. The rank and number of the members of a court-martial must necessarily be, and is, left somewhat to the discretion of the officer convening the court. There is nothing in this case to indicate an abuse of discretion, or that a larger number of officers might have been convened without injury to the service, although if the accused had taken prompt advantage of the defect it might have been necessary to show that a larger number could not have been obtained. His expressed satisfaction with the court as constituted was a clear waiver of any objection to its personnel.

*4. The objection that the court-martial [341] proceedings are void because its sentence was not approved or confirmed by Rear Admiral Bell, who convened the court, is answered by articles 19 and 20 of the act of July 17, 1862, for the better government of the Navy. 12 Stat. at L. 605, chap. 204. The first of these articles provides that "all sentences of courts-martial which shall extend to the loss of life shall require the concurrence of two thirds of the members present," as well as confirmation by the President. "All other sentences may be determined by a majority of votes, and carried into execution, on confirmation of the commander of the fleet, or officer ordering the court, except such as go to the dismissal of a commissioned or warrant officer, which are first to be approved by the President of the United States." As the sentence in this case extended to a dismissal from the service, no confirmation was necessary by Admiral Bell, whose duty was discharged by forwarding the papers to the President.

Petitioner relies upon article 20 of the same act, which declares that "every officer who is by this act authorized to convene courts-martial shall have power, on revisal of its proceedings, to remit or mitigate, but not to commute, the sentence of any such court, which . . . he is authorized to approve and confirm." Obviously, this article extends only to such sentences as the convening officer is authorized to approve and confirm, and has no application where the punishment of dismissal is imposed.

5. The last point made is that the court-martial proceedings are void because the sentence was never confirmed by the President of the United States. The record shows that the proceedings of the court-martial were forwarded and submitted to the Secretary of the Navy for the action of the President, under article 19, above quoted; that the papers were submitted to some officer connected with the Navy Department, who made a statement, termed a "brief," of the

findings of the court, and added the following: "The evidence in the case is positive and clear, and the findings of the court [342]sustained *thereby. Lieut. Comdr. Bishop produces no witnesses in his behalf, and the statement made by him to the court is lame throughout. There is no recommendation by the court for clemency."

December 3, 1867, the Secretary of the Navy certified that the case was submitted to the President for his action in accordance with article 19 of the above act, to which are added the words: "Approved: Andrew Johnson."

On February 8, 1868, the Secretary of the Navy addressed to the petitioner a letter notifying him of the sentence of court-martial, and added as follows: "The sentence of the court in your case *having been approved by the President*, you are hereby dismissed from the Navy service," etc. It is difficult to see how the personal approval of the President could appear more clearly than in this case. In *United States v. Fletcher*, 148 U. S. 84, 37 L. ed. 378, 13 Sup. Ct. Rep. 552, there appeared only the certificate of the Secretary of War that the proceedings of the court-martial were forwarded to the Secretary of War for the action of the President, and that "the proceedings, findings, and sentence are approved;" but it was held that the order was valid, though it did not appear that the President personally examined the proceedings and approved the execution of the sentence. Criticism was made in that opinion of *Runkle v. United States*, 122 U. S. 543, 30 L. ed. 1167, 7 Sup. Ct. Rep. 1141, upon the ground that the circumstances of that case were so exceptional as to render it an unsafe precedent in any other. It was held in that case that there was no sufficient evidence that the action of the court-martial was approved, and it followed that the officer was never legally dismissed the service. No such criticism can be made here, as it not only appears from the letter of February 8 that the sentence of the court had been approved by the President, but his approval distinctly appears at the foot of the brief.

We find nothing in this case of which the petitioner has any just reason to complain. The proceedings of the court-martial were conducted with a substantial, if not a literal, conformity *to the law, and we must [343] presume, at least, that there was sufficient evidence to support the sentence. While drunkenness is not ordinarily considered as criminal, the intoxication of a naval officer while on duty is a gross breach of discipline, and liable to be attended by very serious consequences. Congress evidently acted with forbearance and generosity in reinstating

petitioner in the service after a lapse of three years, and thereby condoned the offense. But it has never, directly or indirectly intimated that petitioner was entitled to pay during the suspension.

The judgment of the Court of Claims is affirmed.

SAMUEL McMILLEN *et al.*, Plffs. in Err.,
v.
FERRUM MINING COMPANY.

(See S. C. Reporter's ed. 343-348.)

Error to state court—Federal question—when raised in time.

1. A Federal question first raised by a petition for a rehearing in the highest state court is too late to support the appellate jurisdiction of the Supreme Court of the United

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Kipley v. Illinois*, 42 L. ed. U. S. 998; and *Re Buchanan*, 39 L. ed. U. S. 884.

On when the Federal question is raised in time to sustain the appellate jurisdiction of the Federal Supreme Court over state courts—see notes to *Mutual L. Ins. Co. v. McGrew*, 63 L. R. A. 33; and *Chicago, I. & L. R. Co. v. McGuire*, ante, 413.

Review in the Supreme Court of the United States of decisions of state courts in cases involving mining claims.

McMILLEN v. FERRUM MIN. CO. is not the first case in which the mere fact that the suit was brought under U. S. Rev. Stat. § 2326 (U. S. Comp. Stat. 1901, p. 1430), to try adverse rights to a mining claim, has been held not necessarily to involve a Federal question so as to authorize a writ of error from the Supreme Court of the United States to a state court. The same ruling was made in *Beals v. Cone*, 188 U. S. 184, 47 L. ed. 435, 23 Sup. Ct. Rep. 275.

Likewise, the mere fact that defendant in a suit to quiet title to a mining claim claims title under a location made under the general mining laws of the United States is not in itself sufficient to raise a Federal question which will sustain a writ of error from the Supreme Court of the United States to a state court, where the gravamen of defendant's argument is not the denial of any right under the mining laws, but the invalidity of the proceedings in a state court under which plaintiffs claim to have acquired title by virtue of a prior location. *De Lamar's Nevada Gold Min. Co. v. Nesbitt*, 177 U. S. 523, 44 L. ed. 872, 20 Sup. Ct. Rep. 715.

The question of fact as to the true course of a mining lode or vein, arising in an action of ejectment brought under U. S. Rev. Stat. § 2326 (U. S. Comp. Stat. 1901, p. 1430), to recover possession of a certain portion of a surface location of a mining claim, is not a Federal one. *Bushnell v. Crooke Min. & Smelting Co.* 148 U. S. 682, 37 L. ed. 610, 13 Sup. Ct. Rep. 771.

Whether there has been such laches as bars
197 U. S.

States, where the state court, in denying the petition, made no reference to the Federal question.

2. The mere fact that the suit was brought under U. S. Rev. Stat. § 2326 (U. S. Comp. Stat. 1901, p. 1430), to try adverse rights to a mining claim, does not necessarily involve a Federal question so as to authorize a writ of error from the Supreme Court of the United States to a state court.

[No. 185.]

Argued March 15, 16, 1905. Decided April 3, 1905.

IN ERROR to the Supreme Court of the State of Colorado to review a judgment which affirmed a judgment of the District Court of Lake County in that State in favor of defendant in a suit to try adverse rights to a mining claim. *Dismissed* for want of jurisdiction.

See same case below (Colo.) 74 Pac. 463.

Statement by Mr. Justice **Brown**:

By this writ of error it is sought to review a judgment of the supreme court of Colorado, affirming a judgment of the dis-

the assertion of a right to a mining claim is not a Federal question. *Moran v. Horsky*, 178 U. S. 205, 44 L. ed. 1038, 20 Sup. Ct. Rep. 856.

Whether ejectment for a mining claim is defeated by a state statute of limitations and an estoppel *in pais* is not a Federal question. *Carothers v. Mayer*, 164 U. S. 325, 41 L. ed. 453, 17 Sup. Ct. Rep. 106.

The question of the estoppel of a party to deny the validity of a mining location is not a Federal one. *Speed v. McCarthy*, 181 U. S. 269, 45 L. ed. 855, 21 Sup. Ct. Rep. 613.

Whether statements made on a hearing before the Land Department of a protest against a mineral entry work an estoppel *in pais* which amounts to a defense to a claim of title under a subsequent entry involves no Federal question, but is determined by rules of general law. *Beals v. Cone*, 188 U. S. 184, 47 L. ed. 435, 23 Sup. Ct. Rep. 275.

See also note to *Apex Transp. Co. v. Garbade*, 62 L. R. A. 513, on *What adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts.*

A statement in an amended answer, that plaintiff intended to set up certain rights under certain mining claims, and that these claims were abandoned and forfeited before certain other claims through which defendants asserted title were located, is not sufficient to constitute a definite claim of right or title under a statute of the United States, which will present a Federal question on writ of error from the Supreme Court of the United States to a state court. *Speed v. McCarthy*, 181 U. S. 269, 45 L. ed. 855, 21 Sup. Ct. Rep. 613.

Whether, upon general principles of law and a state statute, a grantor of a portion of a mining claim is, by his deed, estopped to claim priority of title to the space of vein intersection by reason of a location of the portion of the

tract court of Lake county in favor of the Ferrum Mining Company in a proceeding brought by the plaintiffs in error under Rev. Stat. § 2326 (U. S. Comp. Stat. 1901, p. 1430), to determine the right of possession to certain mining grounds, plaintiffs claiming title as owners of the Eulalia Lode Mining claim, and the defendant claiming title to the same ground as the Golden Rod Lode Mining claim.

*The case was tried before the court and a jury, resulting in a verdict and judgment in favor of the defendant, which was affirmed by the supreme court upon the ground that plaintiffs had not complied with either the Federal or the state statutes, in showing a valid discovery of mineral in their location.

Mr. George R. Elder argued the cause and filed a brief for plaintiffs in error.

Mr. George Cavender argued the cause, and, with *Mr. John A. Ewing*, filed a brief for defendant in error.

Mr. Justice **Brown** delivered the opinion of the court:

In their amended complaint the plaintiffs averred that in the location and record of

claim which he retained, which he had made subsequent to the deed, but before location by the grantee of the land conveyed to him, is not a Federal question. *Gillis v. Stinchfield*, 159 U. S. 658, 40 L. ed. 295, 16 Sup. Ct. Rep. 131.

A ruling of a state court sustaining a demurrer to a replication in which plaintiff alleged that the decision by the Land Department of a question of fact on the hearing of a protest filed by him and others against defendants' original mineral entry was *res judicata* in an adverse suit in which defendants rely on a subsequent entry involves no decision of a Federal question, but is a mere determination that one who was not a party could not claim the advantages of a party. *Beals v. Cone*, 188 U. S. 184, 47 L. ed. 435, 23 Sup. Ct. Rep. 275.

A Federal question is involved in a decision of a state court in favor of plaintiff in a controversy over the ownership of ore in which defendant claimed that, under the act of May 10, 1872 (17 Stat. at L. 91, chap. 152, §§ 2, 3, U. S. Comp. Stat. 1901, pp. 1424, 1425), title thereto passed to it through its patent, instead of to plaintiff, because the end lines of the latter's patent were not parallel; plaintiff contending that its title was acquired under the act of July 26, 1866 (14 Stat. at L. 251, chap. 262), which did not require parallelism of end lines. *Kennedy Min. & Mill. Co. v. Argonaut Min. Co.* 189 U. S. 1, 47 L. ed. 685, 23 Sup. Ct. Rep. 501.

A decision by a state court sustaining the defense of laches against the assertion of a right to a mining claim after it had been abandoned for fourteen years, during which an apparent title had been obtained under a patent to a probate judge for the property as part of a town site, is based on a ground independent of any Federal question. *Moran v. Horsky*, 178 U. S. 205, 44 L. ed. 1038, 20 Sup. Ct. Rep. 856.

A decision of a state court in a suit to recover the value of gold alleged to have been taken by

the Eulalia Lode Mining claim their grant- or had complied with the laws of the United States, the laws of Colorado, and the rules and regulations of miners in the district, with reference to the discovery, location, and appropriation of said Eulalia Mining claim. They did not question the validity of the state statutes, which prescribe certain acts as necessary to a valid location, but set up a compliance with them, and contended that the defendant did not establish a valid location.

Plaintiffs did not claim by virtue of a discovery of their own, but by virtue of their knowledge of the existence of a vein within the surveyed limits of that claim, though several hundred feet distant from the discovery shaft of the Eulalia, which he, McMillen, together with his co-owner, had previously discovered in the process of its development; and insisted that this knowledge was equivalent to an actual discovery by him of a vein within the Eulalia location.

The proposition of plaintiffs, as stated by their counsel, was this:

"That Mr. McMillen, as an owner and a locator of the Eulalia lode, knew at the time he placed his stake upon the Eulalia claim on the 30th of May, 1893, that he in company with the co-owners of the Pocket Liner claim had discovered ore in the shaft of the Pocket Liner claim; that at the moment

that he placed his stake upon that ground, claiming the Eulalia claim as abandoned and unoccupied territory, that theretofore there had been a discovery of mineral within the requirements of the statutes of the United States and of the state of Colorado, and that that knowledge within the mind of *Mr. McMillen constituted a complete, final, [346] and perfect location of that mining claim, provided he did the other things requisite under the statutes of the state of Colorado, by sinking a discovery shaft 10 feet in depth, etc., etc., etc."

The substance of the plaintiffs' argument was that the mere knowledge of the Eulalia locator of the existence of a vein in the Pocket Liner, the previous lode, made his location valid, provided he performed the other things requisite under the statutes of the state of Colorado, besides the actual discovery of mineral. The court did not deny the proposition that, if the locator knew that there had been a discovery of a vein or lode within his location, he might base his location upon it, although he made no discovery himself; but the statutes of Colorado provide (Mills's Anno. Stat. § 3152) certain requirements in addition to those specified in the Revised Statutes, among which were that the discoverer, before filing his location certificate, shall sink a discovery shaft to the depth of at least 10 feet from the lowest part of the rim of such shaft at the surface,

defendants from plaintiff's mining claim, which is based upon an estoppel deemed by that court to operate upon general principles and a local statute, rests upon an independent non-Federal ground broad enough to maintain the judgment. *Gillis v. Stinchfield*, 159 U. S. 658, 40 L. ed. 295, 16 Sup. Ct. Rep. 131.

A decision by a state court in a controversy as to the right of a cotenant to relocate a mining claim when the annual assessment work has not been done, and obtain title as against his cotenants, that a cotenant who relocates a mining claim held in common is to be deemed a trustee for all the cotenants, disposes of the case upon general principles of law. *Speed v. McCarthy*, 181 U. S. 269, 45 L. ed. 855, 21 Sup. Ct. Rep. 613.

See also note to *Mutual L. Ins. Co. v. McGrew*, 63 L. R. A. 33, on *How and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States*.

The conclusions of the highest court of a state upon the questions of fact whether a placer claim was duly located, whether the annual work had been performed, whether there was a valid subsisting placer location, and whether the lodes were discovered by their locators within the boundaries of the placer claim subsequently to its location, cannot be reviewed by the Supreme Court of the United States on writ of error to that court. *Clapper Min. Co. v. Ell Min. & Land Co.* 194 U. S. 220, 48 L. ed. 944, 24 Sup. Ct. Rep. 632.

Findings of fact with reference to the discovery of petroleum, the making of the attempted

location in good faith, and the doing of the requisite work, are conclusive on the Supreme Court of the United States in reviewing the judgment of a state court in an action to quiet title to mineral lands. *Chrisman v. Miller*, 197 U. S. 313, ante, p. 770, 25 Sup. Ct. Rep. 468.

See also note to *Missouri ex rel. Hill v. Dockery*, 63 L. R. A. 571, on *What questions the Federal Supreme Court will consider in reviewing the judgments of state courts*.

The amount of the bond on a writ of error from the Federal Supreme Court to a state court in order to supersede a judgment determining the right of possession of a mining claim should be sufficient to cover damages for delay in working all the ores in the disputed ground, including not only those in sight, but such as, in the judgment of the judge allowing the writ, from the evidence before him, with reasonable probability exist. *Rose v. Richmond Min. Co.* 17 Nev. 70, 27 Pac. 1115.

See also note to *Wedding v. Meyler*, 66 L. R. A. 833, on *Practice and procedure governing the transfer of causes to the Federal Supreme Court on writ of error or appeal*.

Other notes not hereinbefore mentioned relating to the appellate jurisdiction of the Supreme Court of the United States over state courts are: *What the record must show respecting the presentation and decision of a Federal question in order to confer jurisdiction on the Supreme Court of the United States of a writ of error to a state court* (*Hooker v. Los Angeles*, 63 L. R. A. 471), and *What is the record for this purpose* (*Home for Incurables v. New York*, 63 L. R. A. 329).

or deeper, if necessary, to show a well-defined crevice, and shall also post at the point of discovery a notice containing the name of the lode, the name of the locator, and the date of the discovery, and shall also mark the surface boundary of the claim. The court further held that where "the locator himself selects the discovery shaft, as the one in which the discovery of mineral has been made, and there posts his location stake, and bases his location upon such discovery, he may not, after intervening rights have attached, abandon and disregard the same, neglect to comply with such provisions, and select another discovery upon which his location was not predicated." [74 Pac. 463.]

In this connection the court held that, if the plaintiffs relied upon a former discovery they were bound to show that it was claimed by their locator, or adopted by him as the only one upon which the Eulalia lode was made; and that the court was correct in refusing to hear the proof offered, since it did not meet the requirements of the decisions, [347] to the effect that "a former discovery may be made the basis of a valid location. The court, however, found expressly that the plaintiffs not only did not question the validity of the state statutes, which prescribe certain acts as necessary to a valid location, but averred in their complaint that those statutes had been complied with.

After the disposition of the case by the supreme court, plaintiffs in error filed a petition for a rehearing, in which, for the first time, they raised the question that, as there had been upon their part a full compliance with the requirements of Rev. Stat. § 2320 (U. S. Comp. Stat. 1901, p. 1424), before any valid adverse rights had intervened, there was a perfect and complete appropriation of this ground, and that court should have so adjudicated. In its opinion the court reiterated what it had previously said, that, admitting that the plaintiffs might have availed themselves of the previous discovery within the Eulalia location, and adopted the same as their own without making a valid discovery for themselves, they had not brought themselves within this principle, since in their offer of proof they merely relied upon a former knowledge of such location. In its opinion the court made no mention of the Federal question, which does not seem to have been pressed upon their attention. Though unnecessary to our decision, a recent case upon this subject is instructive. *Butte City Water Co. v. Baker*, 196 U. S. 119, ante, 409, 25 Sup. Ct. Rep. 211.

It is sufficient for the purposes of this case to say that no Federal question appears to have been raised until the petition was
197 U. S.

filed for a rehearing. This was obviously too late, unless, at least, the court grants the rehearing and then proceeds to consider the question. *Mallett v. North Carolina*, 181 U. S. 589, 45 L. ed. 1015, 21 Sup. Ct. Rep. 730; *Loeber v. Schroeder*, 149 U. S. 580, 37 L. ed. 856, 13 Sup. Ct. Rep. 934; *Miller v. Texas*, 153 U. S. 535, 38 L. ed. 812, 14 Sup. Ct. Rep. 874.

In both courts the question was treated as one of local law, and the mere fact that suit was brought under Rev. Stat. § 2326 (U. S. Comp. Stat. 1901, p. 1430), to try adverse rights to a mining claim, does not necessarily involve a Federal question, so as to authorize a writ of error from this court. *Bushnell v. Crooke Min. & Smelting Co.* *148 U. S. 682, 37 L. ed. 610, 13 Sup. Ct. [348] Rep. 771; *Telluride Power Transmission Co. v. Rio Grande Western R. Co.* 175 U. S. 639, 44 L. ed. 305, 20 Sup. Ct. Rep. 245; *Blackburn v. Portland Gold Min. Co.* 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222; *Shoshone Min. Co. v. Rutter*, 177 U. S. 505, 44 L. ed. 864, 20 Sup. Ct. Rep. 726.

The writ of error is accordingly dismissed.

ALFRED W. CARTER, Guardian, Plff. in Err.,
v.

GEORGE D. GEAR, Circuit Judge, etc.

(See S. C. Reporter's ed. 348-355.)

Courts—power of Hawaiian judges at chambers—effect of organic act.

The power of the Hawaiian judges at chambers in proceedings not incident or ancillary to some cause pending before a court, conferred by the Hawaiian laws in force at the passage of the organic act of April 30, 1900 31 Stat. at L. 141, chap. 339), was preserved by the provision of § 81 of that act, continuing in force the previous laws of Hawaii concerning "the civil courts and their jurisdiction and procedure."

[No. 442.]

Submitted March 3, 1905. Decided April 3, 1905.

IN ERROR to the Supreme Court of the Territory of Hawaii to review a judgment denying a writ of prohibition to prevent a judge of the Circuit Court of that Territory from entertaining a petition at chambers for the removal of a guardian, which was not incident or ancillary to some cause pending before a court. Affirmed.

Statement by Mr. Justice Brown:

This was a writ of error to review a

judgment of the supreme court of the Territory of Hawaii denying a writ of prohibition.

[349] The facts of the case are substantially as follows: On July 27, 1904, one Low, as next friend of Annie T. K. Parker, a minor, filed a petition before the defendant, George D. Gear, judge of the first judicial circuit, in probate, at chambers, asking for the removal of Alfred W. Carter, plaintiff in error, as guardian of the estate of said minor. He had been originally *appointed such guardian September 29, 1899. The petition was entitled "In the Circuit Court of the First Judicial Circuit, Territory of Hawaii. In Probate. At Chambers," and was in fact filed before the circuit judge sitting at chambers. A demurrer was interposed to the petition upon the ground that the circuit judge had no jurisdiction of the proceedings, for the reason that the statute conferring judicial powers upon the judges at chambers was in conflict with the organic act of the territory.

The demurrer was overruled, and the jurisdiction of the court sustained, apparently with some doubt, by the circuit judge.

This petition for a writ of prohibition was then filed by Carter in the supreme court of the territory against the defendant, Gear, as circuit judge, and Low, the next friend of Annie T. K. Parker, praying that the said circuit judge be prohibited from taking further cognizance of the petition for the removal of Carter, or proceeding therein until the further order of the supreme court. After a full hearing the supreme court affirmed the judgment of the circuit court, and dismissed the petition.

Messrs. **Joseph J. Darlington** and **William F. Mattingly** submitted the cause for plaintiff in error:

The organic act of the territory takes the place of a constitution as the fundamental law of the local government.

First Nat. Bank v. Yankton County, 101 U. S. 129, 133, 25 L. ed. 1046, 1047.

No Hawaiian law relating to the judiciary, whether previously existing or subsequently enacted, can stand if in conflict with the provisions of that act.

23 Ops. Atty. Gen. 539.

A clause like the one in question is an entire distribution of the judicial power, and the legislature cannot vest any portion of it elsewhere.

Cooley, Const. Lim. 7th ed. 129, note 3.

Under constitutional provisions similar to our organic act the word "court" does not include a judge at chambers, and it is not competent for the legislature to vest in judges at chambers any judicial power not

incident or ancillary to some cause pending in a court.

Spencer Creek Water Co. v. Vallejo, 48 Cal. 70; *Risser v. Hoyt*, 53 Mich. 185, 18 N. W. 611; *Toledo, A. A. & G. T. R. Co. v. Dunlap*, 47 Mich. 456, 11 N. W. 271; *Rowe v. Rowe*, 28 Mich. 353; *Pittsburg, Ft. W. & C. R. Co. v. Hurd*, 17 Ohio St. 144; *State ex rel. Ballew v. Woodson*, 161 Mo. 444, 61 S. W. 252.

There are many other statutes in which the word "court" is held not to be synonymous with "judge."

8 Am. & Eng. Enc. Law, 2d ed. p. 23; *McKnight v. James*, 155 U. S. 685, 39 L. ed. 310, 15 Sup. Ct. Rep. 248.

Mr. **John S. Low**, guardian, *in propria persona* submitted the cause for defendant in error:

The supreme court of Hawaii has repeatedly held that a judge sitting at chambers in probate is a court of record.

Re Brash, 15 Hawaiian Rep. 372; *Hoare v. Allen*, 13 Hawaiian Rep. 257; *Aldrich v. First Judge*, 9 Hawaiian Rep. 470.

Independently of the construction which has been placed upon the words "in chambers," in Hawaii, the words "circuit courts," in § 81 of the organic act, mean the courts referred to in the expression "in chambers."

Wilcox v. Wilcox, 14 N. Y. 577; *Pressley v. Lamb*, 105 Ind. 171, 4 N. E. 682; *Granite Mountain Min. Co. v. Weinstein*, 7 Mont. 349, 17 Pac. 108; *O'Bear v. Little*, 79 Ga. 384, 4 S. E. 914; *Pease v. Wagnon*, 93 Ga. 361, 20 S. E. 637; *Stewart v. Daggy*, 13 Neb. 290, 13 N. W. 399.

Chambers is only a place where the court sits without a jury.

Com. v. McLaughlin, 122 Mass. 449.

Mr. Justice **Brown** delivered the opinion of the court:

The writ of prohibition was demanded upon the ground that there was no cause pending in the circuit court of the first circuit, to which the motion and petition of Low, as next friend, was incidental or ancillary, and that Judge Gear, sitting at chambers, was hearing questions of a judicial nature entirely independent of any cause pending in that court.

The single question presented by the record is whether the statutes of the territory of Hawaii, purporting to confer upon the judges of the several courts, at chambers, within their respective jurisdictions, judicial power not incident or ancillary to some cause pending before a court, were in conflict with § 81 of the act of Congress approved April 30, 1900 * (31 Stat. at L. 141, [353] chap. 339), commonly known as the organic act of the territory. This section, page 157, enacts that "the judicial power of the

territory shall be vested in one supreme court, circuit courts, and in such inferior courts as the legislature may from time to time establish. And, until the legislature shall otherwise provide, the laws of Hawaii heretofore in force concerning the several courts and their jurisdiction and procedure shall continue in force, except as herein otherwise provided."

At the time the act of Congress was passed there was in force in the territory of Hawaii an act known as chapter 57 of the Laws of 1892, the 37th section of which gave to the judges of the several circuit courts, at chambers, very ample powers in admiralty, equity, bankruptcy, and probate causes, among which were proceedings "to remove any executor, administrator, or guardian." This act was conceded to be sufficient to justify the action of Judge Gear in removing the guardian in this case. It was substantially re-enacted with amendments in 1903.

The argument is made that § 81 of the organic act is identical with the constitutional provisions of many states, under which similar statutes purporting to confer judicial powers upon circuit judges at chambers, not incident to, or ancillary to, any cause pending in any court, have usually been declared unconstitutional; citing *Spencer Creek Water Co. v. Vallejo*, 48 Cal. 70; *Risser v. Hoyt*, 53 Mich. 185, 18 N. W. 611; *Toledo, A. A. & G. T. R. Co. v. Dunlap*, 47 Mich. 456, 11 N. W. 271; *Rowe v. Rowe*, 28 Mich. 353; *Pittsburg, Ft. W. & C. R. Co. v. Hurd*, 17 Ohio St. 144, 146; *State ex rel. Ballew v. Woodson*, 161 Mo. 444, 61 S. W. 252. We are also referred to *McKnight v. James*, 155 U. S. 685, 39 L. ed. 310, 15 Sup. Ct. Rep. 248, in which we held that a writ of error could not go to an order of a judge of a circuit court, made at chambers.

But, conceding the correctness of these decisions under the constitutions of the several states, and also conceding that the organic act stands in the place of a constitution for the territory of Hawaii, to which its laws must conform, does it follow that the laws respecting proceedings at chambers [354] *are in excess of the powers conferred under the organic act?

Bearing in mind that § 81 of the organic act is but one of a hundred sections, all of which are entitled to equal respect, it is evident that to obtain a comprehensive view of the intention of Congress we are bound to consider the whole act so far as it relates to the disposition of judicial power. To segregate § 81 from all the other provisions of the act must necessarily result in giving it undue prominence.

By § 6 "the laws of Hawaii not inconsistent with the Constitution or laws of the

United States, or the provisions of this act, shall continue in force, subject to repeal or amendment by the legislature of Hawaii, or the Congress of the United States." By § 7 the Constitution of the Republic of Hawaii and a large number of its laws, specially enumerated, are repealed; but the statutes giving probate and equity jurisdiction to the circuit courts are not mentioned.

By § 10 all actions at law, suits in equity, and other proceedings then pending in the courts of the Republic of Hawaii shall be carried on to final judgment and execution in the corresponding courts of the territory of Hawaii. As petitioner, Carter, was appointed guardian of the minor's estate in 1899 by the then judge of the first circuit, and was still proceeding to wind up the estate, we think the petition for his removal was filed in a pending proceeding within the meaning of this section.

Now, as it appears that the powers of judges at chambers had been fixed since 1892, eight years before the organic act was passed, that by § 6 and the final clause of § 81 the laws of Hawaii theretofore in force concerning the several courts and their jurisdiction and procedure were continued in force, except as therein otherwise provided, it would seem that these provisions were especially intended to apply to cases like the present, where a system of procedure which had previously existed was recognized as valid and still existing. In *Hawaii v. Mankichi*, 190 U. S. 197, 47 L. ed. 1016, 23 Sup. Ct. Rep. 787, a similar provision in the resolution *of annexation was held not [355] to abrogate a system of trials by information and convictions by a non-unanimous jury, as applied to cases prior to the organic act of April 30, 1900.

But we do not think it necessary to go further than § 81 itself to find authority for a recognition of the laws previously existing in Hawaii concerning the constitution of its courts and their method of procedure. Whether a petition to a circuit court acting as a court of probate shall be addressed to and passed upon by the judge while sitting in court at chambers is, after all, much more a matter of form than of substance. *Com. v. McLaughlin*, 122 Mass. 449. The petition for the removal of the guardian in this case is entitled: "In the Circuit Court of the First Judicial Circuit, Territory of Hawaii. In Probate. At Chambers." It appears to have been heard by the circuit judge without a jury, his decision being entitled "Before a Judge of the Circuit Court, of the First Circuit, Territory of Hawaii." It must doubtless be treated as a proceeding at chambers, but, for rea-

sons already given, we think the power to act at chambers was saved by § 81 continuing in force the previous laws of Hawaii concerning the courts and their procedure. It would be too narrow a construction to hold that this did not include the procedure before judges of those courts sitting at chambers.

The decree dismissing the writ is affirmed.

[356] *GUILFORD B. KEPPEL, Trustee, etc.

v.

TIFFIN SAVINGS BANK.

(See S. C. Reporter's ed. 356-388.)

Bankruptcy—retention of preference until judgment of avoidance does not prevent proof of claim.

A creditor of a bankrupt, who has in good faith received a preference voidable under the bankrupt act of July 1, 1898, § 67e (30 Stat. at L. 565, chap. 541, U. S. Comp. Stat. 1901, p. 3449), solely because given within four months prior to the filing of the petition in bankruptcy, and who has in good faith retained the preference until deprived thereof by the judgment of a court in a suit by the trustee, still may prove the debt so voidably preferred, notwithstanding the provision of § 57g that "the claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences."

[No. 116.]

Argued and submitted January 6, 1905. Decided April 3, 1905.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Sixth Circuit presenting the question whether the creditor of a bankrupt, who has in good faith received a merely voidable preference, may prove his claim, where he has retained the preference until deprived thereof by the judgment of a court in a suit by the trustee. *Answered in the affirmative.*

Statement by Mr. Justice **White**:

Charles A. Goetz became a voluntary bankrupt on October 12, 1900. Guilford B. Keppel, the trustee, sued the Tiffin Savings Bank in an Ohio court to cancel two real-estate mortgages executed by Goetz, one to secure a note for \$4,000 and the other a note for \$2,000. The mortgage to secure the \$4,000 note was made more than four months before the adjudication in bankruptcy. The mortgage securing the \$2,000 note was executed a few days before the bankruptcy, the mortgagor being at the

time insolvent and intending to prefer the bank. The bank defended the suit, averring its good faith and asserting the validity of both the securities. In a cross petition the enforcement of both mortgages was prayed. The court held **the mortgage* [357] securing the \$4,000 note to be valid, and the mortgage securing the \$2,000 note to be void. The trustee appealed to a circuit court, where a trial *de novo* was had. At such trial the attorney for the bank stated to the court that the bank waived any claim to a preference as to the \$2,000 note, but that he could not assent to a judgment to that effect. A judgment was entered sustaining the security for the \$4,000 note and avoiding that for the \$2,000 note.

The bank subsequently sought to prove that it was a creditor of the estate upon the note for \$2,000, and upon two other unsecured notes, aggregating \$835. The referee refused to allow the proof, upon the ground that, as the bank had compelled the trustee to sue to cancel the security, and a judgment nullifying it had been obtained, the bank had lost the right to prove any claim against the estate. The district judge, upon review, reversed this ruling. The circuit court of appeals to which the issue was taken, after stating the case as above recited, certified questions for our determination.

Mr. John C. Royer argued the cause, and, with Messrs. Henry Weller, and Bunn & Royer, filed a brief for Keppel.

Messrs. George E. Seney and John L. Lott submitted the cause for the Tiffin Savings Bank. Mr. Milton Sayler was on the brief.

Mr. Justice **White**, after making the foregoing statement, delivered the opinion of the court:

The following are the questions asked by the court of appeals:

'First. Can a creditor of a bankrupt, who has received a merely voidable preference, and who has in good faith retained such preference until deprived thereof by the judgment of a court upon a suit of the trustee, thereafter prove the debt so voidably preferred?

"Second. Upon the issue as to the allowance of the bank's claims, was it competent, in explanation of the judgment of the Ohio circuit court in favor of the trustee and against the bank in respect to its \$2,000 mortgage, to show the disclaimer made in open court by the attorney representing the bank, of any claim of preference, and the grounds upon which the bank declined to consent to a judgment in favor of the trustee?

"Third. If the failure to 'voluntarily' surrender the mortgage given to secure the \$2,000 note operates to prevent the allowance of that note, does the penalty extend to and require the disallowance of both the other claims?"

[360] Before we develop the legal principles essential to the solution *of the first question, it is to be observed that the facts stated in the certificate and implied by the question show that the bank acted in good faith when it accepted the mortgage and when it subsequently insisted that the trustee should prove the existence of the facts which, it was charged, vitiated the security. It results that the voidable nature of the transaction alone arose from § 67e of the act of 1898, invalidating "conveyances, transfers, or encumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the state, territory, or district in which such property is situate" [30 Stat. at L. 565, chap. 541, U. S. Comp. Stat. 1901, p. 3449], and giving the assignee a right to reclaim and recover the property for the creditors of the bankrupt estate.

On the one hand, it is insisted that a creditor who has not surrendered a preference until compelled to do so by the decree of a court cannot be allowed to prove any claim against the estate. On the other hand, it is urged that no such penalty is imposed by the bankrupt act, and hence the creditor, on an extinguishment of a preference, by whatever means, may prove his claims. These contentions must be determined by the text, originally considered, of § 57g of the bankrupt act, providing that "the claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences." We say by the text in question, because there is nowhere any prohibition against the proof of a claim by a creditor who has had a preference, where the preference has disappeared as the result of a decree adjudging the preferences to be void, unless that result arises from the provision in question. We say also from the text as originally considered, because, although there are some decisions, under the act of 1898, of lower Federal courts, which are referred to in the

[361] margin,† denying the right of a creditor *to prove his claim, after the surrender of a preference by the compulsion of a decree or judgment, such decisions rest not upon an analysis of the text of the act of 1898 alone considered, but upon what were deemed to have been analogous provisions of the act

of 1867 and decisions thereunder. We omit, therefore, further reference to these decisions, as we shall hereafter come to consider the text of the present act by the light thrown upon it by the act of 1867 and the judicial interpretation which was given to that act.

The text is, that preferred creditors shall not prove their claims unless they surrender their preferences. Let us first consider the meaning of this provision, guided by the cardinal rule which requires that it should, if possible, be given a meaning in accord with the general purpose which the statute was intended to accomplish.

We think it clear that the fundamental purpose of the provision in question was to secure an equality of distribution of the assets of a bankrupt estate. This must be the case, since, if a creditor having a preference retained the preference, and at the same time proved his debt and participated in the distribution of the estate, an advantage would be secured not contemplated by the law. Equality of distribution being the purpose intended to be effected by the provision, to interpret it as forbidding a creditor from proving his claim after a surrender of his preference, because such surrender was not voluntary, would frustrate the object of the provision, since it would give the bankrupt estate the benefit of the surrender or cancellation of the preference, and yet deprive the creditor of any right to participate, thus creating an inequality. But it is said, although this be true, as the statute is plain, its terms cannot be disregarded by allowing that to be done which it expressly forbids. This rests upon the assumption that the word "surrender" necessarily implies only voluntary action, and hence excludes the right to prove where the surrender is the result of a recovery compelled by judgment or decree.

*The word "surrender," however, does not [362] exclude compelled action, but, to the contrary, generally implies such action. That this is the primary and commonly accepted meaning of the word is shown by the dictionaries. Thus, the Standard Dictionary defines its meaning as follows: "1. To yield possession of to another upon compulsion or demand, or under pressure of a superior force; give up, especially to an enemy in warfare; as, to *surrender* an army or a fort." And in Webster's International Dictionary the word is primarily defined in the same way. The word, of course, also sometimes denotes voluntary action. In the statute, however, it is unqualified, and generic, and hence embraces both meanings. The construction which would exclude the primary meaning, so as to cause the word only to embrace voluntary action, would

†*Re Greth*, 112 Fed. 978; *Re Keller*, 109 Fed. 126, 127; *Re Owings*, 109 Fed. 624.

read into the statute a qualification, and this in order to cause the provision to be in conflict with the purpose which it was intended to accomplish,—equality among creditors. But the construction would do more. It would exclude the natural meaning of the word used in the statute, in order to create a penalty, although nowhere expressly or even by clear implication found in the statute. This would disregard the elementary rule that a penalty is not to be readily implied, and, on the contrary, that a person or corporation is not to be subjected to a penalty unless the words of the statute plainly impose it. *Tiffany v. National Bank*, 18 Wall. 409, 410, 21 L. ed. 862, 863. If it had been contemplated that the word “surrender” should entail upon every creditor the loss of power to prove his claims if he submitted his right to retain an asserted preference to the courts for decision, such purpose could have found ready expression by qualifying the word “surrender” so as to plainly convey such meaning. Indeed, the construction which would read in the qualification would not only create a penalty alone by judicial action, but would necessitate judicial legislation in order to define what character and degree of compulsion was essential to prevent the surrender in fact from being a surrender within the meaning of the section.

[363] *It is argued, however, that courts of bankruptcy are guided by equitable considerations, and should not permit a creditor who has retained a fraudulent preference until compelled by a court to surrender it, to prove his debt, and thus suffer no other loss than the costs of litigation. The fallacy lies in assuming that courts have power to inflict penalties, although the law has not imposed them. Moreover, if the statute be interpreted as it is insisted it should be, there would be no distinction between honest and fraudulent creditors, and therefore every creditor who in good faith had acquired an advantage which the law did not permit him to retain would be subjected to the forfeiture simply because he had presumed to submit his legal rights to a court for determination. And this accentuates the error in the construction, since the elementary principle is that courts are created to pass upon the rights of parties, and that it is the privilege of the citizen to submit his claims to the judicial tribunals,—especially in the absence of malice and when acting with probable cause,—without subjecting himself to penalties of an extraordinary character. The violation of this rule, which would arise from the construction, is well illustrated by this case. Here, as we have seen, it is found that the bank acted in good faith, without knowledge of the in-

solvency of its debtor and of wrongful intent on his part, and yet it is asserted that the right to prove its lawful claims against the bankrupt estate was forfeited simply because of the election to put the trustee to proof, in a court, of the existence of the facts made essential by the law to an invalidation of the preference.

We are of opinion that, originally considered, the surrender clause of the statute was intended simply to prevent a creditor from creating inequality in the distribution of the assets of the estate by retaining a preference, and at the same time collecting dividends from the estate by the proof of his claim against it, and consequently that whenever the preference has been abandoned or yielded up, and thereby the danger of inequality has been prevented, such creditor is entitled to stand *on an equal footing[364] with other creditors and prove his claims.

Is the contention well founded that this meaning which we deduce from the text of the surrender clause of the present act is so in conflict with the rule generally applied in bankruptcy acts, and is, especially, so contrary to the act of 1867 and the construction given to it, that such meaning cannot be considered to have been contemplated by Congress in adopting the present act, and hence a contrary interpretation should be applied?

Without attempting to review the English bankruptcy acts, or the provisions contained therein concerning what constituted provable debts, and the decisions relating thereto, it is clear that under those acts, where a debt was otherwise provable and the creditor had acquired a lien to which he was not entitled, the English courts in bankruptcy did not imply a forfeiture by refusing to allow proof of the debt because there had not been a voluntary surrender of the preference. On the contrary, where claims were filed against the estate by one who was asserted to have retained a preference, a well-settled practice grew up, enforced from equitable considerations. The practice in question was followed in the case of *Ex parte Dobson*, 4 Deacon & C. 69, decided in 1834, and was thus stated in the opinion of Sir G. Rose (p. 78):

“I apprehend the practice to be settled, where a creditor applies to prove a debt, and claims a right to property to which the commissioners think he has no lien, that the commissioners admit the proof, and leave the question to be controlled merely by retention of the dividend. This was settled by the case of *Ex parte Ackroyd* [1 Rose, 391], where the commissioners had rejected the proof of a creditor, because he had received a portion of his debt, which the assignees contended he was bound to refund;

but when the question came before Sir John Leach, as vice chancellor, he decided that the proof of the debt was not to be rejected, [365] because there was a question *to be tried between the bankrupt's assignees and the creditor, although it was proper that no dividend should be paid on that proof, until the question was determined."

And Erskine, Ch. J., p. 74, after assuming that the transaction complained of might have been fraudulent and amounted to an act of bankruptcy, said—italics mine—(p. 75.):

"The next part of the prayer is that the claim should be disallowed. *But though the assignment of the property may be invalid, that will not invalidate the debt of the respondents.* We could not, therefore, disallow the claim, or expunge the proof, if the claim had been converted to a proof; all that we can do is to restrain the respondents from receiving any dividends until they give up the property."

Thus the English rule substantially conformed to the construction we have given to the bankruptcy act before us.

Neither our bankrupt act of 1800 (2 Stat. at L. 19, chap. 19) nor that of 1841 (5 Stat. at L. 440, chap. 9) contained a surrender clause, or any provision generally denying the right of a creditor of a bankrupt to prove his debt in the event that he had received a preference. But, under those acts, bankruptcy courts must necessarily have exercised the power of protecting the estate by preventing a creditor having an otherwise provable debt, who retained that which belonged to the estate, from at the same time taking dividends from it.

The purpose of Congress when a forfeiture or penalty was intended, not to leave it to arise from mere construction, but to expressly impose such penalty or forfeiture, is well illustrated by the bankrupt act of 1800, wherein numerous penalties and forfeitures were explicitly declared. Two instances are illustrative. By § 16 it was provided: "That if any person or persons shall fraudulently or collusively claim any debts, or claim or detain any real or personal estate of the bankrupt, every such person shall forfeit double the value thereof, to and for the use of the creditors." And by § 28 it was provided that a creditor suing out a commission, who subsequently accepted a preference, "shall forfeit and [366] lose, as well *his or her whole debts, as the whole he or she shall have taken and received, and shall pay back, or deliver up the same, or the full value thereof, to the assignee or assignees who shall be appointed or chosen under such commission, in manner aforesaid, in trust for and to be divided among the other creditors of the said

bankrupt, in proportion to their respective debts."

The bankrupt act of 1867 (14 Stat. at L. 528, chap. 176) contained the following surrender clause:

"Sec. 23. . . . Any person who after the approval of this act shall have accepted any preference, having reasonable cause to believe that the same was made or given by the debtor, contrary to any provision of this act, shall not prove the debt or claim on account of which the preference was made or given, nor shall he receive any dividend therefrom until he shall first have surrendered to the assignee all property, money, benefit, or advantage received by him under such preference."

And § 35 of the act conferred power upon the assignee to sue to set aside and recover illegal preferences, transfers, etc., but there was not contained in the section any provision prohibiting the proof of claims after recovery by the assignee. In § 39 of the act, however, which was found under the head of involuntary bankruptcy, there was contained an enumeration of the various acts which would constitute acts of bankruptcy, and following a grant of authority to the assignees to sue for and recover property transferred, etc., by the bankrupt contrary to the act, the section concluded with the declaration that when the recipient had reasonable cause to believe that a fraud on the act was intended, and that the debtor was insolvent, "such creditor shall not be allowed to prove his debt in bankruptcy."

Passing the present consideration of the judicial construction given to the act of 1867, and treating, as we believe should be done, the restriction as to the proof of debts expressed in § 39 as applicable to voluntary as well as involuntary bankruptcy, we think, as a matter of original interpretation, the surrender clause of the act of 1867 not only fortifies, but absolutely *sus- [367] tains, the construction which we have given to the surrender clause of the act of 1898. Whilst the surrender clause of the act of 1867 changed the method of procedure prevailing under the English rule, and presumptively also obtaining under the acts of 1800 and 1841, by which a creditor holding a preference might prove his claim, but was allowed to obtain no advantage from so doing until he had surrendered his preference, it cannot, we think, in reason be considered that this mere alteration in the practice to be followed was intended in and of itself to impose a penalty upon a creditor who did not voluntarily surrender his preference. And this we think is demonstrated when it is seen that, after making the change as to the procedure in the proof of debts by preferred creditors, there was subsequently em-

bodied in § 39 an express prohibition, in the nature of a penalty, forbidding the proof of debt by a creditor who came within the purview of the section. Either that provision solely related to proof of debts embraced in the previous surrender clause or it did not. If it did, then the expression of the penalty in § 39 indicates that it was not deemed that the surrender clause contained provision for the penalty, otherwise § 39 would in that regard be wholly superfluous. If, on the other hand, it be considered that § 39 embraced other debts or claims against the estate than those to which the surrender clause related, then the expression of the penalty in § 39, under the rule of *expressio unius*, could not by implication be read into the previous surrender clause. That is to say, if § 23 and § 39 of the act of 1867 be considered as not *in pari materia*, then it follows that the former,—the surrender clause,—standing alone, did not impose the penalty or forfeiture provided for in the latter. If they were *in pari materia*, then the penalty, whilst applicable and controlling as to both, because of its expression in the later section, cannot be said to have existed alone in and by virtue of an earlier section, wherein no penalty was expressed.

[368] The decisions of the lower Federal courts interpreting the *sections in question, as they stood prior to the amendment of § 39 by the act of 1874, hereafter to be referred to, were numerous, and we shall not attempt to review them in detail. They will be found collected in a note contained in the eleventh edition of Bump on Bankruptcy, pp. 550 *et seq.* Disregarding the discord of opinion shown by those decisions concerning what constituted an involuntary surrender,—that is, whether it was involuntary if made at any time after suit brought by the assignee, or was only so after recovery by the force of a judgment or decree,—and putting out of view also the differences of opinion which were engendered by the fact that the forfeiture imposed by § 39 was found in that portion of the act of 1867 which related to involuntary bankruptcy, we think the decisions under the act of 1867, prior to the amendment of 1874, may be classified under four headings.

First. The cases which held that the prohibition of § 39 against the proof of debt operated as a bar to such proof, even although there was a voluntary surrender, where the preference had the characteristics pointed out in § 39. These cases were, however, contrary to the great weight of authority under the act, and the construction which they enforced may be put out of view.

Second. Those cases which, whilst treating the surrender clause as giving a credit-

or an alternative which he might exercise without risk of penalty or forfeiture, yet held that by the operation of § 39 upon the surrender clause the creditor lost the option to prove his claim, when the surrender was compelled by a judgment or decree at the suit of the assignee. The cases enforcing this interpretation constituted the weight of authority, and such construction may, therefore, be said to have been that generally accepted, and, in our judgment, was the correct one.

These cases, which thus held that the loss of the right to prove, after compulsory surrender, arose not from the surrender clause independently considered, but solely from the operation upon that clause of § 39, are exemplified by *the case of *Re Le-* [369] *land*, 7 Ben. 156, Fed. Cas. No. 8,230, opinion of Blatchford, J. In that case, after holding (p. 162) that the prohibition of § 39 applied as well to cases of voluntary as to cases of involuntary bankruptcy, the court came to consider the surrender clause of § 23 as affected by the penalty provided for in § 39, and said:

"This provision is to be construed in connection, and in harmony, with the provision of the 23d section, before cited. If, under the 23d section, the preferred creditor were allowed to surrender to the assignee the property received in preference, even after it had been recovered back by the assignee, as mentioned in the 39th section, so as to be able to prove his debt, no creditor taking a preference would ever be debarred from proving his debt. If, under the 39th section, it were held that the mere taking of a preference by a creditor would debar him from proving his debt, without the precedent necessity for a recovery back by the assignee of the property conveyed in preference, there never could be any scope for the operation of the 23d section in respect to a surrender."

—thus clearly pointing out that by the surrender clause alone the creditor would not be debarred from proving his claim, if in fact there had been a surrender, whether voluntary or not, but that, as a result solely of the prohibition of § 39, the creditor would be barred after recovery by the assignee.

Third. Cases which treated the surrender clause as in and of itself forbidding a surrender after recovery, because the recovery authorized by § 35 was the antithesis of the surrender and precluded a surrender after recovery. This class of cases in effect treated the prohibition expressed in § 39 as unnecessary, *quoad* the subject-matters to which §§ 23 and 35 were addressed. The cases, however, were few in number, and are illustrated by the case of *Re Tonkin*,

4 Nat. Bankr. Reg. 52, Fed. Cas. No. 14, 094.

Fourth. Cases which, without seemingly considering the incongruity of the reasoning, adopted both theories; treated *§§ 23, 35, and 39 as *in pari materia*, and hence applied the prohibition of § 39 to the other two sections, and yet reasoned to show that the surrender clause alone prohibited a surrender after recovery by the assignee. This class of cases is illustrated by *Re Richter*, 1 Dill. 544, 4 Nat. Bankr. Reg. 221, Fed. Cas. No. 11,803. In that case a creditor who, in consequence of a recovery by the assignee, had surrendered a preference, sought to prove his claim against the estate, and his right to do so was resisted. Analyzing the act and stating the different constructions of which it was susceptible, the court expressly declared that the correct view was to construe §§ 23, 35, and 39 together, and that the result of so doing would be to annex to both §§ 35 and 23 the penalty provided in § 39. The surrender clause was then noticed, it being said:

"It is urged by the claimants that this refusal was erroneous, because they had, before the time when they made their motion, surrendered to the assignee all property received by them under the preference. This devolves upon us the duty of interpreting the meaning of the word "surrender," as it is here used. And it is our opinion that a creditor who receives goods by way of fraudulent preference, and who refuses the demand therefor which the assignee is authorized to make (§ 15), denies his liability, allows suit to be commenced by the assignee, defends it, goes to trial, is defeated, and judgment passes against him, which he satisfies on execution, cannot be said, within the meaning of the statute, to have surrendered to the assignee the property received by him under such preference. He has surrendered nothing."

As an alternative, however, to this view, and treating the sections referred to as *in pari materia*, it was reiterated that § 23 was limited and controlled by the penalty provided in § 39.

We need not further notice the cases under the act of 1867, because of the action of Congress on the subject. In 1874 (18 Stat. at L. 178, chap. 390) § 39 of the act of 1867 was amended and re-enacted. That amendment consisted of omitting the forfeiture *clause as originally contained in the section, and substituting in its stead the following proviso:

"Provided, . . . and such person, if a creditor, shall not, in cases of actual fraud on his part, be allowed to prove for more than a moiety of his debt; and this limitation on the proof of debts shall apply to

cases of voluntary as well as involuntary bankruptcy."

Plainly, this amendment not only abolished the penalty provided in § 39 as originally enacted, since it allowed a creditor to prove his claim for the whole amount thereof after recovery against him if he had not been guilty of actual fraud, and, even in case of actual fraud, after recovery, permitted him to prove for a moiety. The amendment clearly also was repugnant to that construction of the act of 1867 given in some of the cases to which we have referred under the third classification, wherein in the reasoning employed it was assumed that a forfeiture or penalty might be implied alone from the terms of the surrender clause, irrespective of the operation of § 39. This results from the very words of the amendment, which says, "and this limitation on the proof of debts shall apply," etc., showing that the restriction on the right to prove after a compulsory yielding up of a preference was deemed by Congress to result not from the surrender clause, but from the limitation expressly declared by § 39 as amended, which operated a qualification of the broad terms of the surrender clause. It manifestly also arises from the fact that, whilst Congress plainly intended by the amendment to make a change in the rigor of the rule previously obtaining, the phraseology of the surrender clause as originally found in the act was not altered.

After the adoption of the amendment of 1874 it is true that in one or two instances it was held that the amendment, instead of mitigating the severity of § 39 as it stood before the amendment, had increased it by adding an additional limitation, *viz.*, prohibiting a preferred creditor who had been guilty of actual fraud from proving for more than one half of his claim, even where he had voluntarily surrendered his *prefer- [372] ence. But these were isolated cases, since practically the otherwise universal construction was that the amendment was remedial and intended by Congress to mitigate, even in cases of actual fraud, the severity of the prohibition of § 39 as originally enacted.

The import of the amendment was tersely stated by Mr. Justice Clifford in *Re Reed*, 3 Fed. 798, 800, as follows:

"Beyond doubt the question must depend upon the true construction of the act of Congress, and I am of the opinion that Congress intended to moderate the rigor of the prior rules and to allow the creditor, after payment back of the preference, whether by suit or otherwise, to prove their whole debt, in case they had been guilty of no actual fraud."

And such construction was also expounded

in the following cases: *Re Currier* (1875) 2 Low. Dec. 436, Fed. Cas. No. 3,492; *Burr v. Hopkins* (1875) 6 Biss. 345, Fed. Cas. No. 2,192, per Drummond, J.; *Re Black* (1878) 17 Nat. Bankr. Reg. 399, Fed. Cas. No. 1,459, per Lowell, J.; *Re Newcomer* (1878) 18 Nat. Bankr. Reg. 85, Fed. Cas. No. 10,148, per Blodgett, J.; *Re Kaufman* (1879) 19 Nat. Bankr. Reg. 283, Fed. Cas. No. 7,627, per Nixon, D. J.; *Re Cadwell* (1883) 17 Fed. 693, per Coxe, J.

The meaning of the amendment of 1874 was considered by the court of appeals of New York in the case of *Jefferson County Nat. Bank v. Streeter*, 106 N. Y. 186, 12 N. E. 706. The New York court expressly adopted the construction given in the cases to which reference has just been made, and its action in so doing was affirmed by this court in *Streeter v. Jefferson County Nat. Bank*, 147 U. S. 40, 37 L. ed. 70, 13 Sup. Ct. Rep. 236.

It follows that the construction which we at the outset gave to the text of the act of 1898, instead of being weakened, is absolutely sustained by a consideration of the act of 1867, both before and after the amendment of 1874, and the decisions construing the same, since in the present act, as we have said, there is nowhere found any provision imposing even the modified penalty which was expressed in the amendment of 1874. The contention that, because the act of 1898 contains a surrender clause, [373] therefore it must be assumed that *Congress intended to inflict the penalty originally imposed by § 39 of the act of 1867, must rest upon the erroneous assumption that that penalty was the result of the surrender clause alone. But this, as we have seen, is a misconception, since from the great weight of judicial authority under the act of 1867, as well as by the express enactment of Congress in the amendment of 1874 and the decisions which construed that amendment, it necessarily results that the penalty enforced under the act of 1867 arose not from the surrender clause standing alone, but solely from the operation upon that clause of the express prohibition contained in § 39 of that act. When, therefore, Congress in adopting the present act omitted to re-enact the provision of the act of 1867, from which alone the penalty or forfeiture arose, it cannot in reason be said that the omission to impose the penalty gives rise to the implication that it was the intention of Congress to re-enact it. In other words, it cannot be declared that a penalty is to be enforced because the statute does not impose it.

And, irrespective of this irresistible implication, a general consideration of the present act persuasively points out the pur-

pose contemplated by Congress in refraining from re-enacting the penalty contained in § 39 of the act of 1867. Undoubtedly the preference clauses of the present act, differing in that respect from the act of 1867, as is well illustrated by the facts of this case, include preferences where the creditor receiving the same acted without knowledge of any wrongful intent on the part of the debtor, and in the utmost good faith. *Pirie v. Chicago Title & T. Co.* 182 U. S. 454, 45 L. ed. 1179, 21 Sup. Ct. Rep. 906. Having thus broadened the preference clauses so as to make them include acts never before declared by Congress to be illegal, it may well be presumed that Congress, when it enacted the surrender clause in the present act, could not have contemplated that that clause should be construed as inflicting a penalty upon creditors coming within the scope of the enlarged preference clauses of the act of 1898, thereby entailing an unjust and unprecedented result.

*Our conclusion, therefore, is that the [374] first question propounded must be answered in the affirmative, and that the two other questions require no response.

And it is ordered accordingly.

Mr. Justice Day, dissenting:

I am unable to agree with the construction given to the sections of the bankruptcy act under consideration, and, because of the importance of the questions involved, have deemed proper a statement of the conclusions reached.

Notwithstanding the first question propounded by the court of appeals presupposes that the \$2,000 mortgage was a preference within the meaning of the bankrupt act, it is argued on behalf of the creditors that, although the mortgage made a few days prior to the bankruptcy proceedings and when the bankrupt was insolvent, was void under § 6343 of the Revised Statutes of Ohio, as amended April 26, 1898 (93 Ohio Laws, p. 290), read in connection with § 67, paragraph e, of the bankruptcy act, it did not constitute a preference which must be surrendered preliminary to proof of the creditor's claim because there was no actual transfer of any property to the creditor, and the only thing obtained was a void mortgage.

The Ohio statute makes provision, among other things, as to sales, etc., in trust or otherwise, in contemplation of insolvency, or with a design to prefer one or more creditors to the exclusion, in whole or in part, of others, and sets forth:

"And every such sale, conveyance, transfer, mortgage, or assignment made, . . . by any debtor or debtors, in the event of a deed of assignment being filed within ninety

(90) days after the giving [or doing] of such thing or act, shall be conclusively deemed and held to be fraudulent, and shall be held to be void as to the assignee of such debtor or debtors, where, upon proof shown, such debtor or debtors was or were actually insolvent at the time of giving or [375] doing of such act *or thing, whether he or they had knowledge of such insolvency or not. . . ."

By § 67, paragraph e, of the bankrupt act, it is provided:

"And all conveyances, transfers, or encumbrances of his property, made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the state, territory, or district in which such property is situate, shall be deemed null and void under this act against the creditors of such debtor, if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt."

Under § 60 of the bankruptcy act of 1898 it was provided:

"a. A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.

"b. If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

In § 1, ¶ 25, of the act of 1898, a "transfer" is defined to include the sale and every other and different mode of disposing of or parting with the property or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security.

This definition of a transfer covers a [376] mortgage given for the *security of a debt in express terms, and § 60 provides that preferences shall include transfers, the effect of the enforcement of which would be to enable any one of the bankrupt's creditors to obtain a greater percentage of his 197 U. S.

debt than other creditors of the same class.

It is true that if the mortgage is void it can have no effect to diminish the estate of the bankrupt, but upon its face the mortgage is good as against the bankrupt and the creditors of the estate.

It is said that, the mortgage being void, the creditor had nothing to surrender, but this assumes the invalidity of the security. Until set aside or voluntarily surrendered it is a good encumbrance upon the property, whether regarded as a conditional conveyance or as a mere security for the debt. It could be set aside by the trustee upon proof of insolvency of the bankrupt and other conditions named in the act at the time of giving it; otherwise it would stand as a valid security, unless the creditor should elect to surrender it and make proof of his claim as a general creditor.

There seems to be no question that, upon its face, though void in the light of the facts found, this mortgage was one of the transfers of property which was invalidated by the act, it being given within the time limited, and at a time when the bankrupt was in fact insolvent, and expressly made void by the Ohio statute when read with the bankrupt act of 1898.

The answer to the first question requires a consideration of § 57g of the act of 1898, which, as it stood prior to the amendment of February 5, 1903 (32 Stat. at L. 797, chap. 487, U. S. Comp. Stat. Supp. 1903, 415), read: "The claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences." May a creditor who has received a preference, voidable by the act, contest the validity thereof, and, if it is declared invalid, still prove his debt upon surrender of his preference as though no contest had been had?

It was held by this court in *Pirie v. Chicago Title & T. Co.* 182 U. S. 438, 45 L. ed. 1171, 21 Sup. Ct. Rep. 876, that a creditor who had received a *preference, although he [377] did not have reason to believe that one was intended, could only keep the property transferred upon condition of refraining from proof of the balance of his debt.

It was pointed out, in that case, in the opinion of the court by Mr. Justice McKenna, that § 60 in its various provisions permitted a creditor who had innocently received a preference to hold it if he chose, and it could only be recovered by the trustee in the event that he had reasonable cause to believe that a preference was intended, in which case the trustee might recover the property or its value. But the innocent creditor might keep the property transferred to him, although a preference within the definition of the act, upon terms of non-

participation in the bankrupt estate in the general distribution to the creditors.

Section 23 of the bankruptcy act of 1867 provided: "Any person who, after the approval of this act, shall have accepted any preference, having reasonable cause to believe that the same was made or given by the debtor contrary to any provision of this act, shall not prove the debt or claim on account of which the preference was made or given, nor shall he receive any dividend therefrom until he shall first have surrendered to the assignee all property, money, benefit, or advantage received by him under such preference." Section 57*g* of the present act, prior to the amendment of February 5, 1903, required broadly that claims of creditors who have received preferences shall be surrendered, and that the same shall not be allowed unless this is done.

Under the former act the surrender was required of creditors who had accepted preferences, having reasonable cause to believe the same contrary to the provisions of the act, and such creditor could not receive any dividend until he had first surrendered the preference. In passing the act of 1898, Congress doubtless had before it prior legislation on the subject, and particularly the act of 1867, the most recent enactment on the subject.

[378] Section 57*g* provides that all preferences, whether innocent *or otherwise, shall be surrendered before the creditor can prove his claim, and the right of proof is not postponed *until* the surrender, but claims are not to be allowed *unless* creditors shall surrender their preferences. The element of time is indicated in the word "*until*," which means to the time of, or up to, while the use of "*unless*" more emphatically denies the right of proving the claim, save or except upon terms of relinquishing the preference.

In view of the purpose of the bankruptcy act to make an equal distribution of the bankrupt's estate among creditors of the same class and to avoid preferences made within four months, I think, having in view the first question put by the circuit court of appeals, that the sections of the law in question must be construed to put a creditor who has received a merely voidable preference, which could be recovered from him by the trustee, to his election between striving to retain that which he has received, and voluntarily surrendering his preference, and filing his claim that he may participate with other unsecured creditors in the general distribution of the estate.

The law looks to a prompt, equal, and inexpensive distribution of the estate among those entitled thereto, and I do not think it was intended to permit a creditor to take the chances of litigation with the trustee,

and, when defeated, still have the right to "surrender" his preference and participate in the distribution of the general estate. I think the surrender contemplated by the law is not the capitulation which comes after unsuccessful resistance, but is intended to require the creditor, who must be presumed to know the law, to make a prompt election and to stand or fall upon the choice made. In other words it was not intended to permit a creditor who holds security liable to defeat under the law to keep it if he can maintain it by successful contest, and, if not, to have the same right and privilege as to proof of his debt that he would have if he promptly availed himself of the privilege of surrender, which the law gives to one who would place himself upon a general equality with other creditors of the estate.

*These conclusions are sustained by a con-[379] sideration of the terms of the law under discussion, as well as the adjudicated cases which have arisen under it. The act of 1898 made important changes when compared with the bankrupt law of 1867. As we have already seen, § 23 of the latter act limited the requirement as to the surrender of preferences to those made or given contrary to the provisions of the act. Section 35 of the same law gave the right to the assignee in bankruptcy to set aside illegal preferences, and § 39, after enumerating certain transactions which should amount to acts of bankruptcy, including fraudulent conveyances as therein described, provided that whenever the beneficiary had reasonable cause to believe that a fraud upon the act was intended, or the debtor was insolvent, the assignee might recover the property, and the creditor should not be allowed to prove his debt in bankruptcy. In 1874 (18 Stat. at L. 178, chap. 390), § 39 of the act was amended, and, instead of prohibiting a creditor who had received a conveyance in fraud of the act from proving his debt, it was provided that such creditor should not, in case of actual fraud on his part, be allowed to prove for more than a moiety of his debt, and this limitation should apply to cases of voluntary as well as involuntary bankruptcy.

It will not, in my view, aid in the determination of the proper construction of the act of 1898 to review the numerous and conflicting decisions made under the act of 1867 as to the effect of these various provisions upon the right of the creditor to prove his claim. The great weight of authority is that one who had a voidable preference under the act could not be permitted to prove his claim after a judgment had been rendered against him in a contest with the trustee.

Presumably with the provisions of the

act of 1867 before it, providing that in certain cases of fraudulent conveyance the creditor could not prove his claim in bankruptcy, first as to the whole, and later as to a half of the debt, and the limitations of the requirement to surrender preferences to those made in violation of the act, Congress [380] laid aside these requirements, *and broadly provided in § 57g of the act of 1898 that all preferences must be surrendered as a condition of proof of claims against the estate. The innocent holder of a preference could not be deprived of his right of election between proof of his debt and the surrender of his preference. He who had a voidable preference might surrender it and prove his debt. If he did not "surrender," the trustee could recover the preference, and the privilege of proof which was conditioned upon surrender no longer existed.

Prior to the amendment of 1903 this court in the case of *Pirie v. Chicago Title & T. Co.*, already referred to, decided that the requirement extended to all manner of preferences, whether innocently received or otherwise, and this was the law until the amendment of 1903.

Therefore the sole question here is: What is meant by the term "surrender" as used in the act of 1898?

We have been referred to four cases decided under this law before the passage of the amendment of 1903. Before passing to them I may refer to a decision of Judge Dillon at the circuit (*Re Richter*, 1 Dill. 544, Fed. Cas. No. 11,803), rendered in 1870 under the act of 1867; but in defining the word "surrender," and pointing out its meaning, the language of the learned judge is as pertinent now as it was then. Having before him the construction of the term "surrender" as used in § 23 of the act of 1867, and speaking of the right of a creditor to prove the balance of a claim which had been illegally preferred, the judge said:

"The statute is that they shall not prove up the debt or claim on account of which the preference was given. It was this precisely which, by the motion under consideration, they sought to have done, and which the court refused to allow.

"It is urged by the claimants that this refusal was erroneous because they had, before the time when they made their motion, surrendered to the assignee all property received by them, under the preference. This devolves upon us the duty of interpreting the meaning of the word 'surrender,' as it is here used. And it is our opinion that a [381] creditor who receives *goods by way of fraudulent preference, and refuses the demand therefor which the assignee is authorized to make (§ 15), denies his liability, allows suit to be commenced by the assignee, 197 U. S.

defends it, goes to trial, is defeated and judgment passes against him, which he satisfies on execution, cannot be said, within the meaning of the statute to have surrendered to the assignee the property received by him under such preference.

"He has surrendered nothing. He accepted a fraudulent preference and defended it to the last. Paying a judgment which he stoutly resisted, and from which he could not escape, is not such a surrender as the statute contemplates. To hold that it was would be against the spirit of the statute, which is to discourage preferences. Such a holding would manifestly encourage them, for if the transaction should be upheld the creditor would profit; if overthrown, he would lose nothing, and stand upon an equal footing with those over whom he had attempted to secure an illegal advantage, and whom he has, by litigation, delayed in the collection of their claims."

The question, under the act of 1898, came before the United States district court for the northern district of Iowa, in the case of *Re Keller*, 109 Fed. 118, 6 Am. Bankr. Rep. 334, where the subject is discussed by Judge Shiras. Summing up the matter, the learned judge said:

"It would certainly be wholly inequitable to hold that a creditor who has received a preference from an insolvent debtor can refuse to account therefor, and, after causing the other creditors the delay, cost, and expense of litigation, after being defeated therein, can still prove up his claim, and take an equal share in the proceeds of the estate after depleting the same in the manner stated. Contesting the claim of the trustee, and paying back the preference in obedience to the process of the court, is not a surrender, within the meaning of clause g of § 57. Therefore there is this difference between a preferred creditor who surrenders the preference, and a preferred creditor from whom the preference is recovered by the trustee: *The former, having voluntarily [382] surrendered the preference received, is entitled to prove up his entire claim, and share with the other creditors. The latter, having refused to surrender, cannot prove the claim or share in the estate."

To the same effect is *Re Owings*, 109 Fed. 623, and in *Re Greth*, 112 Fed. 978, 7 Am. Bankr. Rep. 598, the cases are reviewed and the same conclusion reached.

In Collier on Bankruptcy, 3d edition, page 319, that author says:

"The question what constitutes a surrender has received much discussion. It is admitted by all that if the assignee is compelled to bring an action to invalidate a

transfer, and if he recovers and enters up judgment, no subsequent payment of that judgment by the preferred creditor, and no subsequent compliance by him with its terms can be considered a surrender. By his judgment the trustee has 'recovered' the property. In legal effect the transferee no longer has anything to surrender."

And in the 5th edition of the same work, page 420, it is said:

"What is a surrender.—Here the doctrines declared under the law of 1867 seem at least somewhat applicable. The phrasing of that statute undoubtedly colored some of the decisions under it. But, under well-recognized principles of law, a surrender that is compulsory is not a surrender. The element of fraud is usually present, but may be lacking; the test is, Was the act a voluntary one? Each case turns on its own facts, and there is some conflict, but the weight of decision under the present law supports this view."

The only case decided under the act of 1898, which has come to my attention sustaining a contrary view, is *Re Richard*, 94 Fed. 633, 2 Am. Bankr. Rep. 506, in which it was decided that, notwithstanding the preference was set aside after a fruitless fight with the trustee, the creditor might prove his claim.

We are cited to *Streeter v. Jefferson County Nat. Bank*, 147 U. S. 36, 37 L. ed. 68, 13 Sup. Ct. Rep. 236, as sustaining the contrary view of the meaning of the term [383] "surrender" as used in this act. The case was under the act of 1867. But in that case the contest was over a stock of goods, and the creditor—the bank—had consented through its attorneys to the appointment of a special receiver, who was ordered to sell the goods and pay the proceeds into court. Of this feature of the case Mr. Justice Shiras, who delivered the opinion of the court, said (p. 45, L. ed. p. 71, Sup. Ct. Rep. p. 238):

"To sustain the contention that the bank did not surrender its preference, it is urged that the bank did not at once, on demand of the assignee, turn over the goods levied on, but litigated the matter with the assignee in both the district and the circuit courts, and that the proceeds of the executions were not relinquished until final judgment was entered against the bank.

"It was the opinion of the state court that, as the sheriff, having custody of the goods seized on execution, was, with the consent of the bank's attorneys, appointed special receiver, and was ordered to sell the goods and pay the proceeds into court to await the result of the litigation between

the bank and the assignee in bankruptcy, and that as the proceeds were finally turned over to the assignee, and thus became subject to distribution as bankruptcy assets, the transaction amounted to a surrender under § 5084. In so holding we think the state court was right."

We are also cited to the meaning of the word "surrender" as given in the *Standard Dictionary*:

"1. To yield possession of to another upon compulsion or demand, or under pressure of a superior force; give up, especially to an enemy in warfare; as to *surrender* an army or a fort."

This definition is given in support of the contention that a surrender may sometimes be made involuntarily. This is doubtless true, and obviously the term may have different meanings when used in different connections. It may be that an army may surrender a fort after a most vigorous contest, while there is still the choice between further resistance and *yielding the fortress to [384] an enemy; but the most liberal meaning of the term could hardly describe as a surrender the occupation which a victorious army has gained of a fort after it has ejected the enemy from its walls and is securely intrenched therein without leave of those who have been forcibly driven out.

The bankrupt law contemplates that a secured creditor who holds a security voidable under the law, and which he should put into the common fund as a condition of the right to participate with other unsecured creditors in the division of the estate, must make his choice while he has yet something to give for the privilege of being taken from the class of those who have a security which may be taken from them, and placed in a class, always favored in the bankrupt law, who shall share in the equal distribution of the bankrupt's estate, freed from fraudulent conveyances and voidable preferences.

The complete answer to the argument that one who has received a preference which he must give up before proof as a general creditor has the right to try out with the trustee the question of the validity of the preference, and then surrender, is that when the judgment of the law has taken the preference from him he has nothing left to surrender, and if then so disposed the creditor cannot surrender a thing which has been wrested from him by the strong hand of the law.

In this case the Ohio statutes, when read with the bankrupt law, distinctly avoid preferences, and the trustee, by bringing the action, diminished the estate and delayed its

distribution. The creditor, before the litigation had his election as to the course he would pursue. While he had something to surrender he might give it up, prevent costs, delay, and litigation, and aid the speedy and equal distribution of the bankrupt's estate. After two judgments against him, and when he had absolutely nothing to give up to the bankrupt's estate, it is, in our view, too late to "surrender."

I think the construction here given comports with the purposes and carries into effect the design of the act as expressed *by [385] its terms. It is true that in the present case, after resisting the attack upon the \$2,000 mortgage in the court of common pleas, and when the judgment had gone against the bank, it did not appeal, and its counsel in the circuit court disclaimed intention to insist upon the preference of the \$2,000 mortgage, but even then refused consent to a decree against the mortgage; and in our opinion the time of election was before judgment in the court of original jurisdiction wherein the mortgage was contested and defeated. It is unnecessary to consider whether an election to surrender the preference can be made after issue joined and before judgment. In this case a trial was had upon the merits. The judgment rendered was vacated by the appeal, and in the appellate court, notwithstanding the qualified disclaimer of counsel for the bank, a final judgment was rendered against the mortgage.

These considerations lead to the conclusion that the first and second questions should be answered in the negative.

The importance of the ruling just made is shown in its application, not only to the act of 1898 as it originally stood, but to the act as it now stands since the amendment of February 5, 1903, which only requires a surrender of preferences when the same are in violation of subdivision *b* of § 60, or void or voidable under § 67, subdivision *e*. The reasoning of the majority of the court permits the holder of a preference, no matter how fraudulent, to contest with the trustee when his preference is attacked, and, when convicted of fraud and an intention to defeat the purposes of the law, to "surrender" that which the law has declared he cannot hold, and prove his debt as a general creditor. To permit this seems to me to defeat the purpose of the act, and to encourage the very thing the surrender clause was intended to promote,—a prompt and inexpensive distribution of the estate. The fraudulent transferee, although he has lost his suit, has taken no risk, and may still prove his claim

197 U. S.

on an equality with unpreferred creditors over whom he has sought an illegal advantage. I cannot agree *with this construction, and therefore dissent from the judgment and reasoning of the majority of the court. [386]

I am permitted to state that Mr. Justice Harlan, Mr. Justice Brewer, and Mr. Justice Brown concur in this dissent.

UNITED STATES, *Appt.*,

v.

JOHN SMITH.

(See S. C. Reporter's ed. 386-393.)

Court-martial—time for service of charges—necessity of authorization of general court-martial by President.

1. The arrest referred to in U. S. Rev. Stat. § 1624, art. 43 (U. S. Comp. Stat. 1901, p. 1117,) as the time when the person accused is to be furnished with a copy of the charges and specifications on which he is to be tried by a naval court-martial, is not the preliminary arrest or detention while awaiting the action of higher authority to frame charges and specifications and order the court-martial, but is the arrest resulting from the preferring of the charges by the proper authority and the convening of the court-martial.
2. The prohibition against the convocation of a general court-martial by the commander of a fleet or squadron without the previous authorization of the President, which is made by U. S. Rev. Stat. § 1624, art. 38 (U. S. Comp. Stat. 1901, p. 1116), when such fleet or squadron is "in the waters of the United States," applies only to those waters which are within what was termed by the act of March 3, 1901 (31 Stat. at L. 1108, chap. 852, U. S. Comp. Stat. 1901, p. 1040), the continental limits of the United States.

[No. 184.]

Argued March 15, 1905. Decided April 3, 1905.

APPEAL from the Court of Claims to review a judgment awarding the pay which would have been earned by the claimant but for his confinement under sentence of a naval court-martial. *Reversed.*

See same case below, 38 Ct. Cl. 257.

Statement by Mr. Justice White:

On May 26, 1899, John Smith was serving under enlistment as a fireman of the first class on board the United States naval vessel Yorktown, then at anchor in Iloilo harbor, Philippine Islands. On the date named Smith was reported to the command-

NOTE.—On naval courts-martial—see note to Wilkes v. Dinsman, 12 L. ed. U. S. 618.

ing officer of the Yorktown as having refused to do duty, and consequently such officer ordered him "put under sentries as a prisoner in single irons for safekeeping to await trial by a general court-martial." Subsequently, on June 30, 1899, Rear Admiral Watson, the commander-in-chief of the

[387] United States naval force on the Asiatic station, convened a general court-martial, to meet on July 3, 1899, for the purpose of trying accused persons who might be legally brought before the court, and on the same day a charge was preferred against Smith, by the rear admiral, accompanied with a specification, for refusing to obey a lawful order of his superior officer. Smith, who, as already stated, had been placed under arrest on May 26, 1899, was served on July 1, 1899, with a copy of the charge and specification which had been preferred against him, and an extra watch was put over him as well as over other prisoners who were being held for trial. On July 5, 1899, Smith was sent under guard before the court-martial. He was tried, found guilty, and sentenced "to be confined in such place as the Secretary of the Navy may direct for a period of one year, to perform extra police duties during such confinement, to lose all pay that may become due him during such confinement, except the sum of three dollars (\$3) per month for necessary prison expenses, and a further sum of \$20 to be paid him at the expiration of his term of confinement, when he shall be dishonorably discharged from the United States Navy."

The term of imprisonment prescribed in the sentence was somewhat mitigated by the Secretary of the Navy. Thereafter, on being released, Smith sued in the court of claims to recover the pay which would have been earned by him had he been entitled to receive the same during the period covered by the sentence. The right to recover was based on the averment that a copy of the charge had not been served on Smith when he was originally put under arrest on May 26, 1899, it being claimed that for this reason the judgment of the court-martial was void. After finding the facts as above recited, the court of claims concluded, as matter of law, that the claimant was entitled to recover, and from the judgment entered upon such finding the government appealed.

Assistant Attorney General **Pradt** argued the cause, and, with *Mr. Felix Brannigan*, filed a brief for appellant.

Mr. Edwin B. Hanna also argued the cause, and, with Assistant Attorney General **Pradt**, filed a brief for appellant.

Mr. John Spalding Flannery argued the cause, and, with *Mr. Frederic D. McKenney*, filed a brief for appellee.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court:

Article 43 of § 1624 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 1117), upon which the court of claims based its legal conclusion that the action of the court-martial in question was void because the charge and specification were not served upon the claimant at the time of the original arrest, reads as follows: "The person accused shall be furnished with a true copy of the charges, with the specifications, at the time he is put under arrest."

It is conceded by the findings that at once, when the charge and specification were formulated by Rear Admiral Watson and the court-martial was ordered to be convened, a copy of the charge and specification was served upon Smith. It is also established by the findings that no objection as to tardiness of service was made at the time of trial. Conceding, *arguendo* solely, and without so deciding, that under these circumstances the objection as to the lateness of the service was jurisdictional, and could be collaterally inquired into, we think the contention is wholly devoid of merit. Nearly ten years before the trial in question was had, in the year 1890, the Secretary of the Navy submitted to the Attorney General the question of whether the arrest referred to in article 43 related to the preliminary arrest which might be consequent upon the commission of an offense, or applied to the arrest made after charges had been formulated and a court-martial ordered. The Attorney General advised that the word "arrest," as employed in article 43, did not relate to the preliminary arrest or detention of an accused person awaiting the action of higher authority to frame charges and specifications and order a court-martial, but to the arrest resulting from the preferring of the charges by the proper authority and the convening of a court-martial. 19 Ops. [392] Atty. Gen. 472. The reasoning by which the Attorney General reached the conclusion just stated we think was absolutely conclusive. Doubtless the opinion became the rule of practice in the Navy, and the construction affixed by the Attorney General to the statute was sanctioned by this court in *Johnson v. Sayre*, 158 U. S. 109, 39 L. ed. 914, 15 Sup. Ct. Rep. 773, and such construction has been reiterated in an opinion announced this day. *Bishop v. United States*, 197 U. S. 334, ante, 780, 25 Sup. Ct. Rep. 440.

Whilst these considerations dispose of the contentions raised and passed on below, a new ground for reversal was urged at bar, founded on article 38 of § 1624 of the Re-

vised Statutes. That article reads as follows:

"Art. 38. General courts-martial may be convened by the President, the Secretary of the Navy, or the commander-in-chief of a fleet or squadron; but no commander of a fleet or squadron in the waters of the United States shall convene such court without express authority from the President."

Although it is not denied that Rear Admiral Watson was a commander of a fleet within the meaning of that expression as employed in article 38, it is insisted that, as he convened the court-martial while in Manila bay, about six weeks after the treaty with Spain by which the Philippine Islands were acquired by the United States, therefore the fleet or squadron under his command was "in the waters of the United States," within the meaning of those words as employed in the enactment in question, and there was no power in the commander-in-chief to convoke a court-martial without express authority from the President, which is not found to have been given. This objection, if well taken, is jurisdictional, but in our judgment it is without merit; and we reach this conclusion wholly irrespective of the status of the Philippine Islands.

The clause in question was originally enacted in 1862, before even the acquisition of Alaska, and was intended, we think, to apply to those waters within what was termed by Congress in the act of March 3, 1901 (31 Stat. at L. 1108, chap. 852, U. S. Comp. Stat. 1901, p. 1040), the continental

[393] limits of the United States. In other words, the provision in question did not take into view the dominion or sovereignty of the United States over territory beyond the seas and far removed from the seat of government, but contemplated waters within the United States in the stricter and popular sense of the term. Looking to the language used, in the light of the surrounding circumstances and the purpose which it was intended to accomplish (*Platt v. Union P. R. Co.* 99 U. S. 64, 25 L. ed. 429), it is, we think, manifest that the prohibition against the convocation by the commander of a fleet or squadron of a general court-martial, without the previous authorization of the President, was intended to be operative only when the fleet or squadron was in a home port, as above defined. That is to say, that Congress contemplated the necessity of an order from the President when the circumstances supposed to require the convening of the court-martial could be with facility submitted to the President for his action in the premises. To give a broad meaning to the expression "waters of the United States," as employed in article 38, by construing those words as referring, not only

to the home waters, but to far distant waters, would, we think, defeat the plain purposes of Congress, and seriously impair, if not destroy, an important power vested in the commander of a fleet or squadron when at distant stations, remote from the home country. Certainly, if the remoteness from the continental limits of the United States is immaterial, and the restriction of article 38 is applicable to the commander when his fleet or squadron is within waters thousands of miles removed from the boundaries of the United States, in the restricted sense of that term, no good reason is apparent why the commander of a fleet or squadron should not have been forbidden, without the leave of the President, to convoke a general court-martial, irrespective of where his fleet or squadron might be situated.

Judgment reversed.

*MIDDLETOWN NATIONAL BANK [394]

v.

TOLEDO, ANN ARBOR, & NORTHERN MICHIGAN RAILWAY COMPANY
et al.

(See S. C. Reporter's ed. 394-406.)

Corporations—right to enforce stockholder's liability outside of state of incorporation.

A stockholder's liability in an Ohio corporation cannot be enforced outside of the jurisdiction of that state, on the theory that Ohio Const. art. 13, § 3, is, for that purpose, self-executing, when it provides for the individual liability of the stockholders, where an action in the Ohio courts alone is contemplated by Ohio Rev. Stat. 1880, § 3260, as amended in 1894, which was enacted in pursuance of this constitutional provision, and itself provides for the procedure and states the remedy.

[No. 167.]

Argued and submitted March 7, 1905. Decided April 3, 1905.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Second Circuit presenting the question whether the provision of the Constitution of Ohio for the individual liability of stockholders in a domestic corporation is so far self-executing that it may be enforced out-

NOTE.—On the right to enforce stockholder's liability outside of the state of incorporation—see note to *Cushing v. Perot*, 34 L. R. A. 737.

As to the self-executing nature of constitutional provisions declaring the liability of stockholders in corporations—see note to *Whitman v. National Bank*, 44 L. ed. U. S. 587.

side the jurisdiction of that state without compliance with the requirements of the Ohio statutes with reference to the enforcement of such liability. *Answered in the negative.*

Statement by Mr. Justice **Peckham**:

This case comes here by virtue of a certificate from the United States circuit court of appeals for the second circuit, which sets forth the following facts:

The case came before the circuit court of appeals by appeal from the decree of the United States circuit court for the southern district of New York, sustaining demurrers to the bill of complaint and dismissing the bill. The complainant in the bill was a creditor of the railway company (the defendant), which is a corporation created under the laws of the state of Ohio; and complainant recovered a judgment against the defendant railway company in the supreme court of the state of New York, upon which execution was issued and returned unsatisfied. The complainant then brought its bill in equity in the United States circuit court for the southern district of New York, for the benefit of itself and other creditors, against numerous stockholders of the railway company, defendant, residing in the district, to enforce the liability of those [395] *stockholders for the debts of the railway company, under the laws of Ohio, and that company was made a party defendant.

The Constitution of Ohio (1851), art. 13, § 3, is as follows:

"Dues from corporations shall be secured by such individual liability of the stockholders, and other means, as may be prescribed by law; but in all cases, each stockholder shall be liable, over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum, at least equal in amount to such stock."

In pursuance of this provision of the Constitution the legislature of Ohio adopted statutory provisions with respect to the stockholders of certain corporations, which appear in the Revised Statutes of 1880, § 3258, in the following form:

"The stockholders of a corporation which may be hereafter formed, and such stockholders as are now liable under former statutes, shall be deemed and held liable, in addition to their stock, in an amount equal to the stock by them subscribed, or otherwise acquired, to the creditors of the corporation, to secure the payment of the debts and liabilities of the corporation."

Section 3260 of the Revised Statutes of 1880, as amended in 1894, provided as follows:

"A stockholder or creditor may enforce such liability by action jointly against all

the holders or owners of stock, which action shall be for the benefit of all the creditors of the corporation, and against all persons liable as stockholders; and in such action there shall be found and determined the amount payable by each person liable as stockholder on all the indebtedness of the corporation, in which adjudication no costs shall be taxed to nor collected of any stockholder to an amount which, together with the amount to be paid on said indebtedness, will exceed the amount of the stock on which he is liable, *Provided*, that in any such action, the plaintiff may file in the court a sworn statement that a stockholder or stockholders or the legal representatives of a deceased stockholder have not *been [396] summoned, giving their residence if known, and that it is impracticable to secure service of summons upon such stockholders or such legal representatives of a stockholder, and remitting from the claims of the plaintiff, or of other creditors consenting, so much as may be found payable by such stockholders not served with summons except those who may be insolvent or nonresident of the state; and judgment shall be rendered against the stockholders who have been served with summons for the *pro rata* amount for which they would be liable if all solvent stockholders resident of the state were served with summons; and when a creditor has prosecuted against a corporation an action of [at] law begun before any action to enforce the stockholders' liability, and has recovered final judgment only after such an action to enforce the stockholders' liability has been prosecuted to a final decree in the court in which the action was commenced, such judgment creditor may bring a like action against the stockholders of the corporation to enforce such judgment at any time within four years after the recovery of his said judgment, but the stockholders shall not be liable for any amount in excess of that provided in § 3258."

As so amended this section stood at the time when this suit was begun. Afterwards, in 1900, but before the filing of the second amended bill of complaint, the section, as further amended and supplemented, provided as follows:

"Sec. 3260. Whenever any creditor of a corporation seeks to charge the directors, trustees, or other superintending officers of a corporation, or the stockholders thereof, on account of any liability created by law, he may file his complaint for that purpose in any common pleas court which possesses jurisdiction to enforce such liability.

"Sec. 3260 (a). The court shall proceed thereon, as in other cases, and, when necessary, shall cause an account to be taken of the property and obligations due to and

from such corporation, and may appoint one or more receivers.

[397] "Sec. 3260 (b). If, on the coming in of the answer or upon the taking of such account, it appears that such corporation is insolvent, and has not sufficient property or effects to satisfy such creditor, the court may proceed to ascertain the respective liabilities of the directors, officers, and stockholders, and enforce the same by its judgment, as in other cases.

"Sec. 3260 (c). In all cases in which the directors or other officers of a corporation, or the stockholders thereof, are made parties to an action in which a judgment is rendered, if the property of such corporation is insufficient to discharge its debts, the court shall give notice to nonresident stockholders, as provided in §§ 5048, 5049, 5050, 5051, or 5052 of the Revised Statutes, and shall first proceed to compel each stockholder to pay in the amount due and remaining unpaid on the shares of stock held by him, or so much thereof as is necessary to satisfy the debts of the company.

"Sec. 3260 (d). If the debts of the company remain unsatisfied, the court shall proceed to ascertain the respective liabilities of the directors or other officers and of the stockholders, and to adjudge the amount payable by each, and enforce the judgment as in other cases. The court may authorize and direct the receiver to prosecute such action in his own name as receiver, as may be necessary, in other jurisdictions, to collect the amount found due from any officer or stockholder.

"Sec. 3260 (e). Whenever any action is brought against any corporation, its directors or other superintending officers, or stockholders, according to the provisions of this chapter, the court, whenever it appears necessary or proper, may order notice to be published in such manner as it shall direct, requiring all creditors of such corporation to exhibit their claims and become parties to the action, within a reasonable time, not less than six months from the first publication of such order, and, in default thereof, to be precluded from all benefit of the judgment which shall be rendered in such action, and from any distribution which shall be made under such judgment.

[398] *"Sec. 3260 (f). Upon a final judgment in any such action against an insolvent corporation, the court shall cause a just and fair distribution of the property and assets of such corporation or the proceeds thereof to be made among its creditors.

"Sec. II. That said § 3260 be, and hereby is, repealed.

"Sec. III. This act shall apply to pending actions, and shall take effect and be in force from and after its passage."

197 U. S.

The court below sustained the demurrer on the following ground:

"It is thought that the question raised by this demurrer should be decided upon the assumption that the action is the one provided for by § 3260, Ohio Rev. Stat. as it stood after the amendment of 1894. Inasmuch as that section expressly provides for an action jointly against all the stockholders, including such as are out of the jurisdiction or for other causes cannot be served, and the complaint avers that there are stockholders who have not been made parties, there is a lack of parties defendant, and the demurrer is sustained. If, moreover, the amendments of the statute passed in 1900 are to be considered, the position of the demurrants is even stronger. Manifestly, this action is not the one thereby provided for."

Mr. Frederick C. McLaughlin argued the cause, and, with *Mr. Harvey Scribner*, filed a brief for the bank:

Article 13, § 3, of the Ohio Constitution is self-executing to the extent of declaring a general contractual obligation and a general rule as to property rights.

Whitman v. National Bank, 176 U. S. 559, 44 L. ed. 587, 20 Sup. Ct. Rep. 477; *Willis v. Mabon* (*Willis v. St. Paul Sanitation Co.*) 48 Minn. 140, 16 L. R. A. 281, 31 Am. St. Rep. 626, 50 N. W. 1110; *State ex rel. Atty. Gen. v. Sherman*, 22 Ohio St. 411; *Brown v. Hitchcock*, 36 Ohio St. 667; *Kirtley v. Holmes*, 52 L. R. A. 738, 46 C. C. A. 102, 107 Fed. 1; *Harpold v. Stobart*, 46 Ohio St. 397, 15 Am. St. Rep. 618, 21 N. E. 637.

Section 3260 of the Revised Statutes of Ohio as originally enacted, and as amended in 1894, was declaratory merely of rules of chancery practice long previously followed by Ohio courts.

Umsted v. Buskirk, 17 Ohio St. 113; *Smith v. Newark, S. & S. R. Co.* 8 Ohio, C. C. 583.

The remedy, therefore, is nothing more than the appropriate remedy in equity for the enforcement of a proportionate, collateral liability; and such remedy, from its very origin and nature, is transitory.

Kirtley v. Holmes, 52 L. R. A. 738, 46 C. C. A. 102, 107 Fed. 1.

This general contractual obligation is enforceable in any United States circuit court having jurisdiction of the parties indispensable to a decree.

Smith v. Ft. Scott, H. & W. R. Co. 99 U. S. 398, 401, 25 L. ed. 437, 438; *Reynolds v. First Nat. Bank*, 112 U. S. 405, 410, 28 L. ed. 733, 735, 5 Sup. Ct. Rep. 213; *Chicago & N. W. R. Co. v. Whitton*, 13 Wall. 270, 286, 20 L. ed. 571, 576; *Suydam v. Broad-*

naa, 14 Pet. 67, 10 L. ed. 357. See also *Smith v. Reeves*, 178 U. S. 442-444, 44 L. ed. 1143, 1144, 20 Sup. Ct. Rep. 919; *Foster*, Fed. Pr. 3d ed. §§ 6, 7.

The statutory origin of the obligation is immaterial.

Dennick v. Central R. Co. 103 U. S. 11, 26 L. ed. 439; *Whitman v. National Bank*, 176 U. S. 559, 44 L. ed. 587, 20 Sup. Ct. Rep. 477.

The United States circuit court can and will enforce it.

American File Co. v. Garrett, 110 U. S. 288, 292, 28 L. ed. 149, 4 Sup. Ct. Rep. 90; *Smith v. Ft. Scott, H. & W. R. Co.* 99 U. S. 398, 401, 25 L. ed. 437, 438; *Owings v. Hull*, 9 Pet. 607, 624, 9 L. ed. 246; *Hanley v. Donoghue*, 116 U. S. 1, 6, 29 L. ed. 535, 537, 6 Sup. Ct. Rep. 242; *Barrow S. S. Co. v. Kane*, 170 U. S. 100, 42 L. ed. 964, 18 Sup. Ct. Rep. 526; *Hale v. Haddon*, 37 C. C. A. 240, 95 Fed. 747; *State Nat. Bank v. Sayward*, 33 C. C. A. 564, 63 U. S. App. 20, 91 Fed. 443; *Erickson v. Nesmith*, 15 Gray, 221; *New Haven Horse Nail Co. v. Linden Spring Co.* 142 Mass. 349, 7 N. E. 773; *Post & Co. v. Toledo, C. & St. L. R. Co.* 144 Mass. 341, 59 Am. Rep. 86, 11 N. E. 540.

Complainant seeks to enforce this liability precisely as it is enforced in Ohio.

Fourth Nat. Bank v. Francklyn, 120 U. S. 747, 758, 30 L. ed. 825, 829, 7 Sup. Ct. Rep. 757; *Pollard v. Bailey*, 20 Wall. 520, 22 L. ed. 376; *Slater v. Mexican Nat. R. Co.* 194 U. S. 120, 48 L. ed. 900, 24 Sup. Ct. Rep. 581; *Davis v. Mills*, 194 U. S. 451, 454, 48 L. ed. 1067, 1070, 24 Sup. Ct. Rep. 692; *Harpold v. Stobart*, 46 Ohio St. 397, 15 Am. St. Rep. 618, 21 N. E. 637.

An Ohio corporation may be found and sued in the circuit court of the United States for the southern district of New York.

St. Louis & S. F. R. Co. v. McBride, 141 U. S. 127, 35 L. ed. 659, 11 Sup. Ct. Rep. 982; *Central Trust Co. v. McGeorge*, 151 U. S. 129, 38 L. ed. 98, 14 Sup. Ct. Rep. 286; *Interior Constr. & Improv. Co. v. Gibney*, 160 U. S. 217, 219, 40 L. ed. 401, 402, 16 Sup. Ct. Rep. 272; *Re Keasbey & M. Co.* 160 U. S. 221, 229, 40 L. ed. 402, 405, 16 Sup. Ct. Rep. 273; *New England Mut. L. Ins. Co. v. Woodworth*, 111 U. S. 138, 146, 28 L. ed. 379, 381, 4 Sup. Ct. Rep. 364; *Barrow S. S. Co. v. Kane*, 170 U. S. 100, 42 L. ed. 964, 18 Sup. Ct. Rep. 526.

The decision of the court below resulted from an erroneous legal presumption based upon the false premise that the legislature created and controlled the right.

Whitman v. National Bank, 28 C. C. A. 404, 51 U. S. App. 536, 83 Fed. 288.

The *lex loci contractus* governs as to the substance or obligation of a contract, while

the *lex fori* governs the form of action or procedure.

Kent, Com. 14th ed. pp. 461, 462; 16 *Harvard Law Rev.* p. 262.

This is true whether the origin of the liability be in the statute or the common law, and whether the remedy be statutory or otherwise.

Dennick v. Central R. Co. 103 U. S. 11, 26 L. ed. 439; *Davis v. Mills*, 194 U. S. 451, 454, 48 L. ed. 1067, 1070, 24 Sup. Ct. Rep. 692; *Blair v. Newbegin*, 65 Ohio St. 425, 58 L. R. A. 644, 62 N. E. 1040.

Every condition and limitation imposed upon the substantive right has been complied with, and there is no defect of parties defendant in equity.

Shields v. Barrow, 17 How. 139, 15 L. ed. 160; *Ribon v. Chicago, R. I. & P. R. Co.* 16 Wall. 446, 21 L. ed. 367; *Cameron v. M'Roberts*, 3 Wheat. 591, 4 L. ed. 467.

Mr. **Lucius H. Beers** argued the cause and filed a brief for Eno:

The highest court of Ohio has sanctioned and followed the practice of referring to the debates of the Constitutional Convention as throwing light on the meaning of words used by the framers of the Ohio Constitution.

State ex rel. Atty. Gen. v. Kennon, 7 Ohio St. 546.

In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect.

Edwards v. Darby, 12 Wheat. 206, 210, 6 L. ed. 603, 604.

In considering the subject of stockholders' liability as created by the statutes of Ohio, the highest courts of that state have uniformly referred to such liability as being statutory, and have not referred to it as being created by the Constitution.

Citizens' Bank v. Wright, 6 Ohio St. 318; *State ex rel. Atty. Gen. v. Sherman*, 22 Ohio St. 411; *Rider v. Fritchey*, 49 Ohio St. 285, 15 L. R. A. 513, 30 N. E. 692; *Brown v. Hitchcock*, 36 Ohio St. 676.

Similar constitutions have been so construed as to involve the decision that the constitutional provision was not self-executing.

French v. Teschmaker, 24 Cal. 518; *German v. Benton*, 79 Mo. 148; *Central Agri. & Mechanical Asso. v. Alabama Gold L. Ins. Co.* 70 Ala. 120.

The construction which has been placed on the Ohio Constitution by the highest courts of Ohio is controlling in this court.

Luther v. Borden, 7 How. 1, 40, 12 L. ed. 581, 598; *Post v. Kendall County*, 105 U. S. 667, 26 L. ed. 1204; *Bucher v. Ches-*

hire R. Co. 125 U. S. 555, 581-584, 31 L. ed. 795, 798, 799, 8 Sup. Ct. Rep. 974.

The highest court of Ohio has held that § 3 of article 13 of the Ohio Constitution is not self-executing.

State ex rel. Atty. Gen. v. Sherman, 22 Ohio St. 411; *Rider v. Fritchey*, 49 Ohio St. 285, 15 L. R. A. 513, 30 N. E. 692; *Citizens' Bank v. Wright*, 6 Ohio St. 318.

Mr. Joseph Fettretch argued the cause and filed a brief for Hudson:

In several of the states where the same, or substantially the same, constitutional provision formed part of the law of the state, it has been held that such provisions were not self-executing, and that they did require legislation to determine the liability and the method of its enforcement.

Woodworth v. Bowles, 61 Kan. 569, 60 Pac. 331; *Tuttle v. National Bank*, 161 Ill. 497, 34 L. R. A. 750, 44 N. E. 984; *Marshall v. Sherman*, 148 N. Y. 9, 34 L. R. A. 757, 51 Am. St. Rep. 654, 42 N. E. 419; *Morley v. Thayer*, 3 Fed. 737. See also *Mechanics' Sav. Bank v. Fidelity Ins. Trust & S. D. Co.* 87 Fed. 113; *State Nat. Bank v. Sayward*, 86 Fed. 45, Affirmed in 33 C. C. A. 564, 63 U. S. App. 20, 91 Fed. 443; *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747, 30 L. ed. 825, 7 Sup. Ct. Rep. 757; *Ward v. Joslin*, 186 U. S. 142, 46 L. ed. 1093, 22 Sup. Ct. Rep. 897; *Evans v. Nellis*, 187 U. S. 271, 47 L. ed. 173, 23 Sup. Ct. Rep. 74; *Hale v. Allinson*, 188 U. S. 56, 47 L. ed. 380, 23 Sup. Ct. Rep. 244; *Platt v. Wilmot*, 193 U. S. 602, 48 L. ed. 809, 24 Sup. Ct. Rep. 542; *Cooley*, Const. Lim. 7th ed. p. 121.

Messrs. Charles N. Judson and William B. Hale submitted the cause for Ivison:

Whether or not a constitutional provision is self-executing depends upon the intention of the framers. A provision will be held to be self-executing only where there is a manifest intention that it shall go into immediate effect without the aid of any ancillary legislation.

6 Am. & Eng. Enc. Law, 2d ed. pp. 912, 915, title *Constitutional Law*; *Groves v. Slaughter*, 15 Pct. 449, 10 L. ed. 800; *Fusz v. Spaunhorst*, 67 Mo. 265; *Morley v. Thayer*, 3 Fed. 740; *Willis v. Mabon* (*Willis v. St. Paul Sanitation Co.*) 48 Minn. 150, 16 L. R. A. 281, 21 Am. St. Rep. 626, 50 N. W. 1110; *Tuttle v. National Bank*, 161 Ill. 502, 34 L. R. A. 750, 44 N. E. 984.

In *Barnes v. Wheaton*, 80 Hun, 8, 29 N. Y. Supp. 830, it was held that the Ohio constitutional provision here in question is not self-executing.

See also *Cleveland, L. & W. R. Co. v. Kent*, 87 Hun, 329, 34 N. Y. Supp. 427; *Nimick v. Mingo Iron Works Co.* 25 W. Va. 184; *Marshall v. Sherman*, 148 N. Y. 9, 34

L. R. A. 757, 51 Am. St. Rep. 654, 42 N. E. 419.

Every case in the Ohio reports down to the enactment of § 3260 was expressly based on the statutory liability created by § 3258, and not upon the constitutional provision. The discussion in these cases was always as to the remedy to enforce the statutory liability, and never as to the remedy for, or the existence of, a constitutional liability.

Wright v. McCormack, 17 Ohio St. 87; *Umsted v. Buskirk*, 17 Ohio St. 115; *Brown v. Hitchcock*, 36 Ohio St. 667; *Hawkins v. Iron Valley Furnace Co.* 40 Ohio St. 513; *Mason v. Alexander*, 44 Ohio St. 325, 7 N. E. 435.

As a general rule, constitutional provisions as to stockholders' liability are not self-executing.

6 Am. & Eng. Enc. Law, 2d ed. p. 915, title *Constitutional Law*; *Henley v. Stevenson*, 67 Kan. 4, 72 Pac. 518; *Woodworth v. Bowles*, 61 Kan. 569, 60 Pac. 331; *Marshall v. Sherman*, 148 N. Y. 9, 34 L. R. A. 757, 51 Am. St. Rep. 654, 42 N. E. 419; *Tuttle v. National Bank*, 161 Ill. 497, 34 L. R. A. 750, 44 N. E. 984; *Fowler v. Lamson*, 146 Ill. 478, 37 Am. St. Rep. 163, 34 N. E. 932; *Morley v. Thayer*, 3 Fed. 740; *French v. Teschemaker*, 24 Cal. 518; *Barnes v. Wheaton*, 80 Hun, 8, 29 N. Y. Supp. 830.

If the constitutional provision is not self-executing, we have the ordinary case of a statutory liability coupled with a statutory remedy. In such cases the remedy forms an inseparable part of the liability, and is exclusive.

Pollard v. Bailey, 20 Wall. 520, 22 L. ed. 376; *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747, 30 L. ed. 825, 7 Sup. Ct. Rep. 757; *Morley v. Thayer*, 3 Fed. 741.

Statutory remedies for the enforcement of of stockholder's liability have been universally held to be exclusive.

Evans v. Neilis, 187 U. S. 271, 47 L. ed. 173, 23 Sup. Ct. Rep. 74; *Hale v. Allinson*, 188 U. S. 56, 47 L. ed. 380, 23 Sup. Ct. Rep. 244; *Pollard v. Bailey*, 20 Wall. 520, 22 L. ed. 376; *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747, 30 L. ed. 825, 7 Sup. Ct. Rep. 757; *Morley v. Thayer*, 3 Fed. 737; *Nimick v. Mingo Iron Works Co.* 25 W. Va. 184; *Tuttle v. National Bank*, 161 Ill. 497, 34 L. R. A. 750, 44 N. E. 984; *May v. Black*, 77 Wis. 101, 45 N. W. 949; *Miller v. Smith* (R. I.) 66 L. R. A. 473, 58 Atl. 634; *Henley v. Stevenson*, 67 Kan. 4, 72 Pac. 518; *Waller v. Hamer*, 65 Kan. 168, 69 Pac. 185; *Barnes v. Wheaton*, 80 Hun, 8, 29 N. Y. Supp. 830; *Russell v. Pacific R. Co.* 113 Cal. 258, 34 L. R. A. 747, 45 Pac. 323; *Savings Asso. v. O'Brien*, 51 Hun, 45, 3 N. Y. Supp. 764; *Marshall v. Sherman*, 148 N. Y. 9, 34 L. R. A. 757, 51 Am. St. Rep. 654, 42 N. E. 419;

Cleveland, L. & W. R. Co. v. Kent, 87 Hun, 329, 34 N. Y. Supp. 427; *Howarth v. Angle*, 162 N. Y. 179, 47 L. R. A. 725, 56 N. E. 489.

But even if the constitutional provision were held to be self-executing, the legislature having acted and prescribed a remedy, that remedy is exclusive. So far as a statute does not contravene the Constitution, it has equal force and effect.

Whitman v. National Bank, 176 U. S. 559, 44 L. ed. 587, 20 Sup. Ct. Rep. 477; *Evans v. Nellis*, 187 U. S. 271, 47 L. ed. 173, 23 Sup. Ct. Rep. 74; *Hale v. Allinson*, 188 U. S. 56, 47 L. ed. 380, 23 Sup. Ct. Rep. 244; *Willis v. Mabon*, 48 Minn. 140, 16 E. R. A. 281, 31 Am. St. Rep. 626, 50 N. W. 1110; *Morley v. Thayer*, 3 Fed. 737.

Whichever of the statutory remedies existing at different times is applicable to this case, that remedy is exclusive. Accordingly a stockholder's liability cannot be enforced either within or without the state of Ohio, without compliance with the statutory provisions governing the remedy.

Fourth Nat. Bank v. Francklyn, 120 U. S. 758, 30 L. ed. 829, 7 Sup. Ct. Rep. 757; *Marshall v. Sherman*, 34 L. R. A. 757, note, 148 N. Y. 9, 51 Am. St. Rep. 654, 42 N. E. 419; *Jessup v. Carnegie*, 80 N. Y. 441, 36 Am. Rep. 643; *Viele v. Wells*, 9 Abb. N. C. 277; *Halsey v. McLean*, 12 Allen, 438, 90 Am. Dec. 157.

The liability under the Ohio statute cannot be enforced extraterritorially without first complying with the provisions of the Ohio statute governing the remedy.

Tuttle v. National Bank, 161 Ill. 497, 34 L. R. A. 750, 44 N. E. 984; *Marshall v. Sherman*, 148 N. Y. 9, 34 L. R. A. 757, 51 Am. St. Rep. 654, 42 N. E. 419; *Cleveland, L. & W. R. Co. v. Kent*, 87 Hun, 329, 34 N. Y. Supp. 427; *Savings Asso. v. O'Brien*, 51 Hun, 45, 3 N. Y. Supp. 764; *Morley v. Thayer*, 3 Fed. 737; *Russell v. Pacific R. Co.* 113 Cal. 258, 34 L. R. A. 747, 45 Pac. 323; *May v. Black*, 77 Wis. 101, 45 N. W. 949.

There are two classes of statutes making stockholders liable beyond their subscriptions for stock, for the debts of the corporation. One class imposes a primary and direct liability, such as partners are subject to towards the creditors of the firm, though limited in amount. The liability under this class of statutes may be enforced against a stockholder anywhere according to the laws of the forum.

Whitman v. National Bank, 176 U. S. 559, 44 L. ed. 587, 20 Sup. Ct. Rep. 477; *Miller v. Smith* (R. I.) 66 L. R. A. 473, 58 Atl. 634; *Zang v. Wyant*, 25 Colo. 551, 71 Am. St. Rep. 145, 56 Pac. 565; *Rhodes v. United States Nat. Bank*, 34 L. R. A. 742, 13 C. C. A. 612, 24 U. S. App. 607, 66 Fed. 512; *Flash v. Conn*, 109 U. S. 371, 27 L. ed.

966, 3 Sup. Ct. Rep. 263; *Savings Asso. v. O'Brien*, 51 Hun, 45, 3 N. Y. Supp. 764.

The second class of statutes, to which the Ohio statutes belong, provides only for contribution to a fund to be distributed by a court of equity among creditors generally. Under this class of statutes, the action must first be brought in the state where the corporation is located. Afterwards, nonresident stockholders may be sued in other jurisdictions to enforce the liability as ascertained in the original statutory proceeding.

Evans v. Nellis, 187 U. S. 271, 47 L. ed. 173, 23 Sup. Ct. Rep. 74; *Miller v. Smith* (R. I.) 66 L. R. A. 473, 58 Atl. 634; *Tuttle v. National Bank*, 161 Ill. 497, 34 L. R. A. 750, 44 N. E. 984; *Marshall v. Sherman*, 148 N. Y. 9, 34 L. R. A. 757, 51 Am. St. Rep. 654, 42 N. E. 419; *Barnes v. Wheaton*, 80 Hun, 8, 29 N. Y. Supp. 830; *Cleveland, L. & W. R. Co. v. Kent*, 87 Hun, 329, 34 N. Y. Supp. 427; *Nimick v. Mingo Iron Works Co.* 25 W. Va. 184; *Erickson v. Nesmith*, 4 Allen, 233; *Hale v. Hardon*, 37 C. C. A. 240, 95 Fed. 747; *State Nat. Bank v. Sayward*, 86 Fed. 45, Affirmed in 33 C. C. A. 564, 63 U. S. App. 20, 91 Fed. 443; *Hale v. Allinson*, 188 U. S. 56, 47 L. ed. 380, 23 Sup. Ct. Rep. 244.

Three cases decided by this court are practically decisive of the questions certified.

Whitman v. National Bank, 176 U. S. 559, 44 L. ed. 587, 20 Sup. Ct. Rep. 477; *Evans v. Nellis*, 187 U. S. 271, 47 L. ed. 173, 23 Sup. Ct. Rep. 74; *Hale v. Allinson*, 188 U. S. 56, 47 L. ed. 380, 23 Sup. Ct. Rep. 244.

The extraterritorial enforcement of the stockholders' liability under the Ohio laws has been sought in six cases. In four of these cases the suits failed because the Ohio statute had not been followed, and there had been no original proceeding in Ohio.

State Nat. Bank v. Sayward, 86 Fed. 45, Affirmed in 33 C. C. A. 564, 63 U. S. App. 34, 91 Fed. 443; *Nimick v. Mingo Iron Works Co.* 25 W. Va. 184; *Barnes v. Wheaton*, 80 Hun, 17, 29 N. Y. Supp. 830; *Cleveland, L. & W. R. Co. v. Kent*, 87 Hun, 329, 34 N. Y. Supp. 427.

In two cases the liability under the Ohio laws was enforced extraterritorially, but in each case the Ohio statute had been followed. An original statutory proceeding had been had in the courts of Ohio, and the foreign suits were brought by a receiver appointed in the original proceeding.

Kirtley v. Holmes, 52 L. R. A. 738, 46 C. C. A. 102, 107 Fed. 1; *Burr v. Smith*, 113 Fed. 858.

Mr. Arthur F. Cosby submitted the cause for *Clews et al.*:

The Constitution and statutes of Ohio must be taken together as making one body of law.

Whitman v. National Bank, 176 U. S. 559, 44 L. ed. 587, 20 Sup. Ct. Rep. 477; *Fourth Nat. Bank v. Francklyn*, 120 U. S. 758, 30 L. ed. 829, 7 Sup. Ct. Rep. 757; *Pollard v. Bailey*, 20 Wall. 520, 22 L. ed. 376; *Kirtley v. Holmes*, 52 L. R. A. 738, 46 C. C. A. 102, 107 Fed. 1; *State Nat. Bank v. Sayward*, 33 C. C. A. 564, 63 U. S. App. 20, 91 Fed. 443; *Hale v. Allinson*, 188 U. S. 56, 47 L. ed. 380, 23 Sup. Ct. Rep. 244; *Finney v. Guy*, 189 U. S. 335, 47 L. ed. 839, 23 Sup. Ct. Rep. 558.

The complainant should pursue the ordinary remedy by an original suit in Ohio.

Whitman v. National Bank, 176 U. S. 559, 44 L. ed. 587, 20 Sup. Ct. Rep. 477; *Hancock Nat. Bank v. Farnum*, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 506; *Evans v. Nellis*, 187 U. S. 271, 47 L. ed. 173, 23 Sup. Ct. Rep. 74; *Hale v. Allinson*, 188 U. S. 56, 47 L. ed. 380, 23 Sup. Ct. Rep. 244; *Hale v. Hardon*, 37 C. C. A. 240, 95 Fed. 747; *Finney v. Guy*, 189 U. S. 335, 47 L. ed. 839, 23 Sup. Ct. Rep. 558; *Elkhart Nat. Bank v. Northwestern Guaranty Loan Co.* 30 C. C. A. 632, 58 U. S. App. 83, 87 Fed. 252; *Kirtley v. Holmes*, 52 L. R. A. 738, 46 C. C. A. 102, 107 Fed. 1; *State Nat. Bank v. Sayward*, 86 Fed. 45, Affirmed in 33 C. C. A. 564, 63 U. S. App. 20, 91 Fed. 443.

The practice under the Ohio laws and decisions was not followed.

Umsted v. Buskirk, 17 Ohio St. 114; *Brown v. Hitchcock*, 36 Ohio St. 667; *Wheeler v. Faurót*, 37 Ohio St. 26; *Bullock v. Kilgour*, 39 Ohio St. 543; *Hawkins v. Iron Valley Furnace Co.* 40 Ohio St. 513; *Mason v. Alexander*, 44 Ohio St. 325, 7 N. E. 435; *Bonewitz v. Van Wert County Bank*, 41 Ohio St. 78; *Harpold v. Stobart*, 46 Ohio St. 397, 15 Am. St. Rep. 618, 21 N. E. 637; *Younglove v. Kelly Island Lime Co.* 49 Ohio St. 667, 33 N. E. 234; *Herrick v. Wardwell*, 58 Ohio St. 294, 50 N. E. 903; *Kulp v. Fleming*, 65 Ohio St. 321, 87 Am. St. Rep. 611, 62 N. E. 334.

Mr. John G. Milburn submitted the cause on behalf of Astor.

Mr. Justice Peckham, after making the foregoing statement, delivered the opinion of the court:

The questions propounded by the circuit court of appeals are the following:

First. Whether art. 13, § 3, of the Constitution of Ohio is so far self-executing that it may be enforced outside of the jurisdiction of said state without compliance with said requirements of § 3260 of the Revised Statutes of said state as amended in 1894.

Second. Whether art. 13, § 3, of the Constitution of Ohio is so far self-executing that it may be enforced outside of the jurisdiction of said state without compliance

with said requirements of § 3260 of the Revised Statutes of said state as amended in 1900.

The counsel for the complainant contends that the article of the Ohio Constitution, above set forth, is self-executing to the extent of declaring the general contractual obligation and the general rule as to property rights; and it is insisted that the liability of the stockholders in the railway corporation may be enforced by the courts of another jurisdiction without compliance with the requirements of any of the statutes which have been passed by the legislature of Ohio in regard to the enforcement of the liability provided for in the Constitution. These statutes, it is said, refer only to the form and mode of procedure in local courts, and neither of them contains any limitation or condition imposed upon the substantive right declared by the Constitution, as construed and enforced by the Ohio courts for many years prior to the statutory enactments.

We have not been referred to any decision of the Ohio supreme court directly involving the question whether the provision of the Constitution referred to is self-executing or not. If there were any such decision we should follow it. That court has, however, regarded the liability of stockholders as statutory in its nature, as is seen from its decisions in the cases hereinafter cited.

The question has arisen in some of the other states regarding this same provision, and it has been held to be not self-executing. *Barnes v. Wheaton*, 80 Hun, 8, 29 N. Y. Supp. 830. In that case it was held by the appellate division that it was obvious that the provision was not self-executing, but its purpose was to confer upon the legislature the power and impose upon it the duty of securing dues from corporations by imposing upon the stockholders of such corporations as are organized under the laws of that state an individual liability, and by such other means as, in its discretion, it should deem proper, but limiting such power and discretion by the provision that each stockholder should be made liable to an amount at least equal to the amount of stock held by him. This provision was not regarded as imposing a liability independent of the statute, nor as conferring upon the plaintiff any right to maintain the action then before the court. It has been held substantially to the same effect in *Nimick v. Mingo Iron Works Co.* 25 W. Va. 184.

But whether the constitutional provision might be regarded as, to a certain extent, self-executing in the absence of any statute on the subject, we find that the legislature of

Ohio has passed statutes to enforce such liability. The cases of *Wright v. McCormack*, 17 Ohio St. 86, and *Umsted v. Buskirk*, 17 Ohio St. 113, were both brought under a statute enacted to provide a method for enforcing the constitutional liability, and in the former case the courts speaks of the liability of the stockholders as a "statutory liability," and of the statute itself as a

[405] "statute *under which the liability arises." That was an early statute, passed not long after the adoption of the constitutional provision, and for the purpose of executing it. 50 Ohio Laws, 296, passed May 1, 1852. *Wright v. McCormack* was approved in *Umsted v. Buskirk*, 17 Ohio St. 113. Subsequent statutes were passed for the same purpose of enforcing the liability of stockholders, and those set out in the record not only definitely state the liability, but give the procedure and provide the remedy in order to enforce it. It will be seen that the constitutional provision refers in terms to the securing of dues from corporations by the individual liability of stockholders, and by such other means as may be prescribed by law. The Constitution evidently looks to the legislature for providing means. A statute which is passed in pursuance of such a provision, and which itself provides for the procedure and states the remedy, even though imposing no limit or conditions in regard to such liability other than such as are found in the constitutional provision itself, is, nevertheless, a statute providing a remedy which is to be followed within the principle sustained by the authorities cited below. The statute, under such circumstances, may be said to so far provide for the liability and to create the remedy as to make it necessary to follow its provisions and to conform to the procedure provided for therein. See *Pollard v. Bailey*, 20 Wall. 520, 526, 22 L. ed. 376, 378; *Fourth Nat. Bank v. Franklyn*, 120 U. S. 747, 756, 758, 30 L. ed. 825, 829, 7 Sup. Ct. Rep. 757; *Evans v. Nellis*, 187 U. S. 271, 47 L. ed. 173, 23 Sup. Ct. Rep. 74; *Morley v. Thayer*, 3 Fed. 737, circuit court, district of Massachusetts; *Cleveland, L. & W. R. Co. v. Kent*, 87 Hun, 329, 34 N. Y. Supp. 427; *Nimick v. Mingo Iron Works Co.* 25 W. Va. 184. In *Fourth Nat. Bank v. Franklyn*, 120 U. S. 747, 756, 758, 30 L. ed. 825, 829, 7 Sup. Ct. Rep. 757. Mr. Justice Gray, speaking for this court, said: "In all the diversity of opinion in the courts of the different states, upon the question how far a liability imposed upon stockholders in a corporation by the law of the state which creates it can be pursued in a court held beyond the limits of that state, no case has been found in which such a liability has been enforced by any court without a compliance with

the conditions *applicable to it under the [406] legislative acts and judicial decisions of the state which creates the corporation and imposes the liability. To hold that it could be enforced without such compliance would be to subject stockholders residing out of the state to a greater burden than domestic stockholders." In order to comply with the conditions of the statute of Ohio it seems plain from the provisions of the statute that the action must be brought in that state.

In the case now before us the complainant has paid no attention to the statutes of Ohio, so far as bringing suit in that state is concerned, and therefore has not followed the provisions contained in them. It has commenced no action in the state of Ohio, but, on the contrary, assumes to ask the Federal circuit court in New York state to administer the relief asked for in its bill, against stockholders who are residents of New York, the same as if the suit had been commenced in Ohio. This, we think, the complainant could not do. By the terms of the Ohio statute, properly construed, the remedy must be pursued in the courts of that state. The case of a plaintiff failing to obtain satisfaction of his judgment by following, in Ohio, the remedies given by the Ohio statute, is not before us, and we need not determine the character of any other remedy, or where it may be enforced.

We therefore answer the first question in the negative. It is unnecessary to answer the second question. The answer will be certified to the Circuit Court of Appeals for the Second Circuit.

So ordered.

*PENNSYLVANIA LUMBERMEN'S MUTUAL FIRE INSURANCE COMPANY

v.

CHARLES C. MEYER.

(See S. C. Reporter's ed. 407-419.)

Federal courts — jurisdiction of action against foreign corporation — validity of service of summons on resident director.

1. A foreign insurance company is doing business within the state, so far as the question of the power of a Federal court, sitting in that state, to obtain jurisdiction over such corporation, is concerned, where, under the terms of its policies covering property in that state, it sends its agents there to adjust losses.

NOTE.—As to service of process on foreign corporations—see notes to *Foster v. Charles Betcher Lumber Co.* 23 L. R. A. 490; and *Eldred v. Americau Palace-Car Co.* 45 C. C. A. 3.

As to service on state officer as service on foreign corporation—see note to *Mutual Reserve Fund Life Assn. v. Phelps*, 47 L. ed. U. S. 987.

2. A cause of action founded on a loss of the property covered by a policy of insurance issued by a foreign corporation arises within the state, within the meaning of the provision for service of summons on foreign corporations contained in N. Y. Code Civ. Proc. § 432, subd. 3. where the property insured was situated in that state, the loss was to be adjusted there, and the company, in case of loss, was given the option of payment or of repairing or rebuilding.
3. Service of summons within the state on a resident director of a foreign insurance company, as provided by N. Y. Code Civ. Proc. § 432, subd. 3, when the cause of action arises therein, is a valid service if the company is doing business in the state, and confers jurisdiction on a Federal court sitting in that state.

[No. 182.]

Argued March 14, 15, 1905. Decided April 3, 1905.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Second Circuit, presenting a question as to the validity of the service of summons on a resident director of a foreign insurance company. *Answered in the affirmative.*

Statement by Mr. Justice **Peckham**:

Meyer, the plaintiff below, recovered judgment in the United States circuit court for the western district of New York, against the corporation defendant, for five thousand and some odd dollars, upon policies of fire insurance issued by it upon certain buildings (and the machinery therein) in the city of Rochester, in the state of New York. The corporation sought to obtain a review of the judgment, and to that end sued out a writ of error, and the case was brought before the court of appeals for the second circuit, which has certified certain facts upon which it desires the opinion of this court. These facts are as follows:

The action was commenced in the supreme court of the state of New York by service of the summons on Samuel H. Beach, at the city of Rome, New York, a director of the company, who resided in that city, and, on application of the company, appearing specially, the case was removed into the United States circuit court for the western district of New York, because of diverse citizenship of the parties. By motion, on special appearance, to set aside the service, by plea, exception, and assignment of error, the question as to whether jurisdiction of the company had been obtained by such service has been properly raised.

The defendant in error is, and at the time of the commencement of this action was, a citizen and resident of the state of New York. The plaintiff in error is a fire-in-

surance corporation, organized under the laws of the state of Pennsylvania, and its office is in Philadelphia. Written applications were duly made to it for the issuance of the policies in suit, and were mailed from Rochester, New York, to the company, at Philadelphia, Pennsylvania. The policies were made out and executed by it at Philadelphia, and were sent to the insured at Rochester, New York, where he received the same. All transactions between the company and said insured, subsequent to the issuance of said policies, and until after the destruction of said property by fire, were by correspondence, in writing from Philadelphia to him, at Rochester, and he, writing from Rochester, to it, in Philadelphia.

Three of the said company's thirteen directors reside in the state of New York, but the only act done by them for it is to attend, from time to time, the meetings of the board of directors, which are held in the city of Philadelphia, and there to give such advice and take such action in connection with its business as may seem to them proper. They perform no duties and do no acts for the company in the state of New York, and never have. The company has no agents or officers within that state, and has not had at any time. It has no office within that state, has never been authorized or licensed by the insurance department thereof to do business therein, and has not taken the steps required by law for that purpose. At the date of the service of the summons, as aforesaid, the said company had and now has about nine hundred thousand dollars (\$900,000) outstanding insurance on property within the state of New York, which is something less than one third of its total risks. The applications therefor were made by mail, addressed to it at Philadelphia, and the policies were executed and issued at that city, and sent by mail from there to the insured within the state of New York.

Ever since the plaintiff in error was incorporated it has been engaged in the business of insuring property located in the state of New York and other states against loss by fire, and has sent by mail circulars from Philadelphia into said state, soliciting business. In the prosecution of its business, and for the purpose of increasing it, the company sends its general manager to the different conventions of lumbermen held in the state of New York, for the purpose of urging upon those attending upon such conventions the advantages of insuring with it. It sends its adjusters into the state of New York when a loss by fire occurs there to property insured by it, for the purpose of adjusting the amount of such loss. It originally placed insurance upon the property

covered by the policies in question after its manager had pointed out the advantage of insuring in the company, the conversation being had at the city of Rochester, in that state.

Mr. Frank P. Prichard argued the cause and filed a brief for the insurance company:

In order to give a Federal court jurisdiction in a suit against a corporation foreign to the state within whose borders the suit is brought, two facts must be shown, viz.:

First. That the foreign corporation is carrying on business within the state.

Second. That the corporation is properly brought into court by service upon an officer or agent who can fairly be said to be its representative agent within the state.

St. Clair v. Cox, 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 354; *Connecticut Mut. L. Ins. Co. v. Spratley*, 172 U. S. 602, 43 L. ed. 569, 19 Sup. Ct. Rep. 308.

The residence in a state of directors of a foreign corporation does not give the corporation a domicile in the state, or constitute the carrying on of business there.

Conley v. Mathieson Alkali Works, 190 U. S. 406, 47 L. ed. 1113, 23 Sup. Ct. Rep. 728.

The mere fact that the contracts made in the home state relate to property or persons in the foreign state does not make the execution and performance of such contracts the doing of business in such foreign state.

Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *United States v. American Bell Teleph. Co.* 29 Fed. 17; *Marine Ins. Co. v. St. Louis, I. M. & S. R. Co.* 41 Fed. 643; *Sullivan v. Sheehan*, 89 Fed. 247; *Hyde v. Goodnow*, 3 N. Y. 266; *Huntley v. Merrill*, 32 Barb. 626; *Cummer Lumber Co. v. Associated Mfrs. Mut. F. Ins. Co.* 67 App. Div. 151, 73 N. Y. Supp. 668, Affirmed in 173 N. Y. 633, 66 N. E. 1106; *Scamans v. Knapp-Stout & Co. Co.* 89 Wis. 171, 27 L. R. A. 362, 46 Am. St. Rep. 825, 61 N. W. 757; *Clay F. & M. Ins. Co. v. Huron Salt & Lumber Mfg. Co.* 31 Mich. 346; *New Orleans v. Rhenish Westphalian Lloyds*, 31 La. Ann. 781; *State v. Williams*, 46 La. Ann. 922, 15 So. 290.

In the cases in which this court has sustained findings that a foreign corporation was doing business in a state, the decision has always rested on the fact that the business was being actually conducted in the state by agents of the corporation, and not on the fact that the contracts related to property within the state.

Connecticut Mut. L. Ins. Co. v. Spratley, 172 U. S. 602, 43 L. ed. 569, 19 Sup. Ct.

Rep. 308; *Chattanooga Nat. Bldg. & L. Asso. v. Denson*, 189 U. S. 408, 47 L. ed. 870, 23 Sup. Ct. Rep. 630.

The sending of adjusters into New York to adjust the amount of loss was not doing business in the state.

Sullivan v. Sheehan, 89 Fed. 247; *People ex rel. McCall v. Gilbert*, 44 Hun, 522; *French v. People*, 6 Colo. App. 311, 40 Pac. 463.

The solicitation of business by mail circulars, and the advertising of the merits of the company by its manager while attending conventions, are not doing business within the state.

Carpenter v. Westinghouse Air-brake Co. 32 Fed. 434.

Was the service on a resident director who had no duties and performed no acts in the state for the corporation, a sufficient service?

St. Clair v. Cox, 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 354; *Schmidlaff v. La Confiance Ins. Co.* 71 Ga. 246; *Clark & M. Priv. Corp.* § 690; *Goldey v. Morning News*, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559; *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 47 L. ed. 1113, 23 Sup. Ct. Rep. 728; *Barrow S. S. Co. v. Kane*, 170 U. S. 100, 42 L. ed. 964, 18 Sup. Ct. Rep. 526; *Connecticut Mut. L. Ins. Co. v. Spratley*, 172 U. S. 602, 43 L. ed. 569, 19 Sup. Ct. Rep. 308.

The right to appeal to the Federal courts, and the right to be exempt from suit and judgment except by due process of law, are rights which cannot be taken away from a corporation simply because it is doing business within a state. It may be that the state can expel the corporation from its borders, but it cannot oust the jurisdiction of the Federal courts, or compel those courts to give judgment where there has been no real service.

Cable v. United States L. Ins. Co. 191 U. S. 288, 48 L. ed. 188, 24 Sup. Ct. Rep. 74; *Barron v. Burnside*, 121 U. S. 186, 30 L. ed. 915, 1 Inters. Com. Rep. 295, 7 Sup. Ct. Rep. 931.

If the New York statute is to be construed as authorizing a service upon a person who, under the decisions of this court, is not really its representative, then it amounts to a provision that, if the corporation does business within the state, it shall submit to judgments against it without due process of law. This, it is submitted, is beyond the power of the state.

Frawley v. Pennsylvania Casualty Co. 124 Fed. 259.

Mr. Heman W. Morris argued the cause and filed a brief for Meyer:

In contracts for the payment of money, if the instrument is silent as to the place

of payment, it is the duty of the debtor to seek out the creditor and make payment to him at his place of residence.

Sanderson v. Boues, 14 East, 507; *Hale v. Patton*, 60 N. Y. 233, 19 Am. Rep. 168; *Dockham v. Smith*, 113 Mass. 320, 18 Am. Rep. 495.

Immediately upon the happening of the loss, the loss of the assured, to the extent of the amount insured, becomes a debt against the company which it is bound to discharge as other debts are discharged.

Wood, Fire Ins. 2d ed. 322.

The contract represented by a fire insurance policy is, in case of a loss under it, to be performed on the part of the company where the insured property is situated and the loss occurs.

LaFayette Ins. Co. v. French, 18 How. 404, 15 L. ed. 451; *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357.

The cause of action in this case arose in the state of New York, and under the laws of that state the state court acquired jurisdiction of the plaintiff in error by the service of the summons on one of its directors within the state.

Childs v. Harris Mfg. Co. 104 N. Y. 477, 11 N. E. 50; *Ithaca Fire Department v. Beecher*, 99 N. Y. 429, 2 N. E. 154; *Griesa v. Massachusetts Ben. Asso.* 39 N. Y. S. R. 1, 15 N. Y. Supp. 71; *Fidelity Mut. Life Asso. v. Ficklin*, 74 Md. 172, 21 Atl. 680, 23 Atl. 197; *Burckle v. Eckhart*, 3 N. Y. 132.

As to whether the service of process issued by a state court will be deemed sufficient under the laws of that state, the decisions of the highest courts of the state on that point will be regarded as controlling upon the Federal courts.

Ex parte Schollenberger, 96 U. S. 369, 24 L. ed. 853; *New England Mut. L. Ins. Co. v. Woodworth*, 111 U. S. 146, 28 L. ed. 381, 4 Sup. Ct. Rep. 364; *Amy v. Watertown*, 130 U. S. 301, 32 L. ed. 946, 9 Sup. Ct. Rep. 530.

The plaintiff in error was doing business in the state of New York at the time the cause of action accrued, and also at the time the action was commenced.

Connecticut Mut. L. Ins. Co. v. Spratley, 172 U. S. 602, 43 L. ed. 569, 19 Sup. Ct. Rep. 308; *New York v. Hamilton F. Ins. Co.* 39 N. Y. 45, 100 Am. Dec. 400; *LaFayette Ins. Co. v. French*, 18 How. 404, 15 L. ed. 451; *Ex parte Schollenberger*, 96 U. S. 369, 24 L. ed. 853; *Baltimore & O. R. Co. v. Koontz*, 104 U. S. 10, 26 L. ed. 643; *Chattanooga Nat. Bldg. & L. Asso. v. Denson*, 189 U. S. 408, 47 L. ed. 870, 23 Sup. Ct. Rep. 630; *New Haven Pulp & Board Co. v. Downingtown Mfg. Co.* 130 Fed. 605; *Firemen's Ins. Co. v. Thompson*, 155 Ill. 197 U. S.

204, 46 Am. St. Rep. 335, 40 N. E. 488; *Barrow S. S. Co. v. Kane*, 170 U. S. 100, 42 L. ed. 964, 18 Sup. Ct. Rep. 526.

In every case where service upon an officer or a director of a foreign corporation has been set aside, it has been on the ground that the corporation was not doing business in the state, and never upon the ground that the officer or director, not being there engaged in the company's business, was not a proper representative of the company upon whom service could be made.

St. Clair v. Cox, 106 U. S. 353, 27 L. ed. 223, 1 Sup. Ct. Rep. 354; *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 47 L. ed. 1113, 23 Sup. Ct. Rep. 728.

Directors are deemed proper officers on whom service of process against a corporation may be made.

Hiller v. Burlington & M. River R. Co. 70 N. Y. 223; *Childs v. Harris Mfg. Co.* 104 N. Y. 477, 11 N. E. 50.

In actions in the state courts against foreign corporations, where the corporation is found within the state for the purposes of the suit, jurisdiction on it may be obtained by service of process upon an officer, director, or agent of the corporation, in the manner provided by the laws of the state, with the exception that if the laws authorize service on an agent it must be one who represents the corporation in the state.

New England Mut. L. Ins. Co. v. Woodworth, 111 U. S. 146, 28 L. ed. 381, 4 Sup. Ct. Rep. 364; *Amy v. Watertown*, 130 U. S. 301, 32 L. ed. 946, 9 Sup. Ct. Rep. 530.

Mr. Justice **Peckham**, after making the foregoing statement, delivered the opinion of the court:

Upon the facts thus certified the circuit court of appeals asks the question: "Had the circuit court jurisdiction of the plaintiff in error?"

In addition to the facts contained in the foregoing certificate, the counsel for the respective parties stipulated upon the argument in this case before this court that a copy of one of the policies on which suit was brought in this case was correctly set out in the printed record in the circuit court of appeals, and that this court might consider and decide the case with the same effect as if, in the statement of facts accompanying the question certified by the circuit court of appeals, that court had found and certified the additional fact that the record in the circuit court of appeals contained a true copy of one of the policies, and that the others sued upon were in the same form and language as the one set out in that record.

The policies in suit were issued upon a two-story frame sawmill building and addi-

tions, and also upon engines and boilers and other machinery placed in that building, situated on Monroe avenue, in the city of Rochester, state of New York. The policies provide that the company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and that such loss or damage is to be ascertained or estimated according to such actual cash value, with proper deduction for depreciation, however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; the assessment or estimate is to be [413] made by the insured *and the company; if they differ as to the amount of loss, the same is to be ascertained by two competent and disinterested appraisers, the insured and the company each selecting one, and the two so chosen are to select a competent and disinterested umpire; the appraisers together are to estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, they are to submit their differences to the umpire; and the award in writing of any two shall determine the amount of the loss. After the amount of the loss or damage has been thus determined, the sum for which the company is liable is payable in sixty days. It is optional with the company to repair, rebuild, or replace the property lost or damaged with other of like kind and quality, within a reasonable time, as provided for in the policy.

In order that a Federal court may obtain jurisdiction over a foreign corporation, the corporation must, among other things, be doing business within the state. *St. Clair v. Cox*, 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 354; *Goldney v. Morning News*, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559; *Barrow S. S. Co. v. Kane*, 170 U. S. 100, 42 L. ed. 964, 18 Sup. Ct. Rep. 526; *Connecticut Mut. L. Ins. Co. v. Spratley*, 172 U. S. 602, 43 L. ed. 569, 19 Sup. Ct. Rep. 308.

To obtain jurisdiction of a foreign corporation under the Code of New York, personal service of the summons upon and a delivery to the defendant must be made in the manner designated by § 432 of the Code of Civil Procedure of that state. Subdivision 1 of that section provides for the service of the summons on and its delivery to the president, treasurer, or secretary; subdivision 2 provides for like service upon and delivery to a person designated for the purpose by the corporation. The service was made in this case under subdivision 3 of that section, which reads as follows:

3. "If such a designation is not in force,

or if neither the person designated nor an officer specified in subdivision first of this section can be found with due diligence, and the corporation has property within the state, or the cause of action arose therein, to the cashier, a director, or a managing agent of the corporation within the state."

*It does not appear that the company had [414] any property within the state, and therefore, in order to come within subdivision (3) of the section, the cause of action must have arisen therein, and the summons must have been served within the state upon one of the officers named in that subdivision; viz., the cashier, a director, or a managing agent of the corporation.

(1) Was the company doing business in New York state? Nearly one third of the amount of its total fire risks was in that state when these policies were issued and when the loss occurred. If it be conceded that the contract was made in Philadelphia, it does not follow that all its business was therefore done in the state of Pennsylvania. The contract was an insurance policy issued upon real estate and machinery in a building situated in the city of Rochester, in New York. The contract was to pay the amount of loss which might be sustained by fire, as specified in the policy. The policy provides for the manner of determining the amount of this loss, either by agreement between the company and the owner, or, in case of disagreement, then by the appraisers, as already stated. The provisions of the contract clearly contemplate the presence of an agent of the company at the place of the loss after it has occurred, for the purpose of determining its extent, and adjusting, if possible, the amount payable by the company to the owner. If no such adjustment can be made, the policy provides in terms for the appointment of appraisers, one by the company and one by the owner, and that they disagreeing, an umpire shall be appointed, and the agreement by any two shall be binding. After that, the loss is payable to the owner by the company within sixty days. As the policy insures against loss, it of course contemplates that such loss may occur; and it also contemplates that the company shall send to the place where the loss occurred, that is, to New York, its agent, for the purpose stated. When, under the terms of the contract, the company sends its agent into the state where the property was insured, and where the loss *occurred, for [415] the purpose of adjustment, it would seem plain that it was then doing the business contemplated by its contract, within the state. A fire-insurance company which issues its policies upon real estate and personal property situated in another state is as much engaged

in its business when its agents are there under its authority, adjusting the losses covered by its policies, as it is when engaged in making contracts to take such risks. If not doing business in such case, what is it doing? It is doing the act provided for in its contract, at the very place where, in case a loss occurred, the company contemplated the act should be done; and it does it in furtherance of the contract, and in order to carry out its provisions, and it could not properly be carried out without this act being done; and the contract itself is the very kind of contract which constituted the legal business of the company, and for the purpose of doing which it was incorporated. This is not a sporadic case, nor the contracts in suit the only ones of their kind issued upon property within the state of New York. Many contracts of the nature of the one in suit were entered into by the company, covering property within the state. We think it would be somewhat difficult for the defendant to describe what it was doing in New York, if it was not doing business therein, when sending its agents into that state to perform the various acts of adjustment provided for by its contracts, and made necessary to carry them out.

We have no difficulty in concluding that the defendant was doing business in the state of New York during all the time of the existence of these policies.

(2) Did the cause of action arise within that state? Although the contract may have been a Pennsylvania contract, yet it does not follow that all its provisions were to be carried out in that state. The policy of insurance was, as we have said, upon real estate within the state of New York, and upon machinery contained in the buildings insured. After the defendant and the owner had either agreed upon the amount of loss, or the same had been estimated and determined

[416] upon by *the appraisers, as provided for in the policy, the defendant, by the terms of that instrument, promised to pay to the owner the amount thus arrived at, within sixty days. The policy does not state in so many words where such payment is to be made, but it is a general rule that, in the absence of any such provision, or of any language from which a different inference may be inferred, the right of the creditor to demand payment at his own domicile exists, and it is the duty of the debtor to pay his debt to the creditor in that way. It is stated in the opinion of this court, by Mr. Justice Field, in *State Tax on Foreign-held Bonds* (*Cleveland, P. & A. R. Co. v. Pennsylvania*), 15 Wall. 300, 320, 21 L. ed. 179, 187: "All the property there can be in the nature of things in debts of corpora-

tions belongs to the creditors, to whom they are payable, and follows their domicile, wherever that may be. Their debts can have no locality separate from the parties to whom they are due. This principle might be stated in many different ways, and supported by citations from numerous adjudications, but no number of authorities, and no forms of expression, could add anything to its obvious truth, which is recognized upon its simple statement." It is stated in 2 *Parsons on Contracts*, 8th ed. 702, as follows: "All debts are payable everywhere, unless there be some special limitation or provision in respect to the payment; the rule being that debts as such have no *locus* or *situs*, but accompany the creditor everywhere, and authorize a demand upon the debtor everywhere." See also *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797. In *Hale v. Patton*, 60 N. Y. 233, 236, 19 Am. Rep. 168, Andrews, J., in delivering the opinion of the court, said: "In general, a debtor who is indebted on a money obligation is bound, if no place of payment is specified in the contract, to seek the creditor, and make payment to him personally. But this rule is subject to the exception that if the creditor is out of the state when payment is to be made, the debtor is not obliged to follow him, but readiness to pay within the state in that case will be as effectual as actual payment to save a forfeiture. Co. Litt. 304, 2; *Smith v. Smith*, 25 Wend. 405; *Allshouse v. Ramsay*, 6 Whart. *331, 37 Am. Dec. 417; [417] *Southworth v. Smith*, 7 Cush. 391; *Tasker v. Bartlett*, 5 Cush. 359." And the same views in *Dockhan v. Smith*, 113 Mass. 320, 18 Am. Rep. 495. The exception as to the creditor being out of the state, spoken of by Judge Andrews, refers to the subsequent absence of the creditor from the state which was his domicile when the contract was there made.

In some other of the cases above cited, it is said the debtor need not follow the creditor out of the state where the contract was made in order to pay or make tender of payment of the debt. That depends upon the contract, and what inference of the place of payment may be drawn from its contents, when it does not state in so many words where payment is to be made. Where the debtor is a fire-insurance company, and makes such a contract as the policies in suit, and it is engaged in doing business by insuring property outside the state of its creation, and makes provision such as is made in this case for payment or for rebuilding or repairing, we think the place of payment in contemplation of the parties, and to be inferred from the facts set forth,

is at the domicile of the creditor, in the state where the property insured was situated.

Instead of making payment for the loss sustained by fire, the defendant had the option of repairing or rebuilding. If it availed itself of that right, of course it would have to rebuild at the place where the loss occurred. So far as appears from the statement of facts, the defendant has failed to make payment, and has also failed to avail itself of its option to rebuild. The payment, we think, was to be made at the same place where the rebuilding was to be done, in case the defendant availed itself of its right to rebuild; that is, within the state of New York, where the loss occurred. Failing to make payment, or failing to build or repair, it failed to comply with the terms of its contract, and out of that failure the cause of action arose in the state of New York.

(3) We think the service of the summons within the state of New York upon a director residing in that state was, under the facts of this case, a good service. As is [418] seen, the company *was doing business within the state, and the cause of action arose therein, and, in such a case, service upon a director residing in the state was sufficient. There is nothing in the cases of *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 47 L. ed. 1113, 23 Sup. Ct. Rep. 728, and *Geer v. Mathieson Alkali Works*, 190 U. S. 428, 47 L. ed. 1122, 23 Sup. Ct. Rep. 807, to the contrary. The first of the above-cited cases seems rather to assume that if the company were doing business in the state, the service on a resident director would have been good. Although it is stated in the case at bar that the duties of a director of this defendant were to be performed at Philadelphia, where the board of directors met, yet that fact is not material in this case. A foreign fire-insurance corporation doing business within another state, and voluntarily electing a part of its directors from among those who are residents of such state, may be said, from that very fact, to add to the confidence of possible insurers with the company in that state, and in that way to secure more business therein than would otherwise be the case. Although doing no particular act in the state for this company, such directors are, nevertheless, members of and policy holders therein, and are a part of the governing body of the company, and are, by their position, so far representative thereof as, in our judgment, to render service of process upon them in the state of their residence, when the company is doing business therein, a good service upon the company itself. Service upon them, it may be assumed, would certainly result in notice to the company it-

self, which is at least one of the reasons for holding a service on an agent good.

It would be most unwise to hold, upon the facts herein stated, that a person who suffered loss under a policy of insurance could only obtain redress, when refused by the company, in the courts of the state where the company was incorporated. It is not unreasonable for the state, under such facts, to endeavor to secure to its citizens a remedy in the domestic forum upon this very important class of contracts. *Lafayette Ins. Co. v. French*, 18 How. 404, 407, 15 L. ed. 451, 452. And we have no doubt that if it were generally understood by *policy [419] holders in states other than the state where the company was created that resort for the enforcement of their rights must, in all cases, be had to the courts of the state of the creation of the company, even though the company did business in such other states, the number of policy holders in the other states would seriously fall off.

The service of the summons was, in our judgment, a good service on the company, and we therefore answer the question of the *Circuit Court of Appeals in the affirmative*; and it is so ordered.

Mr. Justice Harlan took no part in the decision of this case.

FREDERIC W. LINCOLN, Henry W. Peabody, John R. Bradlee, and Charles D. Barry, Trading as Copartners under the Firm Name and Style of Henry W. Peabody & Company, *Plffs. in Err.*,

v.

UNITED STATES. (No. 149.)

WARNER, BARNES, & COMPANY, Limited, *Appt.*,

v.

UNITED STATES. (No. 466.)

(See S. C. Reporter's ed. 419-429.)

Duties—on imports to Manila—scope of President's order—ratification.

1. The existence of an armed insurrection of the natives in the Philippine Islands after the ratification of the treaty of peace with Spain did not justify the exaction of duties on imports from the United States into Manila after that date, under an order of the President issued during the Spanish-American war, that "on the occupation of any forts and places in the Philippine Islands by the forces of the United States" the duties shall be levied and collected "as a military contribution."
2. The collection of duties on imports to Manila, which was not authorized by the Presi-

dent's order of July 12, 1898, after the ratification of the treaty of peace with Spain, was not ratified by the act of July 1, 1902, § 2 (32 Stat. at L. 691, 692, chap. 1369, U. S. Comp. Stat. Supp. p. 242), ratifying such order and the action of the Federal authorities taken in accordance with its provisions.

[Nos. 149, 466.]

Argued March 3, 1905. Decided April 3, 1905.

IN ERROR to the District Court of the United States for the Southern District of New York to review a judgment dismissing a suit to recover duties exacted on imports from New York to Manila after the ratification of the treaty of peace with Spain. *Reversed.* Also an—

APPEAL from the Court of Claims to review the dismissal of a petition which sought to recover other duties exacted under similar circumstances. *Reversed.*

The facts are stated in the opinion.

Messrs. Paul Fuller, Frederic R. Coudert, Jr., and Henry M. Ward argued the cause and filed a brief for plaintiffs in error and appellant:

Manila was not hostile territory, and the possession and sovereignty of the United States were complete.

De Lima v. Bidwell, 182 U. S. 1, 180, 45 L. ed. 1041, 1049, 21 Sup. Ct. Rep. 743.

The President had not the power, after the ratification of the treaty, to collect the duties involved in these cases.

Dooley v. United States, 182 U. S. 222, 45 L. ed. 1074, 21 Sup. Ct. Rep. 762.

This court has decided that the language of the order under which these duties were collected did not authorize their collection after the ratification of the treaty.

Dooley v. United States, 182 U. S. 235, 45 L. ed. 1081, 21 Sup. Ct. Rep. 762.

There is no legal distinction between the status of Manila at the time of the exaction of these duties, and that of Porto Rico prior to the passage of the Foraker act.

Fourteen Diamond Rings v. United States (The Diamond Rings) 183 U. S. 176, 46 L. ed. 138, 22 Sup. Ct. Rep. 59.

The contention of the government and ruling of the court of claims that Manila was "hostile territory" after the ratification is wholly unsound.

Prize Cases, 2 Black, 635, 673, 674, 17 L. ed. 459, 478, 479; *Coleman v. Tennessee*, 97 U. S. 517, 24 L. ed. 1122; Birkhimer, Military Government & Martial Law, p. 53; *United States v. Rice*, 4 Wheat. 246, 254, 4 L. ed. 562, 564; *United States v. Hayward*, 2 Gall. 485, Fed. Cas. No. 15,336; *Fourteen Diamond Rings v. United States (The Dia-*
197 U. S.

mond Rings) 183 U. S. 176, 46 L. ed. 138, 22 Sup. Ct. Rep. 59.

Messrs. Hillary A. Herbert and Benjamin Micou filed a brief for certain claimants having interests similar to those of appellant in No. 466.

Solicitor General Hoyt argued the cause and filed a brief for the United States:

Not until after the formal declaration of the end of the insurrection did hostilities die out in sporadic instances of ladronism or brigandage. The facts are found and are irresistible. Indeed, they are patent to the knowledge of all as part of history. The court will take judicial notice of such events.

Brown v. Piper, 91 U. S. 37, 23 L. ed. 200; *The Delaware*, 161 U. S. 472, 40 L. ed. 776, 16 Sup. Ct. Rep. 516; *New York Indians v. United States*, 170 U. S. 32, 42 L. ed. 938, 18 Sup. Ct. Rep. 531; *United States v. Rio Grande Dam & Irrig. Co.* 174 U. S. 698, 43 L. ed. 1139, 19 Sup. Ct. Rep. 770.

In the absence of any laws of Congress on this subject, the regulating and collecting of such revenues in enemy's territory in the possession of the United States devolves upon the President, as the constitutional Commander in Chief, and upon the military and naval officers under his direction.

2 Halleck, International Law, 3d ed. pp. 445-449.

These doctrines apply equally to foreign and civil wars.

Matthews v. McStea, 91 U. S. 7, 23 L. ed. 188; 1 Kent, Com. p. 66; 1 Halleck, International Law, p. 527.

The following decisions uphold the right of the Federal authorities to regulate or restrict trade with domestic territory in which a condition of war prevails as a result of insurrection.

United States v. Grossmayer, 9 Wall. 72, 19 L. ed. 627; *Hanger v. Abbott*, 6 Wall. 532, 18 L. ed. 939; *McKee v. United States*, 8 Wall. 163, 19 L. ed. 329; *Prize Cases*, 2 Black, 635, 17 L. ed. 459; *Hamilton v. Dilin*, 21 Wall. 73, 22 L. ed. 528; *The Reform (United States v. The Reform)* 3 Wall. 617, 18 L. ed. 105; *The Sea Lion (The Sea Lion v. United States)* 5 Wall. 630, 18 L. ed. 618; *The Ouachita Cotton (Withenbury v. United States)* 6 Wall. 521, 18 L. ed. 935; *Coppell v. Hall*, 7 Wall. 542, 19 L. ed. 244; *Mrs. Alexander's Cotton (United States v. Alexander)* 2 Wall. 404, 17 L. ed. 915.

The war power embraces, whenever necessary, the authority to raise revenue by imposing taxes.

Lamar v. Browne, 92 U. S. 187, 23 L. ed. 650; *New Orleans v. New York Mail & S. S. Co.* 20 Wall. 393, 22 L. ed. 357.

A treaty of peace cannot operate instantly to supplant executive acts and orders when,

because of any paramount necessity, like the condition of war in the Philippines, that result should not follow.

Leitensdorfer v. Webb, 20 How. 178, 15 L. ed. 891; *Hamilton v. Dillin*, 21 Wall. 73, 22 L. ed. 528; *Cross v. Harrison*, 16 How. 190, 14 L. ed. 899.

The attitude of the legislature in approving the executive action under the circumstances is evidence that Congress united with the executive in the opinion that, under the prevailing conditions, the military government was legal and necessary.

Prize Cases, 2 Black, 670, 17 L. ed. 477; *Hamilton v. Dillon*, 21 Wall. 73, 22 L. ed. 528.

The test always is: Does the legislative body or other agency of government which ratifies possess authority to do the act, or to confer power to do it, in the first instance?

Marsh v. Fulton County, 10 Wall. 676, 19 L. ed. 1040; *Norton v. Shelby County*, 118 U. S. 451, 30 L. ed. 189, 6 Sup. Ct. Rep. 1121; *Sykes v. Columbus*, 55 Miss. 137; *Grenada County v. Brogden* (*Grenada County v. Brown*) 112 U. S. 261, 28 L. ed. 704, 5 Sup. Ct. Rep. 125; *Brown v. New York*, 63 N. Y. 239; *State v. Torinus*, 26 Minn. 1, 37 Am. Rep. 395, 49 N. W. 259; *McMillen v. Boyles*, 6 Iowa, 304; *Mattingly v. District of Columbia*, 97 U. S. 687, 24 L. ed. 1098; *Thomson v. Lee County*, 3 Wall. 327, 18 L. ed. 177; *Campbell v. Kenosha*, 5 Wall. 194, 18 L. ed. 610; *Marshall County v. Schenck*, 5 Wall. 772, 18 L. ed. 713; *Gelpcke v. Dubuque*, 1 Wall. 175, 202, 17 L. ed. 520, 524; *Fleekner v. Bank of United States*, 8 Wheat. 338, 363, 5 L. ed. 631, 637.

Mr. Justice **Holmes** delivered the opinion of the court:

These are suits to recover duties exacted from the plaintiffs in error and appellants upon merchandise shipped by them from New York to Manila, and landed at the latter port between April 11, 1899, the date when the ratifications of the treaty with Spain [30 Stat. at L. 1754] were exchanged, and October 25, 1901. The duties were levied under an order of the President dated July 12, 1898. The case of *Peabody & Company* was decided on demurrer to the answer of the United States, which set up that during the time mentioned there existed an armed insurrection in the Philippine Islands, of such size as to call for military operations by the United States; that, although Manila was in our possession, it was held only by force of arms as a part of hostile territory, and that the President's order was a lawful exercise of the war power of the United States. The district court overruled the demurrer and dismissed the suit. — Fed. —.

The case of *Warner, Barnes, & Company* was decided on a finding of facts by the court of claims, and that court also dismissed the petition. — Ct. Cl. —. These facts mainly concern the magnitude of the insurrection, and need not be stated.

It will be observed that the President's order relied upon was an order issued during the war with Spain, nine months before the treaty of peace was made. It was a measure taken with reference to that war alone, and not with reference to the insurrection of the native inhabitants of the Philippines, which did not happen until much later. Aguinaldo declared hostilities on February 4, 1899. The natural view would be that the order expired by its own terms when the war with Spain *was at an end. The order directs[428] that "upon the occupation of any forts and places in the Philippine Islands by the forces of the United States" the duties shall be levied and collected "as a military contribution." Of course, this was not a power in blank for any military occasion which might turn up in the future. It was a regulation for and during an existing war, referred to as definitely as if it had been named. See *Dooley v. United States*, 182 U. S. 222, 234, 235, 45 L. ed. 1074, 1082, 1083, 21 Sup. Ct. Rep. 762.

However this may be, we are of opinion that the cases before us are governed by the decision in *Fourteen Diamond Rings v. United States* (*The Diamond Rings*) 183 U. S. 176, 180, 181, 46 L. ed. 138, 142, 143, 22 Sup. Ct. Rep. 59. In that case it was decided that after the title passed to the United States there was nothing in the Philippine insurrection of sufficient gravity to give to the islands the character of foreign countries within the meaning of a tariff act. That means that there was no such "firm possession" by an organized hostile power as made Castine a foreign port in the war of 1812. *United States v. Rice*, 4 Wheat. 246, 254, 4 L. ed. 562, 564. Whatever sway the Philippine government may have had in Luzon, we suppose that probably at any time the United States could have sent a column of a few thousand men to any point on the island, as was stated by the Secretary of War in his report in 1899, and as the United States was willing that the court of claims should find. In the language of the above-mentioned decision: "If those in insurrection against Spain continued in insurrection against the United States, the legal title and possession of the latter remained unaffected."

Apart from the question of the duration of the President's order, it plainly was an order intended to deal with imports from foreign countries only and Philippine ports not in the actual military control of the

United States. But even had it been intended to have a wider scope, we do not perceive any ground on which it could have been extended to imports from the United States to Manila,—a port which was continuously in the possession as well as ownership of the United States from the time of the treaty with Spain. Manila was not like Nashville during the Civil War, a part of a [429] state recognized as *belligerent and as having impressed a hostile status upon its entire territory. *Hamilton v. Dillin*, 21 Wall. 73, 94-96, 22 L. ed. 528, 533, 534. The fact that there was an insurrection of natives not recognized as belligerents in another part of the island, or even just outside its walls, did not give the President power to impose duties on imports from a country no longer foreign. See *Dooley v. United States*, 182 U. S. 222, 234, 45 L. ed. 1074, 1082, 21 Sup. Ct. Rep. 762.

We see no sufficient ground for saying that the collection of these duties has been ratified by Congress. The only act needing mention is that of July 1, 1902 (chap. 1369, § 2, 32 Stat. at L. 691, 692, U. S. Comp. Stat. Supp. 1903, p. 242). That act ratifies the action of the President "heretofore taken by virtue of the authority vested in him as Commander-in-Chief of the Army and Navy, as set forth in his order of July 12th, 1898," etc., together with the subsequent amendments to that order. "And the actions of the authorities of the government of the Philippine Islands, taken in accordance with the provisions of said order and subsequent amendments, are hereby approved." Without considering how far the first part of the section extends, the approval of the action of the authorities is confined to those which were in accordance with the provision of the order, which, as we already have intimated, the collection of these duties was not. See, further, *De Lima v. Bidwell*, 182 U. S. 1, 199, 200, 45 L. ed. 1041, 1057, 1058, 21 Sup. Ct. Rep. 743.

Judgments reversed.

Leave to file petitions for rehearing on ratification by Congress of collection of duties, granted May 29, 1905.

[430]*LOUISVILLE & NASHVILLE RAILROAD COMPANY, *Plff. in Err.*,
v.

BARBER ASPHALT PAVING COMPANY
and The City of Louisville.

(See S. C. Reporter's ed. 430-435.)

NOTE.—On the necessity for special benefit to sustain assessments for local improvements—see note to *Re Madera Irrig. Dist. Bonds*, 14 L. R. A. 755.
197 U. S.

Public improvements—assessment under area rule—lack of benefits as depending on use of property.

The fact that the only use made of a lot abutting on a street improvement is for a railway right of way does not make invalid, under U. S. Const. 14th Amend., for lack of benefits, an assessment thereon for the grading, curbing, and paving, made under the area rule prescribed by Ky. Stat. §§ 2833, 2834.

[No. 170.]

Argued March 7, 8, 1905. Decided April 3, 1905.

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment which affirmed a judgment of the Jefferson Circuit Court in that state enforcing the lien of an assessment for a street improvement. *Affirmed.*

See same case below, 25 Ky. L. Rep. 1024, 76 S. W. 1097.

The facts are stated in the opinion.

Mr. **Helm Bruce** argued the cause, and, with Messrs. *James P. Helm* and *T. K. Helm*, filed a brief for plaintiff in error:

The only constitutional basis for taxation by special assessment upon selected property, as distinguished from general taxation, is special benefits to the property assessed, accruing from the improvement for which the assessment is made.

2 Dill. Mun. Corp. § 761, subsec. 3; *Barnes v. Dyer*, 56 Vt. 469; *McCormack v. Patchin*, 53 Mo. 33, 14 Am. Rep. 440; *State, Agens, Prosecutor, v. Newark*, 37 N. J. L. 415, 18 Am. Rep. 729; *Hammett v. Philadelphia*, 65 Pa. 146, 3 Am. Rep. 615; *King v. Portland*, 38 Or. 402, 55 L. R. A. 812, 63 Pac. 2; *Preston v. Roberts*, 12 Bush, 587; *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187; *Adams v. Shelbyville*, 154 Ind. 467, 49 L. R. A. 797, 77 Am. St. Rep. 484, 57 N. E. 114; *Lathrop v. Racine*, 119 Wis. 461, 97 N. W. 192; *White v. Tacoma*, 109 Fed. 32; *Sears v. Boston*, 173 Mass. 71, 43 L. R. A. 834, 53 N. E. 138; *Hutcheson v. Storrrie*, 92 Tex. 685, 45 L. R. A. 289, 71 Am. St. Rep. 884, 51 S. W. 848; *Schroder v. Overman*, 61 Ohio St. 1, 47 L. R. A. 156, 76 Am. St. Rep. 354, 55 N. E. 158; *Kersten v. Milwaukee*, 106 Wis. 200, 48 L. R. A. 851, 81 N. W. 948, 1103; *Smith v. Worcester*, 182 Mass. 232, 59 L. R. A. 728, 65 N. E. 40.

The prohibitions of the 14th Amendment to the Federal Constitution, against depriving any person of his property without due process of law, are leveled not only against the legislative department of the state, but

run against the judicial and executive departments as well.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 233, 41 L. ed. 979, 983, 17 Sup. Ct. Rep. 581.

A railway right of way cannot be assessed with any part of the cost of improving a street, because it is one class of property concerning which it is not possible to indulge the presumption that it is benefited by such an improvement.

Alleghany City v. Western Pennsylvania R. Co. 138 Pa. 375, 21 Atl. 763; *Chicago, M. & St. P. R. Co. v. Milwaukee*, 89 Wis. 506, 28 L. R. A. 249, 62 N. W. 417; *Detroit, G. H. & M. R. Co. v. Grand Rapids*, 106 Mich. 13, 28 L. R. A. 793, 58 Am. St. Rep. 466, 63 N. W. 1007; *State, New Jersey R. & Transp. Co., Prosecutor, v. Elizabeth*, 37 N. J. L. 330; *Chicago, R. I. & P. R. Co. v. Ottumwa*, 112 Iowa, 300, 51 L. R. A. 763, 83 N. W. 1074.

Messrs. Helm Bruce and James P. Helm also filed a brief for plaintiff in error in opposition to a motion to dismiss or affirm.

Messrs. William Furlong and A. E. Richards argued the cause, and, with Mr. Benjamin F. Washer, filed a brief for defendants in error:

In *French v. Barber Asphalt Paving Co.* 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625, this court is particular to affirm and reaffirm the validity of those systems of taxation in which the legislature, determining finally and conclusively the question of benefits, prescribes the tax territory to contribute to the cost of local improvements.

Other cases support this proposition.

Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; *Mattingly v. District of Columbia*, 97 U. S. 687, 24 L. ed. 1098; *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; *Wight v. Davidson*, 181 U. S. 371, 45 L. ed. 900, 21 Sup. Ct. Rep. 616; *Tonawanda v. Lyon*, 181 U. S. 389, 45 L. ed. 908, 21 Sup. Ct. Rep. 609; *Cass Farm Co. v. Detroit*, 181 U. S. 396, 45 L. ed. 914, 21 Sup. Ct. Rep. 644; *Webster v. Fargo*, 181 U. S. 394, 45 L. ed. 912, 21 Sup. Ct. Rep. 623; *Deroit v. Parker*, 181 U. S. 399, 45 L. ed. 917, 21 Sup. Ct. Rep. 624; *King v. Portland*, 184 U. S. 61, 46 L. ed. 431, 22 Sup. Ct. Rep. 290; *Chadwick v. Kelley*, 187 U. S. 540, 47 L. ed. 293, 23 Sup. Ct. Rep. 175; *Seattle v. Kelleher*, 195 U. S. 351, ante, 232, 25 Sup. Ct. Rep. 44.

The assessment challenged as unconstitutional in the case now submitted is but the

enforcement of the settled laws of Kentucky, applied, since the origin of the state, to all persons in like circumstances and under similar conditions.

Lexington v. McQuillan, 9 Dana, 513, 35 Am. Dec. 159; *Louisville v. Hyatt*, 2 B. Mon. 177, 36 Am. Dec. 594; *Louisville v. Louisville Rolling Mill Co.* 3 Bush, 424, 96 Am. Dec. 243; *Howell v. Bristol*, 8 Bush, 498; *Loeser v. Redd*, 14 Bush, 20; *Pearson v. Zable*, 78 Ky. 170; *Preston v. Rudd*, 84 Ky. 150; *Barfield v. Gleason*, 111 Ky. 491, 63 S. W. 964; *Pfaffinger v. Kremer*, 115 Ky. 498, 74 S. W. 238; *Louisville v. Bitzer*, 115 Ky. 359, 61 L. R. A. 434, 73 S. W. 1115.

When a case presents considerations of peculiar and extraordinary hardships amounting, in the opinion of the judges of the court of appeals, to actual confiscation of private property to public use, the Kentucky law affords ample constitutional protection.

See *Louisville v. Bitzer*, 115 Ky. 359, 61 L. R. A. 434, 73 S. W. 1115; *Covington v. Southgate*, 15 B. Mon. 491; *Louisville v. Louisville Rolling Mill Co.* 3 Bush, 416, 96 Am. Dec. 243; *Broadway Baptist Church v. McAtee*, 8 Bush, 508, 8 Am. Rep. 480; *Frantz v. Jacob*, 88 Ky. 532, 11 S. W. 654; *Preston v. Rudd*, 84 Ky. 153.

The same statute now under review has been upheld in this court.

Walston v. Nevin, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192.

The contention of counsel for plaintiff in error, that the perpetual right of way of the railroad is not property to be taxed under the Kentucky law of special assessments, does not present a question determinable in this court.

Commercial Bank v. Buckingham, 5 How. 326, 12 L. ed. 173; *Murray v. Gibson*, 15 How. 423, 14 L. ed. 756; Guthrie's 14th Amendment, p. 44; *Turner v. Wilkes County*, 173 U. S. 461, 43 L. ed. 768, 19 Sup. Ct. Rep. 464; *Missouri, K. & T. R. Co. v. McCann*, 174 U. S. 580, 43 L. ed. 1093, 19 Sup. Ct. Rep. 755; *Sioux City, O'N. & W. R. Co. v. Manhattan Trust Co.* 172 U. S. 642, 43 L. ed. 1180, 19 Sup. Ct. Rep. 879; *Morley v. Lake Shore & M. S. R. Co.* 146 U. S. 162, 36 L. ed. 925, 13 Sup. Ct. Rep. 54; *Board of Liquidation v. Louisiana*, 179 U. S. 622, 45 L. ed. 347, 21 Sup. Ct. Rep. 263; *Arndt v. Griggs*, 134 U. S. 316, 33 L. ed. 918, 10 Sup. Ct. Rep. 557; *Merchants' & M. Nat. Bank v. Pennsylvania*, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829.

Railway rights of way are assessable for street improvements.

Ludlow v. Cincinnati Southern R. Co. 78 Ky. 357; *Cicero & P. Street R. Co. v. Chicago R. Co.* 176 Ill. 501, 52 N. E. 866; *Indianapolis & V. R. Co. v. Capitol Paving &*

Constr. Co. 24 Ind. App. 114, 54 N. E. 1076; *State, Patterson & H. River R. Co. Prosecutor, v. Passaic*, 54 N. J. L. 341, 23 Atl. 945; *Smith*, Modern Law of Mun. Corp. § 1239; *Illinois C. R. Co. v. Decatur*, 147 U. S. 190, 37 L. ed. 132, 13 Sup. Ct. Rep. 293.

Messrs. William Furlong, Benjamin F. Washer, and Henry L. Stone also filed a brief for defendants in error on a motion to dismiss or affirm.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a proceeding under the Kentucky Statutes, § 2834, to enforce a lien upon a lot adjoining a part of Frankfort avenue, in Louisville, for grading, curbing, and paving with asphalt the carriage way of that part of the avenue. The defendant, the plaintiff in error, pleaded that its only interest in the lot was a right of way for its main roadbed, and that neither the right of way nor the lot would or could get any benefit from the improvement, but, on the contrary, rather would be hurt by the increase of travel close to the defendant's tracks. On this ground it set up that any special assessment would deny to it the equal protection of the laws, contrary to the 14th Amendment of the Constitution of the United States. It did not object to the absence of the parties having any reversionary interest, but defended against any special assessment on the lot. The answer was demurred to, judgment was rendered for the plaintiff, and this judgment was affirmed by the Kentucky court of appeals. 25 Ky. L. Rep. 1024, 76 S. W. 1097. A writ of error was taken out, and the case was brought to this court. It will be noticed that the case concerns only grading, curbing, and paving, and what we shall have to say is confined to a case of that sort.

The state of Kentucky created this lien by a statute entitled "An Act for the Government of Cities of the First Class." Louisville is the only city of the first class at present in Kentucky, and the general principles of the act are taken verbatim from the part of the charter of Louisville which was considered and upheld by this court in *Walston v. Nevin*, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192. But we take the statute as a general prospective law, and not as a legislative adjudication concerning a particular place and a particular plan, such as may have existed in *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921. and as was thought to exist [433] in *Smith v. Worcester*, 182 Mass. 232, 59 L. R. A. 728, 65 N. E. 40, referred to at the argument.

The law provides in the case of original construction, such as this improvement was, 197 U. S.

that it shall be made at the exclusive cost of the adjoining owners, to be equally apportioned according to the number of feet owned by them. In the case of a square or subdivision of land bounded by principal streets, which the land including the defendant's lot was held to be (see *Cooper v. Nevin*, 90 Ky. 85, 13 S. W. 841; *Nevin v. Roach*, 86 Ky. 492, 499, 5 S. W. 546), the land is assessed half way back from the improvement to the next street. Act of 1898, chap. 48; Ky. Stat. § 2833. A lien is imposed upon the land, and "the general council, or the courts in which suits may be pending, shall make all corrections, rules, and orders to do justice to all parties concerned." § 2834. The principle of this mode of taxation seems to have been familiar in Kentucky for the better part of a hundred years. *Lexington v. McQuillan*, 9 Dana, 513, 35 Am. Dec. 159.

The argument for the plaintiff in error oscillates somewhat between the objections to the statute and the more specific grounds for contending that it cannot be applied constitutionally to the present case. So far as the former are concerned they are disposed of by the decisions of this court. There is a look of logic when it is said that special assessments are founded on special benefits, and that a law which makes it possible to assess beyond the amount of the special benefit attempts to rise above its source. But that mode of argument assumes an exactness in the premises which does not exist. The foundation of this familiar form of taxation is a question of theory. The amount of benefit which an improvement will confer upon particular land—indeed, whether it is a benefit at all—is a matter of forecast and estimate. In its general aspects, at least, it is peculiarly a thing to be decided by those who make the law. The result of the supposed constitutional principle is simply to shift the burden to a somewhat large taxing district,—the municipality,—and to disguise, rather than to answer, the theoretic *doubt. It is [434] dangerous to tie down legislatures too closely by judicial constructions not necessarily arising from the words of the Constitution. Particularly, as was intimated in *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921, it is important for this court to avoid extracting from the very general language of the 14th Amendment a system of delusive exactness in order to destroy methods of taxation which were well known when that amendment was adopted, and which it is safe to say that no one then supposed would be disturbed. It now is established beyond permissible controversy that laws like the one before us are not contrary to the Constitution of the United

States. *Walston v. Nevin*, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192; *French v. Barber Asphalt Paving Co.* 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625; *Webster v. Fargo*, 181 U. S. 394, 45 L. ed. 912, 21 Sup. Ct. Rep. 623; *Cass Farm Co. v. Detroit*, 181 U. S. 396, 45 L. ed. 914, 21 Sup. Ct. Rep. 644; *Detroit v. Parker*, 181 U. S. 399, 45 L. ed. 917, 21 Sup. Ct. Rep. 624; *Chadwick v. Kelley*, 187 U. S. 540, 543, 544, 47 L. ed. 293-295, 23 Sup. Ct. Rep. 175; *Schaefer v. Werling*, 188 U. S. 516, 47 L. ed. 570, 23 Sup. Ct. Rep. 449; *Seattle v. Kelleher*, 195 U. S. 351, 358, ante, 232, 235, 25 Sup. Ct. Rep. 44.

A statute like the present manifestly might lead to the assessment of a particular lot for a sum larger than the value of the benefits to that lot. The whole cost of the improvement is distributed in proportion to area, and a particular area might receive no benefits at all, at least if its present and probable use be taken into account. If that possibility does not invalidate the act, it would be surprising if the corresponding fact should invalidate an assessment. Upholding the act as embodying a principle generally fair and doing as nearly equal justice as can be expected seems to import that if a particular case of hardship arises under it in its natural and ordinary application, that hardship must be borne as one of the imperfections of human things. And this has been the implication of the cases. *Davidson v. New Orleans*, 96 U. S. 97, 106, 24 L. ed. 616, 620; *Mattingly v. District of Columbia*, 97 U. S. 687, 692, 24 L. ed. 1098, 1100; *Parsons v. District of Columbia*, 170 U. S. 45, 52, 55, 42 L. ed. 943, 946, 947, 18 Sup. Ct. Rep. 521; *Detroit v. Parker*, 181 U. S. 399, 400, 45 L. ed. 917, 921, 21 Sup. Ct. Rep. 624; *Chadwick v. Kelley*, 187 U. S. 540, 544, 47 L. ed. 293, 294, 23 Sup. Ct. Rep. 175.

But in this case it is not necessary to stop with these general considerations. The plea plainly means that the improvement [435] *will not benefit the lot, because the lot is occupied for railroad purposes and will continue so to be occupied. Compare *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 257, 258, 41 L. ed. 979, 992, 17 Sup. Ct. Rep. 581. That, apart from the specific use to which this land is devoted, land in a good-sized city generally will get a benefit from having the streets about it paved, and that this benefit generally will be more than the cost, are propositions which, as we already have implied, a legislature is warranted in adopting. But, if so, we are of opinion that the legislature is warranted in going one step further and saying that on the question of benefit or no benefit the land shall be considered simply in its general re-

lations and apart from its particular use. See *Illinois C. R. Co. v. Decatur*, 147 U. S. 190, 37 L. ed. 132, 13 Sup. Ct. Rep. 293. On the question of benefits the present use is simply a prognostic, and the plea of prophecy. If an occupant could not escape by professing his desire for solitude and silence, the legislature may make a similar desire fortified by structures equally ineffective. It may say that it is enough that the land could be turned to purposes for which the paving would increase its value. Indeed, it is apparent that the prophecy in the answer cannot be regarded as absolute, even while the present use of the land continues; for no one can say that changes might not make a station desirable at this point; in which case the advantages of a paved street could not be denied. We are not called on to say that we think the assessment fair. But we are compelled to declare that it does not go beyond the bounds set by the 14th Amendment of the Constitution of the United States.

Judgment affirmed.

Mr. Justice **Harlan**, not having been present at the argument, took no part in the decision.

Mr. Justice **White** and Mr. Justice **Peckham** dissent.

*JAMES STILLMAN, *Appt.*, [436]

v.

C. B. COMBE, Independent Executor of the Estate of Stephen Powers, Deceased, C. B. Combe, *et al.*

(See S. C. Reporter's ed. 436-442.)

Federal courts—jurisdiction—ancillary action.

Jurisdiction of a bill which seeks to reach and distribute to the persons found entitled thereto the proceeds of a sale of lands to the United States cannot be entertained by a Federal circuit court on the theory that the cause is ancillary to an action at law to recover the lands from the United States, as occupied without right, in which the rival claimants had united in procuring final judgment in favor of two of their number, leaving their respective interests to be settled by arbitration.

[No. 174.]

Argued March 10, 13, 1905. Decided April 3, 1905.

NOTE.—On ancillary jurisdiction of Federal courts—see note to *Rosenbaum Bros. v. Council Bluffs Ins. Co.* 3 L. R. A. 190.

APPEAL from the Circuit Court of the United States for the Southern District of Texas to review a decree granting the relief sought by a bill, jurisdiction of which was entertained on the ground that the cause was ancillary to an action at law. *Reversed* with directions to make restitution to the appellant, and to dismiss the bill.

The facts are stated in the opinion.

Messrs. John A. Garver and James M. Beck argued the cause and filed a brief for appellant:

A suit is ancillary when it is supplemental to a previous action or suit, and so connected with it as to form an incident to it and substantially a continuation of it.

Barrow v. Hunton, 99 U. S. 80, 82, 25 L. ed. 407, 408; *Marshall v. Holmes*, 141 U. S. 589, 597, 35 L. ed. 870, 873, 12 Sup. Ct. Rep. 62; *Raphael v. Trask*, 194 U. S. 272, 278, 48 L. ed. 973, 978, 24 Sup. Ct. Rep. 647.

The cases in which suits have been held to be ancillary fall into two general classes.

I. In the following cases the court was in control of the fund at the time of the commencement of the ancillary suit:

Freeman v. Howe, 24 How. 450, 16 L. ed. 749; *Milwaukee & M. R. Co. v. Milwaukee & St. P. R. Co.* (*Milwaukee & M. R. Co. v. Soutter*) 2 Wall. 609, 17 L. ed. 886; *People's Bank v. Calhoun* (*People's Bank v. Winslow*) 102 U. S. 256, 26 L. ed. 101; *Krippendorf v. Hyde*, 110 U. S. 276, 28 L. ed. 145, 4 Sup. Ct. Rep. 27; *Gumbel v. Pitkin*, 124 U. S. 131, 31 L. ed. 374, 8 Sup. Ct. Rep. 379; *Morgan's L. & T. R. & S. S. Co. v. Texas C. R. Co.* 137 U. S. 171, 34 L. ed. 625, 11 Sup. Ct. Rep. 61; *Re Tyler*, 149 U. S. 164, 37 L. ed. 689, 13 Sup. Ct. Rep. 785; *White v. Ewing*, 159 U. S. 36, 40 L. ed. 67, 15 Sup. Ct. Rep. 1018; *Baggs v. Martin*, 179 U. S. 206, 45 L. ed. 155, 21 Sup. Ct. Rep. 109; *Julian v. Central Trust Co.* 193 U. S. 93, 113, 48 L. ed. 629, 639, 24 Sup. Ct. Rep. 399; *McBee v. Marietta & N. G. R. Co.* 48 Fed. 243; *Compton v. Jesup*, 15 C. C. A. 397, 31 U. S. App. 486, 68 Fed. 263; *New York Commercial Co. v. Francis*, 28 C. C. A. 199, 51 U. S. App. 663, 83 Fed. 769; *Widaman v. Hubbard*, 88 Fed. 806; *Davis v. Martin*, 51 C. C. A. 27, 113 Fed. 6; *Memphis Sav. Bank v. Houchens*, 52 C. C. A. 176, 115 Fed. 96; *Re Sabin*, 18 Nat. Bankr. Reg. 151, Fed. Cas. No. 12,195.

II. The second class of cases, where ancillary bills have been entertained, is where the court is asked to take some action with reference to a previous judgment or decree rendered by it, or with reference to an action still pending and undetermined. There are two different kinds of applications which can be made under this class:

1. To assist in carrying the previous judgment or decree into effect.

2. To correct or modify the previous judgment or decree, or to vacate it on the ground of fraud or mistake, or to enjoin its enforcement, or to enjoin the prosecution of a pending action at law.

Where the previous action was one at law, the method of enforcing the final judgment in it is by a common-law writ. In an action of debt or assumpsit or conversion, the writ is an execution. In an action of ejectment, it is a writ of possession.

A court of equity lends its assistance for the purpose of enforcing a previous judgment in an action at law only where the common-law writ is ineffective,—as, for instance, where property belonging to the judgment debtor and properly applicable to the satisfaction of the judgment is held for his benefit by another or has been fraudulently disposed of by him.

Babcock v. Millard, 4 West. Law Month. 314, Fed. Cas. No. 699; *Hatch v. Dorr*, 4 McLean, 112, Fed. Cas. No. 6,206; *First Nat. Bank v. Turnbull*, 16 Wall. 190, 21 L. ed. 296; *New Orleans v. Fisher*, 180 U. S. 185, 45 L. ed. 485, 21 Sup. Ct. Rep. 347.

Cases of this character, in which a court of equity is most frequently appealed to, are those where some additional action is essential to make the previous decree of the court in a suit in equity effective. Such cases are the directing of a supplemental account, compelling the performance of some affirmative act or the observance of the terms of the previous decree, etc.

Milwaukee & M. R. Co. v. Chamberlain, 6 Wall. 748, 18 L. ed. 859; *Root v. Woolworth*, 150 U. S. 401, 37 L. ed. 1123, 14 Sup. Ct. Rep. 136.

Every court of general jurisdiction has complete control over its own proceedings and over its judgments and decrees during the term at which they are rendered; and at any time before the end of the term, it may set aside or amend them in any manner deemed advisable.

Henderson v. Carbondale Coal & Coke Co. 140 U. S. 25, 40, 35 L. ed. 332, 338, 11 Sup. Ct. Rep. 691.

But it has no power to do this, upon petition, after the expiration of the term (*Bronson v. Schulten*, 104 U. S. 410, 26 L. ed. 797; *Central Trust Co. v. Grant Locomotive Works*, 135 U. S. 207, 34 L. ed. 97, 10 Sup. Ct. Rep. 736), although, in some states, this power has been extended by statute beyond the term at which the proceedings were held.

But where, owing to the expiration of the term, the court has no power to grant relief upon petition, it will do so upon suit brought for the purpose; and such suit is regarded as dependent or ancillary. The most familiar examples of this class are

stockholders' bills to vacate foreclosure decrees against corporations on the ground of collusion, and bills to enjoin the enforcement of judgments or decrees so as to permit a defendant to interpose a defense or counterclaim which was not provable in the original action.

Dunn v. Clarke, 8 Pet. 1, 8 L. ed. 845; *Pennock v. Coe*, 23 How. 117, 16 L. ed. 436; *Jones v. Andrews*, 10 Wall. 327, 19 L. ed. 935; *Dewey v. West Fairmont Gas Coal Co.* 123 U. S. 329, 31 L. ed. 179, 8 Sup. Ct. Rep. 148; *Johnson v. Christian*, 125 U. S. 642, 31 L. ed. 820, 8 Sup. Ct. Rep. 989, 1135; *Pacific R. Co. v. Missouri P. R. Co.* 111 U. S. 505, 28 L. ed. 498, 4 Sup. Ct. Rep. 583; *Carey v. Houston & T. C. R. Co.* 161 U. S. 115, 40 L. ed. 638, 16 Sup. Ct. Rep. 537; *Cortes Co. v. Thannhauser*, 20 Blatchf. 59, 9 Fed. 226; *Symmes v. Union Trust Co.* 60 Fed. 830; *McDonald v. Seligman*, 81 Fed. 753; *Brown v. Walker*, 84 Fed. 532; *Broadis v. Broadis*, 86 Fed. 951; *Richardson v. Loree*, 36 C. C. A. 301, 94 Fed. 375; *Merchants' Nat. Bank v. Leland*, 38 How. Pr. 31, Fed. Cas. No. 9,452; *Dunlap v. Stetson*, 4 Mason, 349, Fed. Cas. No. 4,164; *Thompson v. McReynolds*, 29 Fed. 657.

Mr. Fred Beall argued the cause, and, with **Mr. C. L. Bates**, filed a brief for appellees:

The circuit court in which the consent judgment was rendered is vested with ancillary jurisdiction to entertain this suit in equity for the purposes of granting to the parties to the former suit and their privies equitable relief against the aforesaid unjust, inequitable, and fraudulent use of said judgment and the process of the court that rendered it, and the violation of said contract, and the breach of said trust; and to determine the conflicting claims of the parties to said fund; and to compel appellant to account for the trust fund converted by him and pay the same over to the parties found to be entitled to it, and to secure to the parties the fruits, benefits, and advantages of the proceedings and judgment in the former suit; and to regulate the operation of said judgment by ingrafting a trust upon it.

Krippendorf v. Hyde, 110 U. S. 276, 287, 28 L. ed. 145, 149, 4 Sup. Ct. Rep. 27; *Pacific R. Co. v. Missouri P. R. Co.* 111 U. S. 505, 28 L. ed. 498, 4 Sup. Ct. Rep. 583; *New Orleans v. Fisher*, 180 U. S. 185, 199, 45 L. ed. 485, 492, 21 Sup. Ct. Rep. 347; *Pennock v. Coe*, 23 How. 117, 16 L. ed. 436; *Clarke v. Mathewson*, 12 Pet. 164, 9 L. ed. 1041; *Dunn v. Clarke*, 8 Pet. 1, 8 L. ed. 845; *Jones v. Andrews*, 10 Wall. 327, 19 L. ed. 935; *Root v. Woolworth*, 150 U. S. 401, 37 L. ed. 1123, 14 Sup. Ct. Rep. 136; *Freeman v. Howe*, 24 How. 450, 16 L. ed. 749; *Mil-*

waukee & M. R. Co. v. Milwaukee & St. P. R. Co. (*Milwaukee & M. R. Co. v. Soutter*) 2 Wall. 609, 645, 17 L. ed. 886, 900; *Hatch v. Dorr*, 4 McLean, 112, Fed. Cas. No. 6,206; *Babcock v. Millard*, 4 West. Law Month. 314, Fed. Cas. No. 699; *Dunlap v. Stetson*, 4 Mason, 349, Fed. Cas. No. 4,164; *Cortes Co. v. Thannhauser*, 20 Blatchf. 59, 9 Fed. 226; *Merchants' Nat. Bank v. Leland*, 38 How. Pr. 31, Fed. Cas. No. 9,452; *Thompson v. McReynolds*, 29 Fed. 657; *Lamb v. Ewing*, 4 C. C. A. 320, 12 U. S. App. 11, 54 Fed. 272; *First Nat. Bank v. Turnbull*, 16 Wall. 190, 21 L. ed. 296.

Mr. J. D. Childs also argued the cause and filed a brief for appellees:

This suit is undoubtedly an ancillary one.

Carey v. Houston & T. C. R. Co. 161 U. S. 113, 40 L. ed. 638, 16 Sup. Ct. Rep. 537; *Krippendorf v. Hyde*, 110 U. S. 276, 28 L. ed. 145, 4 Sup. Ct. Rep. 27; 2 Thompson's ed. Supp. Rose's Notes 1905, p. 605.

Mr. Justice Holmes delivered the opinion of the court:

This is an appeal from a decree of the circuit court, upon the single question of the jurisdiction of that court. The jurisdiction was sustained *de bene*, on appeal from a preliminary *injunction, by the circuit [439] court of appeals. 29 C. C. A. 660, 52 U. S. App. 622, 86 Fed. 202. It is certified that jurisdiction was entertained solely upon the ground that this cause is ancillary to an action at law and the final judgment rendered therein. If that ground fails, it is apparent from the record, and is not disputed, that there is no other. To decide the case it is not necessary to consider anything except the allegations of the bill, and a large part of those may be laid on one side as not material to the question here.

The purpose of the bill is to reach and distribute, to the parties found entitled to the same, the proceeds of a sale to the United States of land which the defendants Stillman (the appellant) and Carson, as administrator, recovered in the above-mentioned action at law. The land was occupied without right by the United States as part of the Fort Brown military reservation, and on March 3, 1885, Congress appropriated \$160,000 to pay for the land and its use and occupation, but not until a complete title should be vested in the United States, the full amount of the price to be paid directly to the owners of the property. The next year certain claimants brought suit for the land, in a state court, against Colonel Kellogg, the officer in command of the reservation. The suit was removed to the United States circuit court, the United States intervened, and, for the purpose of settling the title, set up outstanding rights

in third persons. Other known claimants, including Stillman and Carson, as administrator, each of whom claimed an undivided half, became or were made parties. By the local practice the respective shares of the parties might have been determined in the action as well as the principal question of the right of all or some of them to recover from Colonel Kellogg. But on July 13, 1887, most, although not all, of the claimants, including Stillman and Carson, made an agreement on which the jurisdiction in the present cause is based.

This agreement recited that the case was likely to be tried the next day, that it was [440] apprehended that unless a perfect title could be adjudged to some of the parties there was danger of losing the appropriation, that in the time available there was little chance of an accurate adjudication of all rights, that it was primarily desirable to have a judgment which would be satisfactory to the department at Washington, and secondarily, to agree on a method of working out the exact rights of the parties, after judgment, conveyance to the government by those adjudicated to be owners, and payment of the money. It also recited the claims of others not parties to the agreement, and the belief of the contractors that those claims would fail at the trial. Therefore it was agreed that the parties to the contract would unite in procuring a judgment for the whole property in favor of Stillman and Carson, administrator, that upon its being procured a conveyance should be made by the said owners to the government, and a warrant for the price upon the Treasurer of the United States obtained from the Secretary of War. After a preliminary payment, the rest of the money was to be deposited in a named bank in Galveston, to the credit of three arbitrators, also named. The parties to the agreement submitted their claims to these arbitrators, with somewhat blind provisions for substitution, and the arbitrators were to give their checks upon the fund to those whom they found entitled, for the sums found due.

The next day after this agreement was made, on July 14, 1887, a verdict was rendered for Stillman and Carson, administrator, one undivided half to each, and judgment was entered upon the same, both, it is alleged, by consent of parties. But the next steps contemplated by the agreement did not follow as quickly as anticipated. Without any fault of Stillman and Carson, they did not get their pay and deliver the deed until April, 1895,—nearly eight years later. At that time, according to Stillman's answer, at all events, before June 14, 1897, when this bill was filed, according to the allegations of the bill, one of the arbitra-
197 U. S. U. S., Book 49.

tors named was dead, and another refused to act, so that the arbitration agreed upon was impossible in its original form. It also appears from the decree *that Stillman [441] had expended large sums in collecting the money from the United States. The bill alleges that Stillman and Carson fraudulently appropriated to their own use the whole fund of \$160,000 received from the United States. It further alleges that they are conspiring fraudulently to prevent a decision by arbitration, as agreed, and fraudulently are using the judgment to deprive the true owners of their rights. On these allegations the bill seeks not to have the arbitration carried out, but to obtain a distribution of the fund by the court.

We are somewhat at a loss to add anything to a statement of the case to show how utterly without foundation is the claim of jurisdiction over this bill as an ancillary suit. The bill does not seek either to disturb the judgment or to have anything done towards carrying it out. The judgment was satisfied, and the functions of the court in the former case were at an end, when the land was recovered. Stillman and Carson cannot be using it fraudulently or in any other way. Its uses all are over. The court had nothing to do with the subsequent sale of the land, and still less with the distribution of the purchase money when the sale was made. There neither was nor ought to have been any fund in court. It may be that the judgment would not have been the same but for the agreement of some of the parties upon those matters. But the bill does not allege that it was obtained by fraud, and, as we have said, does not seek to set it aside. The agreement no doubt put Stillman and Carson in a position of trust, but, no matter to whom it was known, it did not make Stillman and Carson trustees of the court, as they are called in the bill. It did not extend the duties of the court beyond the recovery of the land to seeing that the parties who recovered it, in case of a subsequent sale, should pay over in due proportion to those equitably entitled. The parties gave up their right to have the court decide who had rights in the land, and the extent of their shares, and substituted a contract and a decision out of court. They still rely upon the contract, and they must be left to their remedy upon it.

*It is suggested that the affirmance by the [442] circuit court of appeals of an interlocutory decree appointing a receiver, and issuing a preliminary injunction against Stillman and Carson using the judgment for the purpose of depriving the other parties in interest of their rights in the \$160,000, in some way prejudices the present appeal. It is enough to say that the action of the circuit

court of appeals was on the appeal of Carson alone, Stillman not having appeared in the action.

Decree reversed, with directions to make restitution to the appellant, and to dismiss the bill.

H. HACKFELD & COMPANY, Limited,
Petitioner,
v.
UNITED STATES.

(See S. C. Reporter's ed. 442-453.)

Agreed case—stipulation of ultimate fact—immigration—shipowner's duty to detain and deport immigrants.

1. A stipulation of the parties that the escape of immigrants who had been received on board a steamship for deportation to the port from whence they came could not have been reasonably anticipated by the master or officers, and did not occur by reason of any negligence or want of proper care upon their part, is as binding on the courts as the specific evidentiary facts set out in such stipulation.
2. Shipowners who have wrongfully brought aliens into the United States, and have received them back on board the vessel for deportation, are not made absolute insurers of the return of the immigrants to the port from whence they came, by the act of March 3, 1891, § 10 (26 Stat. at L. 1084, chap. 551, U. S. Comp. Stat. 1901, p. 1299), punishing as a misdemeanor the "neglect" to detain the persons so received, or to return them to that port; but nothing more is required than a faithful and careful effort to carry out the duty so imposed.

[No. 164.]

Argued March 6, 1905. Decided April 3, 1905.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment which affirmed a conviction in the District Court for the District of Hawaii of a neglect to return to the port from whence they came certain immigrants unlawfully brought into the United States. *Reversed* and remanded to the District Court, with instructions to discharge the petitioner.

See same case below, 60 C. C. A. 428, 125 Fed. 596.

Statement by Mr. Justice Day:

[443] *This case is here on writ of certiorari to the circuit court of appeals for the ninth circuit, to review a judgment of that court affirming a judgment of the district court for the district of Hawaii, in which the petitioner, Hackfeld & Company, was ad-

judged guilty of a violation of § 10 of the act of March 3, 1891 (26 Stat. at L. 1084, chap. 551, U. S. Comp. Stat. 1901, p. 1299), and to pay a fine of \$600, for neglecting to return to the port from whence they came, Yokohama, Japan, two certain Japanese immigrants unlawfully in the United States, in violation of the act of Congress. The conviction was upon information filed and trial had to the court, a jury having been waived, and upon a stipulated finding of facts, agreed upon by the attorney for the United States and the petitioner. After statements as to the corporate character of the defendant company, and that it was the agent of the steamship Korea, a vessel plying between the state of California and the Empire of Japan, it is stipulated that the vessel brought into the port of San Francisco, in the United States, two certain Japanese immigrants from Yokohama, Japan, on October 28, 1902; that on the following day, October 29, 1902, the said Japanese were denied admission into the United States by the board of special inquiry at the port of San Francisco, and the said board, being duly appointed and authorized in the premises, ordered the deportation of the said Japanese immigrants. That on the 7th day of November, 1902, the said Japanese were received on board the vessel Korea for transportation to Japan. The stipulation then recites the following facts:

"That on the 12th day of November, A. D. 1902, the said steamship Korea did arrive at the port of Honolulu, in the district and territory of Hawaii; that at the time of the arrival of said steamship Korea at said port of Honolulu the said immigrants were still on board of said vessel; that said Japanese immigrants, together with certain deported Chinese, were placed in a room on board said vessel and locked up by the steerage steward of said vessel; at 12 o'clock midnight of said 12th day of November, A. D. 1902, said Japanese were still *on board[444] said vessel in said room; that between that time and 5 o'clock on the morning of the 13th day of November, A. D. 1902, said Japanese had effected their escape; that the only method of egress was through portholes, which were nearly 25 feet above the water; that this method of escape could not have been reasonably anticipated by the master, or officers, or agents of said steamship Korea; that said escape did not occur by *vis major*, or inevitable accident; and that said escape did not occur by reason of any negligence or lack of proper care on the part of the officers of the vessel or said defendant.

"That the said defendant made search for said escaped immigrants, but up to the present time have not apprehended the said im-

migrants, and said immigrants have not been returned to Japan."

From the conviction in the lower court upon these stipulated facts a writ of error was taken to the circuit court of appeals for the ninth circuit. In that court, without passing upon the question whether the statute justified conviction without proof of negligence, it was held that the judgment of conviction should be affirmed because the facts recited left room for the inference that the petitioner was found guilty of negligence in putting the Japanese in the room without taking the necessary precautions against escape through the portholes. The stipulation that the escape did not occur by reason of negligence or lack of proper care on the part of the officers of the vessel it was held did not bind the court, nor prevent it from placing upon the facts stipulated the construction which, in its judgment, they should properly receive. 60 C. C. A. 428, 125 Fed. 596.

Mr. Maxwell Evarts argued the cause and filed a brief for petitioner:

The trial court was bound by the stipulation of the parties.

Raimond v. Terrebonne Parish, 132 U. S. 192, 194, 33 L. ed. 309, 310, 10 Sup. Ct. Rep. 57; *Wilson v. Merchants' Loan & T. Co.* 183 U. S. 121, 128, 46 L. ed. 113, 116, 22 Sup. Ct. Rep. 55.

The relation of the trial court to a stipulation of facts is not unlike the attitude of an appellate court in reference to the findings of the court below. If the lower court finds the ultimate facts in the case, then the appellate court is necessarily bound by such findings, and cannot overcome it by claiming that the evidential facts show such finding to be wrong.

Dooley v. Pease, 31 C. C. A. 582, 60 U. S. App. 248, 88 Fed. 446, 180 U. S. 126, 45 L. ed. 457, 21 Sup. Ct. Rep. 308; *Wayne County v. Kennicott*, 103 U. S. 554, 20 L. ed. 486.

Penal statutes should be construed strictly.

United States v. Wiltberger, 5 Wheat. 95, 5 L. ed. 42.

Assistant Attorney General Robb argued the cause and filed a brief for respondent:

Where the facts are undisputed, admitted, or conclusively proved, negligence is a question of law for the court.

21 Am. & Eng. Enc. Law, p. 506; *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679; *Elliott v. Chicago, M. & St. P. R. Co.* 150 U. S. 245, 37 L. ed. 1068, 14 Sup. Ct. Rep. 85; *Union P. R. Co. v. McDonald*, 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619; *Southern P. Co. v. Pool*, 160 U. S. 438, 40 L. ed. 485, 16 Sup. Ct. Rep. 338.

197 U. S.

It is well settled at common law that an officer who keeps a prisoner so negligently that he escapes is answerable for his neglect as a crime.

1 Bishop, Crim. Law, ed. 1865, § 392; 2 Bishop, Crim. Law, ed. 1865, § 1056; 1 Russell, Crimes, 8th Am. ed. 420; *Smith v. Com.* 59 Pa. 325.

The transportation company having been the custodian of these alien immigrant prisoners, and having permitted them to escape, negligence was to be presumed. The court was clearly right, upon the admitted facts, in ruling that defendant was guilty of negligence.

San Francisco Lumber Co. v. Bibb, 139 Cal. 325, 73 Pac. 864; *Berkshire v. Missouri P. R. Co.* 28 Mo. App. 225; *Graves v. Alsap*, 1 Ariz. 274, 25 Pac. 836; *Detroit v. Beckman*, 34 Mich. 125, 22 Am. Rep. 507; *Murphy v. People*, 3 Colo. 147; *Atty. Gen. v. Rice*, 64 Mich. 385, 31 N. W. 203; *Jones v. Madison County*, 72 Miss. 777, 18 So. 87; *Holms v. Johnston*, 12 Heisk. 155; *Happel v. Brethauer*, 70 Ill. 166, 22 Am. Rep. 70.

The admission of specific facts nullifies a reservation denying their legal effect.

20 Enc. Pl. & Pr. 661; *Haight v. Green*, 19 Cal. 113.

The contemporaneous and long-continued practice of officers required to execute or take special cognizance of a statute is strong evidence of its true meaning, and should not be disregarded except for cogent reasons.

26 Am. & Eng. Enc. Law, p. 635; *Stuart v. Laird*, 1 Cranch, 299, 2 L. ed. 115; *Edwards v. Darby*, 12 Wheat. 206, 6 L. ed. 603; *United States v. State Bank*, 6 Pet. 29, 8 L. ed. 308; *Cooley v. Port Wardens*, 12 How. 299, 13 L. ed. 996; *Union Ins. Co. v. Hoge*, 21 How. 35, 16 L. ed. 61; *Havemeyer v. Iowa County*, 3 Wall. 294, 18 L. ed. 38; *United States v. Gilmore*, 8 Wall. 330, 19 L. ed. 396; *United States v. Moore*, 95 U. S. 760-763, 24 L. ed. 588, 589; *United States v. Johnston*, 124 U. S. 236-253, 31 L. ed. 389, 396, 8 Sup. Ct. Rep. 446; *Pennoyer v. McConnaughy*, 140 U. S. 1-23, 35 L. ed. 363-370, 11 Sup. Ct. Rep. 699; *Burrow-Giles Lithographic Co. v. Sarony*, 111 U. S. 53, 28 L. ed. 349, 4 Sup. Ct. Rep. 279; *Brown v. United States*, 113 U. S. 568, 28 L. ed. 1079, 5 Sup. Ct. Rep. 648; *The Laura (Pollock v. Bridgeport S. B. Co.)* 114 U. S. 411, 29 L. ed. 147, 5 Sup. Ct. Rep. 881; *United States v. Philbrick*, 120 U. S. 52, 30 L. ed. 559, 7 Sup. Ct. Rep. 413; *United States v. Hill*, 120 U. S. 169, 30 L. ed. 627, 7 Sup. Ct. Rep. 510; *Schell v. Fauche*, 138 U. S. 572, 34 L. ed. 1043, 11 Sup. Ct. Rep. 376; *Heath v. Wallace*, 138 U. S. 573, 34 L. ed. 1063, 11 Sup. Ct. Rep. 380; *United States v. Alabama G. S. R. Co.* 142 U. S. 615, 35 L. ed. 1134, 12

Sup. Ct. Rep. 306; *Swift's Case*, 14 Ct. Cl. 208.

While it is true that penal statutes should be construed strictly, it is equally true that they will be construed so as to give effect to the legislative intent, and where that intent is clear, courts will not construe a statute with such technicality as to defeat its purpose.

United States v. Hartwell, 6 Wall. 385-397, 18 L. ed. 830-833; *Hawaii v. Mankichi*, 190 U. S. 197, 47 L. ed. 1016, 23 Sup. Ct. Rep. 787; *Johnson v. Southern P. Co.* 195 U. S. 1, ante, 65, 25 Sup. Ct. Rep. 158; *United States v. Lacher*, 134 U. S. 624, 33 L. ed. 1080, 10 Sup. Ct. Rep. 625; *Bolles v. Outing Co.* 175 U. S. 262, 44 L. ed. 156, 20 Sup. Ct. Rep. 94; *O'Grady v. Wiseman*, Rap. Jud. Quebec, 9 B. R. 169, 3 Can. Crim. Cas. 332; *Indianapolis v. Huegele*, 115 Ind. 581, 18 N. E. 172; *State v. McCrystol*, 43 La. Ann. 907, 9 So. 922; *State v. Glaudi*, 43 La. Ann. 914, 9 So. 925; *State v. Archer*, 73 Md. 44, 20 Atl. 172; *Stricker v. Pennsylvania R. Co.* 60 N. J. L. 230, 37 Atl. 776; *State v. Godfrey*, 97 N. C. 507, 1 S. E. 779; *Hardwick v. Vermont Teleph. & Teleg. Co.* 70 Vt. 180, 40 Atl. 169.

When an act or part thereof which has received a judicial interpretation is re-enacted in the same terms, or where words used in a statute have a definite and well-known meaning in law, that construction or that meaning must be considered to have the sanction of the legislature unless the contrary appears.

26 Am. & Eng. Enc. Law, p. 650; *United States v. Central P. R. Co.* 118 U. S. 235, 30 L. ed. 173, 6 Sup. Ct. Rep. 1038; *United States v. Le Bris*, 121 U. S. 278, 30 L. ed. 946, 7 Sup. Ct. Rep. 894; *United States v. Mooney*, 116 U. S. 104-106, 29 L. ed. 550, 551, 6 Sup. Ct. Rep. 304; *The Devonshire*, 8 Sawy. 209, 13 Fed. 39; *Rutland v. Mendon*, 1 Pick. 154; 44 Am. Dig. col. 2865.

The word "neglect" is used here in its ordinary sense, and means to omit.

2 Bouvier, Dict. Neglect, 478; *Rosenplaenter v. Roessle*, 54 N. Y. 262; *Merrifield v. Cobleigh*, 4 Cush. 178; *Atchison, T. & S. F. R. Co. v. Billings*, 7 Kan. App. 399, 52 Pac. 61; *Willoughby v. Willoughby*, 9 Q. B. 923; *Leslie v. Lorillard*, 31 Hun, 305; *Daniels v. Ellison*, 3 N. H. 279.

Mr. Justice **Day**, after making the foregoing statement, delivered the opinion of the court:

The circuit court of appeals disposed of this case upon the view that the judgment of conviction would have been warranted upon the evidentiary facts stipulated, and that the stipulation, in so far as it stated that the escape of the immigrants could not

have been reasonably anticipated by the master or officers of the steamship, and did not occur by reason of any negligence or want of proper care upon their part, was the statement of a mere conclusion not binding upon the court, and would not prevent it from rendering an independent judgment upon the facts stated. We cannot take this view of the case. It may be conceded that where the facts are all stated the court cannot be concluded by a stipulation of the parties as to the legal conclusions to be drawn therefrom, but we know no rule of public policy which will prevent the United States attorney from stipulating with the defendant in a case of this character as to the ultimate facts in the controversy. It is to be presumed that such an officer will do his duty to the government, and not stipulate away the rights of the prosecution. The question of negligence in a given case is not usually reduced to one of law, and, as is the case here, its presence or absence is the ultimate question to be decided between the parties. Ordinarily, the issue of negligence is one of fact to be determined *by the jury.[447] This proposition has been so often adjudicated in this court that it is only necessary to refer to the cases in passing. It has been held that, where there is no reasonable doubt as to the facts or the inference to be drawn from them, the question becomes one of law. Where the state of facts is such that reasonable minds may fairly differ upon the question as to whether there was negligence or not, its determination is a matter of fact for the jury to decide. *Grand Trunk R. Co. v. Ives*, 144 U. S. 408-417, 36 L. ed. 485-489, 12 Sup. Ct. Rep. 679; *Baltimore & O. R. Co. v. Griffith*, 159 U. S. 603-611, 40 L. ed. 274-278, 16 Sup. Ct. Rep. 105; *Texas & P. R. Co. v. Gentry*, 163 U. S. 353-368, 41 L. ed. 186-193, 16 Sup. Ct. Rep. 1104; *Warner v. Baltimore & O. R. Co.* 168 U. S. 339, 42 L. ed. 491, 18 Sup. Ct. Rep. 68.

The evidentiary facts in the stipulation upon which this case was tried are not very fully set forth, and the government and the defendant were content to stipulate that the method of escape through the portholes (assuming that it was by this means the immigrants escaped) could not have been reasonably anticipated by those in charge of the Korea, and that the escape did not occur by reason of any negligence or lack of proper care upon the part of the officers of the vessel or the defendant.

We think the parties were entitled to have this case tried upon the assumption that these ultimate facts, stipulated into the record, were established, no less than the specific facts recited.

We come, then, to the important question in this case, as to the construction of the

statute under which the petitioner was convicted and fined. The conviction was under § 10 of the act of March 3, 1891 (26 Stat. at L. 1084, chap. 551, U. S. Comp. Stat. 1901, p. 1299), which is as follows:

"Sec. 10. That all aliens who may unlawfully come to the United States shall, if practicable, be immediately sent back on the vessel by which they were brought in. The cost of their maintenance while on land, as well as the expense of the return of such aliens, shall be borne by the owner or owners of the vessels on which such aliens came; and if any master, agent, consignee, or owner of such vessel shall refuse to receive [448] back *on board the vessel such aliens, or shall neglect to detain them thereon, or shall refuse or neglect to return them to the port from which they came, or to pay the cost of their maintenance while on land, such master, agent, consignee, or owner shall be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than three hundred dollars for each and every offense; and any such vessel shall not have clearance from any port of the United States while any such fine is unpaid."

The question is as to the effect of this requirement upon shipowners who have wrongfully brought aliens into this country, and who, having received them on board the vessel for the purpose of returning them to the place from whence they came, shall neglect to detain them thereon, or neglect to return them. In this case the court found the defendants guilty as charged in the information, in that they refused and neglected to return to the port from whence they came the two Japanese immigrants. It is the contention of the government that this statute requires of persons situated as were the defendants the absolute duty of returning to the place from whence they came immigrants unlawfully brought into the ports of the United States; and that the word "neglect," as used in this statute, is equivalent to the word "fail" or "omit," and the return of the immigrants is required at all hazards, and the vessel owner will only be relieved when the default is the result of *vis major*, or inevitable accident. This contention finds support in the case of *Warren v. United States*, 7 C. C. A. 368, 5 U. S. App. 656, 58 Fed. 559, decided in November, 1893, in the circuit court of appeals for the first circuit, in which § 10 of the act of March 3, 1891, was directly under consideration. We are cited to no other cases construing this section, wherein it was directly involved, although in *United States v. Spruth*, 71 Fed. 678, a case in the district court for the eastern district of Pennsylvania, involving the 8th section of the same act, Judge Butler criticized the decision in the *War-*
197 U. S.

ren Case, and expressed doubts as to the construction therein given to the language of a criminal statute. The word "neglect," *as [449] sometimes used, imports an absence of care or attention in the doing or omission of a given act, or it may be used in the sense of an omission or failure to perform some act. To "neglect" is not always synonymous with to "omit." Whether the use of the term is intended to express carelessness or lack of attention required by the circumstances, or to express merely a failure to do a given thing, depends upon the connection in which the term is used and on the meaning intended to be expressed. These meanings find illustration in the lexical definition of the word, as well as the adjudicated cases in which it has been construed when applied to different subjects. In Webster's Dictionary the verb "neglect" is defined as meaning "not to attend to with due care or attention; to forbear one's duty in regard to; to suffer to pass unimproved, unheeded, undone." In the Standard Dictionary the word is defined as meaning "to fail to perform through carelessness." And in the Century Dictionary: "1. To treat carelessly or heedlessly; forbear to attend to or treat with respect; be remiss in attention or duty toward; . . . 2. To overlook or omit; disregard. . . . 3. To omit to do or perform; let slip; leave undone; fail through heedlessness to do or in doing (something)."

As defined in the penal statutes of several of the states, the word "neglect" is said to import "a want of such attention to the nature or probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns." Words and Phrases Judicially Defined, vol. 5, p. 4740.

While the term may be used as indicative of carelessness, it may also merely mean an omission or failure to do or perform a given act. This meaning finds illustration in the case of *Rosenpluenter v. Roessle*, 54 N. Y. 262, 266, in which a guest at a hotel who failed to deposit his valuables for safe-keeping, as required by the statute, was held to have "neglected" to deposit within the meaning of the law, for, having the opportunity so to do, he omitted to avail himself of this means of safe-keeping. An illustration of the meaning of the term when indicative *of a want of care is found in *Wat-* [450]
son v. Hall, 46 Conn. 204, 206, in which case it was held that in a statute by which a grand juror is made subject to prosecution when he shall neglect to make seasonable complaint of a crime, the word "neglect" was construed to be used in the sense of omission from carelessness to do something that can be done and that ought to be done, and the grand juror was held not to have

neglected the complaint when, after investigation, he had become convinced that the offense should not be prosecuted.

In which sense is the term used in this statute? This is a highly penal statute, and we think the well-known rule, as laid down by Mr. Chief Justice Marshall in the case of *United States v. Wiltberger*, 5 Wheat. 76, 95, 5 L. ed. 37, 42, is applicable here:

"The rule that penal laws are to be construed strictly is, perhaps, not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislative, not in the judicial, department. It is the legislature, not the court, which is to define a crime and ordain its punishment."

It is true that in the construction of penal statutes, as well as others, the object and purpose is to ascertain the correct meaning of the act, with a view to carrying out the expressed intent of the legislature, and penal statutes are not to be construed so strictly as to defeat the obvious intention of the legislature. *United States v. Lacher*, 134 U. S. 624, 33 L. ed. 1080, 10 Sup. Ct. Rep. 625. We are to search for the true meaning of this statute, remembering that it undertakes to define an offense which is not to be broadened by judicial construction so as to include acts not intended by Congress. The statute imposes upon one who has brought immigrants into the United States not permitted to land here the duty of returning them to the place from whence they came, with a penalty by fine in case the duty is neglected. If by this requirement it was intended to make the shipowner or master an insurer of the absolute return of the immigrant, at all hazards, except when excused by *vis major*, or inevitable

[451] *accident, it would seem that Congress would have chosen terms more clearly indicative of such intention, and, instead of using a word of uncertain meaning, would have affixed the penalty in cases wherein the owner or master omitted or failed to safely return the immigrant illegally brought here, or provided some punishment for the person who had so far complied with the terms of the statute as to receive the immigrant on board his vessel, but had permitted the escape, either with or without fault upon his part. Where the statute permits of a construction which does not require this absolute insurance of the return of the immigrant, but holds the shipowner to the care and diligence required by the circumstances, we do not feel inclined to adopt the construction least favorable to the accused. This statute imports a duty, and,

830

in the absence of a requirement that it shall be performed at all hazards, we think no more ought to be required than a faithful and careful effort to carry out the duty imposed.

It is urged by the government that in view of the re-enactment of § 10 as § 19 of the act of 1903 (32 Stat. at L. 1213, chap. 1012, U. S. Comp. Stat. Supp. 1903, p. 179), it is to receive a construction in harmony with the judicial interpretation given to the act before the revision. While recognizing the rule that doubtful terms which have acquired through judicial interpretation a well-understood legislative meaning are presumed to be used by the legislature in the sense determined by authoritative decisions—*The Abbotsford (The Abbotsford v. Johnson)*, 98 U. S. 440, 25 L. ed. 168—we do not think the rule applies to this case. So far as we know, there has been but one decision, in the *Warren Case*, 7 C. C. A. 368, 5 U. S. App. 656, 58 Fed. 559, which was doubted in the *Spruth Case*, 71 Fed. 678. In 1900 the construction of this act was under consideration by the Attorney General of the United States upon a question submitted by the Secretary of the Treasury, involving the remission of fines to which the owner or master of a vessel was supposed to be liable under the terms of the act now under consideration. In construing § 10 of the act the Attorney General said:

"But while I assume nothing relative to the facts in this *case, with which it is [452] your duty to deal, and not mine. I am clearly of the opinion that in a case where every precaution to detain in safe custody and prevent escape has been rigidly taken, and yet in some real and unforeseen emergency an escape has occurred, there is no such neglect as the act contemplates. If the question were regarded otherwise, the act would rather have said, 'if any such alien shall escape from such vessel, such master shall be deemed guilty of a misdemeanor, and shall be punished.'" 23 Ops. Atty. Gen. p. 277.

In this state of judicial and official opinion we do not think this act can be said to have received such judicial interpretation as should control its legislative meaning. We think the Attorney General, in the case cited, laid down the true rule, which does not make the shipowner the insurer, at all hazards, of the safe return of the immigrant, but does require every precaution to detain him and prevent his escape.

It is further urged by the government that, if the burden of proof in cases under this act is placed upon the prosecution, it will be impossible to convict, as the facts

197 U. S.

and circumstances under which the escape took place are within the knowledge of the defendants alone. We are not dealing with the question of burden of proof in this case, for here it is expressly stipulated that the defendants could not have anticipated the escape by the method employed, and were not guilty of any want of care in the premises. Undoubtedly, the act of Congress should be given a reasonable interpretation, with a view to effect its purpose to prevent the introduction into this country of classes of persons excluded by the immigration laws. If this act should be construed as requiring the return, at all hazards, of the immigrants, those who are required to perform its mandate will doubtless claim the right to use all the force necessary to avoid the penalty of the law in delivering the immigrant to the country or place from whence he came. What would be the result of such power it is easy to imagine. It is difficult to see how a shipowner could insure the return [453] of such immigrants *without such confinement or imprisonment as may result in great hardship to that class of individuals who may themselves have had no intention to violate any law of this country. We think this statute was intended to secure, not the delivery of the immigrant at all hazards, but to require good faith and full diligence to carry him back to the port from whence he came. It follows that the judgment of the Circuit Court of Appeals must be reversed, and the cause remanded to the District Court, with instructions to discharge the petitioner.

NEW ORLEANS GASLIGHT COMPANY,
Plff. in Err.,
v.

DRAINAGE COMMISSION OF NEW ORLEANS, The Sewerage & Water Board, Successors, Substituted.

(See S. C. Reporter's ed. 453-462.)

Contracts—impairment of obligation—due process of law—requiring gas company to bear cost of changing mains to suit city drainage system.

1. The imposition on a gas company of the

cost of changes in the location of its pipes and mains under the city streets, necessitated by the construction of the municipal drainage system authorized by La. act July 9, 1896, does not impair any contract rights acquired under its exclusive franchise to supply gas to the city and its inhabitants through pipes and mains laid in the city streets.

2. A gas company has no such property right in the location of its pipes and mains laid under an exclusive franchise to supply gas to the city and its inhabitants, as to make the imposition upon it of the cost of changes in the location of such pipes and mains, necessitated by the construction of the municipal drainage system authorized by La. act July 9, 1896, a taking of property without due compensation.

[No. 172.]

Argued March 8, 9, 1905. Decided April 3, 1905.

IN ERROR to the Supreme Court of the State of Louisiana to review a judgment which on rehearing affirmed the judgment of the Civil District Court of the Parish of Orleans in that state denying the right of a gas company to recover the sums paid out for making the changes in the location of its pipes and mains necessitated by the construction of a municipal drainage system. *Affirmed.*

See same case below, 111 La. 838, 35 So. 929.

Statement by Mr. Justice Day:

The New Orleans Gaslight & Banking Company was incorporated in 1835, and was given the exclusive privilege of vending gas in the city of New Orleans and its faubourgs and the city of La. Fayette, to such persons or bodies corporate as might voluntarily choose to contract for the same; and it *was permitted to lay pipes and conduits at its own expense in the public ways and streets of New Orleans, having due regard for the public convenience. In 1845 and 1854 the charter of the company as to its right to engage in banking was withdrawn, and the right to vend gas and use the streets was continued to the corporation under the name of the New Orleans Gaslight Company until April 1, 1875, when its corporate privileges should end, the com-

NOTE.—On the privilege of using streets as a contract within the constitutional provision against impairing the obligation of contracts—see note to Clarksburg Electric Light Co. v. Clarksburg, 50 L. R. A. 142.

As to what laws are void as impairing obligation of contracts—see notes to Franklin County Grammar School v. Bailey, 10 L. R. A. 405; Fletcher v. Peck, 3 L. ed. U. S. 162; McCanna v. Citizens' Trust & Surety Co. 24 C. C. A. 20; and Montana Ore-Purchasing Co. v. Boston & 197 U. S.

M. Consol. Copper & S. Min. Co. 35 C. C. A. 12.

As to what constitutes due process of law—see Kuntz v. Sumption, 2 L. R. A. 655, and note; Re Gannon, 5 L. R. A. 359, and note; Ulman v. Baltimore, 11 L. R. A. 224, and note; and Gilman v. Tucker, 13 L. R. A. 304, and note. And see notes to People v. O'Brien, 2 L. R. A. 255; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

pany during the continuance of its charter to furnish the Charity Hospital with necessary gas and fixtures free of charge. By amendments the contract privilege of the company was extended until April 1, 1895, the exclusive privileges granted by the original charter not to extend beyond the time fixed in the act of incorporation. In 1870 another company, under the name of the Crescent City Gaslight Company, was incorporated, its charter providing that the company, its successors, and assigns, should for fifty years from the expiration of the charter of the New Orleans Gaslight Company have the sole and exclusive privilege of making and supplying gaslight in the city of New Orleans, and for that purpose be allowed to lay pipes and conduits in the streets and alleys of the city where the same may be required, at its own expense, in such manner as to least inconvenience the city and its inhabitants; and the company was also required to afterwards repair, with the least possible delay, the streets it had broken. In 1873 an act of the legislature fixed the date of the expiration of the exclusive franchise of the New Orleans Gaslight Company at April, 1875, and the franchise of the Crescent City Gaslight Company was confirmed from that date for the period of fifty years. On March 29, 1875, the New Orleans Gaslight Company and the Crescent City Gaslight Company were consolidated under the name of the former corporation. This company is the plaintiff in the action in the state court. By an act of the legislature, approved July 9, 1896, the state created a board known as the Drainage Commission of New Orleans, which board was given the power to control and execute a plan for the drainage of the city of New Orleans, and also the power to appropriate property according to the laws of the state, by legal proceedings, for the purpose of constructing a drainage system. After adopting a system of drainage, and proceeding with the construction thereof, according to the plans, it was found necessary to change the location in some places in the streets of the city, of the mains and pipes theretofore laid by the New Orleans Gaslight Company. The testimony shows that there was nothing to indicate that these changes were made in other than cases of necessity and with as little interference as possible with the property of the gas company. By stipulation between the parties it was agreed that the charges should be paid by the gas company when it became necessary to accede to the demands of the drainage commission; the gas company should keep an account thereof; and that its right to recover for the amount expended by it should not be prejudiced by

the arrangement made, but should be submitted to the courts for final adjudication. This action was brought to recover the cost of the changes so made. In the court of original jurisdiction there was a judgment in favor of the drainage commission. Upon appeal the supreme court of Louisiana reversed this judgment. Upon rehearing, the latter judgment was reversed and a final decree rendered, affirming the judgment of the lower court, rejecting the claim of the gas company. 111 La. 838, 35 So. 929. A writ of error to this court brings into review that judgment, the contention being that the judgment of the state court has impaired the contract rights of the gas company, and has the effect to take its property without compensation, in derogation of rights secured by the Constitution and the 14th Amendment.

Mr. Charles F. Buck argued the cause and filed a brief for plaintiff in error:

The rights of the plaintiff company are of a surer and more permanent character than a mere license,—a user at the pleasure of the sovereign.

New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252.

So far as it may be found necessary in prosecuting the drainage work to appropriate, expropriate, take, or damage the property of the New Orleans Waterworks Company, including the removal and replacing of waterworks, mains, and pipes, the drainage commission can only lawfully proceed by previously making just and adequate compensation.

Moore v. New Orleans Waterworks Co. 114 Fed. 382.

A franchise or privilege to use streets for a quasi-public purpose will constitute an irrevocable contract, unless there is in some form a clear reservation to cancel or revoke it.

Chicago v. Taylor, 125 U. S. 161, 31 L. ed. 638, 8 Sup. Ct. Rep. 820; *Little Nestucca Toll Road Co. v. Tillamook County*, 31 Or. 1, 65 Am. St. Rep. 802, 48 Pac. 465; *Southwestern R. Co. v. Southern & A. Teleg. Co.* 46 Ga. 43, 12 Am. Rep. 585; *Connecticut River R. Co. v. Franklin County*, 127 Mass. 50, 34 Am. Rep. 338; *San Mateo v. Southern P. Co.* 8 Sawy. 238, 13 Fed. 733; *Rutland Electric Light Co. v. Marble City Electric Light Co.* 65 Vt. 377, 20 L. R. A. 821, 36 Am. St. Rep. 868, 26 Atl. 635; *State, Hudson Teleph. Co. Prosecutor v. Jersey City*, 49 N. J. L. 303, 60 Am. Rep. 619, 8 Atl. 123; *Fidelity Trust & Safety Vault Co. v. Mobile Street R. Co.* 53 Fed. 687; *Clarksburg Electric Light Co. v. Clarksburg*, 50 L. R. A. 142, and note, 47 W. Va. 739, 35 S. E. 994;

Louisville Gas Co. v. Citizens' Gaslight Co. 115 U. S. 683, 29 L. ed. 510, 6 Sup. Ct. Rep. 265; *Chicago Municipal Gaslight & Fuel Co. v. Lake*, 130 Ill. 42, 22 N. E. 616; *Indianapolis v. Consumers Gas Trust Co.* 140 Ind. 114, 27 L. R. A. 514, 49 Am. St. Rep. 183, 39 N. E. 433; *Sixth Ave. R. Co. v. Kerr*, 72 N. Y. 330; 2 Dill. Mun. Corp. 3d ed. § 588, p. 582; *Irwin v. Great Southern Teleph. Co.* 37 La. Ann. 63; *Glover v. Powell*, 10 N. J. Eq. 211.

The police power, whatever it may be in nature and scope, is subordinate to the Constitution.

Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636.

The police power cannot be pleaded to justify damaging or taking of private property engaged in a lawful purpose authorized by the state.

Louisville Gas Co. v. Citizens' Gaslight Co. 115 U. S. 683, 29 L. ed. 510, 6 Sup. Ct. Rep. 265; *Mills*, Em. Dom. § 7; *Elliott, Roads & Streets*, § 20, p. 897, *Limitation of Police Power, and Vested Rights*; *Cooley*, Const. Lim. 3d ed. pp. 544, 572, chap. 16; *Benson v. New York*, 10 Barb. 245; *Miller v. New York & E. R. Co.* 21 Barb. 516; *Russell*, Pol. Power, p. 25; *Re Cheeseborough*, 78 N. Y. 232; *Cavanagh v. Boston*, 139 Mass. 426, 52 Am. Rep. 716, 1 N. E. 834; *Lewis*, Em. Dom. § 35; *Freund*, Pol. Power, §§ 513, 515, 555, 577; *Detroit v. Detroit Citizens' Street R. Co.* 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410; *Railroad Tax Case*, 8 Sawy. 238, 13 Fed. 755; *McCauley v. Weller*, 12 Cal. 500; *The Binghamton Bridge (Chenango Bridge Co. v. Binghamton Bridge Co.)* 3 Wall. 51, 18 L. ed. 137; *Bridge Proprietors v. Hoboken Land & Improv. Co.* 1 Wall. 116, 17 L. ed. 571; *Irwin v. Great Southern Teleph. Co.* 37 La. Ann. 63; *Shreveport & R. River Valley R. Co. v. St. Louis & S. W. R. Co.* 51 La. Ann. 814, 25 So. 424; *Pontchartrain R. Co. v. Levee Comrs.* 49 La. Ann. 570, 21 So. 765; *Western U. Teleg. Co. v. Myatt*, 98 Fed. 335.

The enforced removal and relaying of the mains of the plaintiff company is a "taking" or "damaging" of its private property.

Elliott, Roads & Streets, 2d ed. §§ 202, 203; *Freund*, Pol. Power, § 507, p. 543; *Eaton v. Boston, C. & M. R. Co.* 51 N. H. 504, 12 Am. Rep. 147; *Pumpelly v. Green Bay & M. Canal Co.* 13 Wall. 166, 20 L. ed. 557; *Cotting v. Kansas City Stock Yards Co.* 183 U. S. 105, 106, 46 L. ed. 107, 22 Sup. Ct. Rep. 30; *United States v. Lynah*, 188 U. S. 469, 47 L. ed. 548, 23 Sup. Ct. Rep. 349; *Chicago v. Taylor*, 125 U. S. 161, 31 L. ed. 638, 8 Sup. Ct. Rep. 820.

Mr. Omer Villeré argued the cause and filed a brief for defendant in error:

Expenses of erecting gates, planking the crossing, and maintaining flagmen, which
197 U. S.

will necessarily result from the laying out of a street across a railroad, must be regarded as incidental to the exercise of the police powers of the state, and do not constitute an element of just compensation to the railroad.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581.

Expense of changing the location of water pipes in accordance with a change of grade of the street is *damnum absque injuria*.

Jamaica Pond Aqueduct Corp. v. Brookline, 121 Mass. 5.

The cost of relaying a water pipe to make way for a sewer could not be recovered, although the water pipe had been originally laid under the direction of the city.

National Waterworks Co. v. Kansas City, 28 Fed. 921. See also *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Chicago, B. & Q. R. Co. v. Quincy*, 136 Ill. 563, 29 Am. St. Rep. 334, 27 N. E. 193; *Middlesex R. Co. v. Wakefield*, 103 Mass. 261; *Jamaica Pond Aqueduct Corp. v. Brookline*, 121 Mass. 5; *Columbus Gaslight & Coke Co. v. Columbus*, 50 Ohio St. 65, 19 L. R. A. 510, 40 Am. St. Rep. 648, 33 N. E. 292; *Cleveland v. Augusta*, 102 Ga. 233, 43 L. R. A. 638, 29 S. E. 584.

In creating the drainage commission of New Orleans, and in authorizing and directing it to execute a system of drainage for the city of New Orleans, the legislature was validly exercising the police power of the state in the interest of the health and comfort of its citizens.

Carondelet Canal & Nav. Co. v. New Orleans, 38 La. Ann. 309; *Melpomene Street v. New Orleans*, 14 La. Ann. 455; *Bass v. State*, 34 La. Ann. 494.

The franchise of the plaintiff company to make use of the public streets of New Orleans was taken subject to the implied condition that the state in the exercise of its police power might subsequently authorize in such streets other works subservient to the health and comfort of the citizens of New Orleans, the execution of which works might, incidentally, cause damage to the property held by plaintiff under its prior franchise. The loss caused by such subsequently authorized work, when executed with reasonable care, was *damnum absque injuria*.

Bass v. State, 34 La. Ann. 494; *Peart v. Meeker*, 45 La. Ann. 421, 12 So. 490; *Egan v. Hart*, 45 La. Ann. 1360, 14 So. 244; *Carondelet Canal & Nav. Co. v. New Orleans*, 38 La. Ann. 308; *Vidalat v. New Orleans*, 43 La. Ann. 1121, 10 So. 175; *Ruch v. New Orleans*, 43 La. Ann. 275, 9 So. 473; *Pontchartrain R. Co. v. Levee Comrs.* 49 La. Ann. 570, 21 So. 765; *Eldridge v. Trezevant*, 160 U. S. 455, 40 L. ed. 490, 16 Sup. Ct. Rep.

345; *Dubose v. Levee Comrs.* 11 La. Ann. 165; *National Waterworks Co. v. Kansas City*, 28 Fed. 921; *Middlesex R. Co. v. Wakefield*, 103 Mass. 261; *Cincinnati v. Penny*, 21 Ohio St. 499, 8 Am. Rep. 73; *Brown v. Duplessis*, 14 La. Ann. 854; *Dill. Mun. Corp.* §§ 656, 671; *Lewis, Em. Dom.* §§ 107, 109.

The principle is well established that the legislature cannot part with or bargain away any portion of its police power; and from this principle it follows that, even if the plaintiff received an exclusive grant and right in and to the space in the streets of the city of New Orleans occupied by its mains and conduits, such grant would have constituted no bar to the perfection of a system of drainage.

Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652.

Mr. Justice **Day** delivered the opinion of the court:

In the case of the *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252, it was held that the complainant, by reason of the franchises granted and agreements made, as fully set forth in that case, had acquired the exclusive right to supply gas to the city of New Orleans and its inhabitants through pipes and mains laid in the streets.

It is the contention of the plaintiff in error that, having acquired the franchise and availed itself of the right to locate its pipes under the streets of the city, it has thereby acquired a property right which cannot be taken from it by a shifting of some of its mains and pipes from their location to accommodate the drainage system, without compensation for the cost of such changes. It is not contended that the gas company has acquired such a property right as will prevent the drainage commission, in the exercise of the police power granted to it by the state, from removing the pipes so as to make room for its work, but it is insisted that this can only be done upon terms of compensation for the cost of removal. This contention requires an examination of the extent and nature of the rights conferred in the grant to the gas company. The exclusive privilege which was sustained by this [459] court in the case of *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252, was the right to supply the city and its inhabitants with gas for the term granted. There was nothing in the grant of the privilege which gave the company the right to any particular location in the streets; it

had the right to use the streets, or such of them as it might require in the prosecution of its business, but in the original grant to the New Orleans Gaslight & Banking Company the pipes were to be laid in the public ways and streets, "having due regard to the public convenience." And in the grant to the Crescent City Gaslight Company the pipes were to be "laid in such manner as to produce the least inconvenience to the city or its inhabitants." In the very terms of the grant there is a recognition that the use of the streets by the gas company was to be in such manner as to least inconvenience the city in such use thereof. Except that the privilege was conferred to use the streets in laying the pipes in some places thereunder, there was nothing in the terms of the grant to indicate the intention of the state to give up its control of the public streets,—certainly not so far as such power might be required by proper regulations to control their use for legitimate purposes connected with the public health and safety. In the case above cited, in which the exclusive right to supply gas was sustained, there was a distinct recognition that the privilege granted was subject to proper regulations in the interest of the public health, morals, and safety. Upon this subject Mr. Justice Harlan, speaking for the court, said (115 U. S. 671, 29 L. ed. 524, 6 Sup. Ct. Rep. 263):

"With reference to the contract in this case it may be said that it is not, in any legal sense, to the prejudice of the public health or the public safety. It is none the less a contract because the manufacture and distribution of gas, when not subjected to proper supervision, may possibly work injury to the public; for the grant of exclusive privileges to the plaintiff does not restrict the power of the state, or of the municipal government of New Orleans acting under authority for that purpose, to establish and enforce regulations which are not *incon-[460] sistent with the essential rights granted by plaintiff's charter, which may be necessary for the protection of the public against injury, whether arising from the want of due care in the conduct of its business, or from an improper use of the streets in laying gas pipes, or from the failure of the grantee to furnish gas of the required quality and amount. The constitutional prohibition upon state laws impairing the obligation of contracts does not restrict the power of the state to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the execution of such contracts. Rights and privileges arising from contracts with a state

are subject to regulations for the protection of the public health, the public morals, and the public safety, in the same sense and to the same extent as are all contracts and all property, whether owned by natural persons or corporations."

The drainage of a city in the interest of the public health and welfare is one of the most important purposes for which the police power can be exercised. The drainage commission, in carrying out this important work, it has been held by the supreme court of the state, is engaged in the execution of the police power of the state. *State v. Flower*, 49 La. Ann. 1199, 1203, 22 So. 623.

It is admitted that in the exercise of this power there has been no more interference with the property of the gas company than has been necessary to the carrying out of the drainage plan. There is no showing that the value of the property of the gas company has been depreciated, nor that it has suffered any deprivation further than the expense which was rendered necessary by the changing of the location of the pipes to accommodate the work of the drainage commission. The police power, in so far as its exercise is essential to the health of the community, it has been held cannot be contracted away. *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 567, 38 L. ed. 269, 272, 14 Sup. Ct. Rep. 437; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 751, 28 L. ed. 585, 587, 4 Sup. Ct. Rep. 652; *Stone v. Mississippi*, 101 U. S. 814, 816, 25 L. ed.

[461] 1079. In a large city *like New Orleans, situated as it is, and the *entrepôt* of an extensive commerce coming from many foreign countries, it is of the highest importance that the public health shall be safeguarded by all proper means. It would be unreasonable to suppose that in the grant to the gas company of the right to use the streets in the laying of its pipes it was ever intended to surrender or impair the public right to discharge the duty of conserving the public health. The gas company did not acquire any specific location in the streets; it was content with the general right to use them; and when it located its pipes it was at the risk that they might be, at some future time, disturbed, when the state might require for a necessary public use that changes in location be made.

This right of control seems to be conceded by the learned counsel for the plaintiff in error, in so far as it relates to the right to regulate the use of the surface of the streets, and it is recognized that the users of such surface may be required to adapt

197 U. S.

themselves to regulations made in the exercise of the police power. We see no reason why the same principle should not apply to the subsurface of the streets, which, no less than the surface, is primarily under public control. The need of occupation of the soil beneath the streets in cities is constantly increasing, for the supply of water and light and the construction of systems of sewerage and drainage; and every reason of public policy requires that grants of rights in such subsurface shall be held subject to such reasonable regulation as the public health and safety may require. There is nothing in the grant to the gas company, even if it could legally be done, undertaking to limit the right of the state to establish a system of drainage in the streets. We think whatever right the gas company acquired was subject, in so far as the location of its pipes was concerned, to such future regulations as might be required in the interest of the public health and welfare. These views are amply sustained by the authorities. *National Waterworks Co. v. Kansas*, 28 Fed. 921, in which the opinion was delivered by Mr. Justice Brewer, *then circuit judge; *Columbus Gaslight & Coke Co. v. Columbus*, 50 Ohio St. 65, 19 L. R. A. 510, 40 Am. St. Rep. 648, 33 N. E. 292; *Jamaica Pond Aqueduct Corp. v. Brookline*, 121 Mass. 5; *Re Deering*, 93 N. Y. 361; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 254, 41 L. ed. 979, 990, 17 Sup. Ct. Rep. 581. In the latter case it was held that uncompensated obedience to a regulation enacted for the public safety under the police power of the state was not taking property without due compensation. In our view, that is all there is to this case. The gas company, by its grant from the city, acquired no exclusive right to the location of its pipes in the streets, as chosen by it, under a general grant of authority to use the streets. The city made no contract that the gas company should not be disturbed in the location chosen. In the exercise of the police power of the state, for a purpose highly necessary in the promotion of the public health, it has become necessary to change the location of the pipes of the gas company so as to accommodate them to the new public work. In complying with this requirement at its own expense, none of the property of the gas company has been taken, and the injury sustained is *damnum absque injuria*.

We find no error in the judgment of the Supreme Court of Louisiana, and the same is affirmed.

[463]*IRON CLIFFS COMPANY, Cleveland Cliffs Iron Company, William G. Mather, and Murray M. Duncan, *Plffs. in Err.*,

v.

NEGAUNEE IRON COMPANY, Edward N. Breitung, and Mary Kaufman.

(See S. C. Reporter's ed. 463-475.)

Error to state court—Federal question—when decision not involved.

A decree of the state court requiring defendants to vacate certain lands, and enjoining them from further mining thereon, which was the relief prayed in a bill proceeding on the theory that the corporation holding a mining lease under which defendants justified their occupation as its agents was no longer in existence, is not reviewable in the Federal Supreme Court as involving a denial of the claim that in proceeding to determine the case without making the corporation a party defendant it will be deprived of its property without due process of law, since, not being a party, the rights of the corporation are not affected by such decree.

[No. 173.]

Argued March 9, 10, 1905. Decided April 3, 1905.

IN ERROR to the Supreme Court of the State of Michigan to review a decree requiring the defendants to vacate certain lands and enjoining them from mining thereon. *Dismissed* for want of jurisdiction.

See same case below, 96 N. W. 468.

Statement by Mr. Justice **Day**:

This case was begun in the circuit court of the state of Michigan by the defendants in error, the Negaunee Iron Company, Edward N. Breitung, and Mary Kaufman, against the Iron Cliffs Company, the Cleveland Cliffs Iron Company, William G. Mather, and Murray M. Duncan. The defendants in error, plaintiffs in the court below, claimed to be the owners of certain premises upon which there was an outstanding lease purporting to run for a term of ninety-nine years from its date, September 17, 1857, made by Charles Harvey to the Pioneer Iron Company. As the controversy in this court centers about this lease, the allegations of the bill in respect thereto may be noticed. It is alleged that the interest conveyed by Harvey on the 17th day of

September, 1857, to the Pioneer Iron Company was for the sole purpose of mining and quarrying at its own expense such ores and marble as might be found on the premises, subject to the qualification that the said company should not quarry, mine, or remove any ore from said *lands, except[464] such as it could actually convert into merchantable iron in its own furnaces and forges, being the furnaces and forges then being constructed or about to be constructed by the said company at Negaunee. Complainants allege that at the time of the filing of the bill they were, and for more than fifteen years theretofore had been, in the actual and exclusive possession of all the lands described in the bill, and the ore and marble thereon, claiming to be the exclusive owners thereof. That said Pioneer Iron Company, in the month of September, 1859, erected two certain ore furnaces at Negaunee, instead of one furnace, as contemplated at the time of the execution of the grant or lease by Harvey to the Pioneer Iron Company.

That said Pioneer Iron Company carried on the business of manufacturing iron at its said furnaces from the time they were constructed until about the 1st day of January, 1866. That said Pioneer Iron Company, in carrying on its said business, procured no iron from the premises, or any portion of the premises described in said lease executed by the said Charles T. Harvey to the said Pioneer Iron Company, but procured all of their ore for the manufacturing of iron from other lands.

Complainant alleges that on the 1st day of January, 1866, the Pioneer Iron Company ceased to do business, and has not since that time manufactured or operated under the lease, but, on the contrary, at and from the date aforesaid abandoned the same. On the 10th day of March, 1866, the Pioneer Iron Company entered into an agreement with and leased to the Iron Cliffs Company for the period of ten years its entire real and personal property situated in the county of Marquette, Michigan, consisting of all its iron works, buildings, lands, and property rights. That after making said lease and agreement with the Iron Cliffs Company the said Pioneer Iron Company made and filed no reports as required by the laws of the state of Michigan.

"That at some time prior to the 1st day of January, 1873, the said Iron Cliffs Com-

NOTE.—On the general subject, of writs of error from United States Supreme Court to state courts—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Kipley v. Illinois*, 42 L. ed. U. S. 998; and *Re Buchanan*, 39 L. ed. U. S. 884.

On what adjudications of state courts can be brought up for review in the Supreme Court of

the United States by writ of error to those courts—see note to *Apex Transp. Co. v. Garbade*, 62 L. R. A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to *Mutual L. Ins. Co. v. McGrew*, 63 L. R. A. 33.

pany became the owner of all the capital stock of said Pioneer Iron Company, and [465] said stock has *since that time been held in the names of different individuals for the uses and purposes of said Iron Cliffs Company, and the certificates of stock representing said capital stock of said Pioneer Iron Company have been and now are held in the names of different individuals who are officers, directors, stockholders, agents, or servants of the said Iron Cliffs Company and of the Cleveland Cliffs Iron Company, a corporation organized under the laws of the state of West Virginia and doing business at Negaunee, in said county of Marquette, Michigan, which two corporations have been operating together in the conduct of their business, and whose officers and agents are in the main the same persons; that said stock is held as aforesaid for the use and benefit of said Iron Cliffs Company and the said Cleveland Cliffs Iron Company.

"That on the 2d day of April, A. D. 1887, the corporate existence of said Pioneer Iron Company, by the terms of its articles of association, expired by limitation, and said corporation became and was thereby dissolved; and that whatever rights, if any, the said Pioneer Iron Company had and held under and by virtue of said lease, were thereby terminated and extinguished, and such rights and interest thereby reverted to and became vested in said Charles T. Harvey and his grantees.

"That all the lands hereinbefore specially described are mineral lands, and have therein large deposits of valuable iron ore, and that the chief value of said lands consists in the iron ore situated therein, and the mining and removing therefrom of said iron ore by the defendants would take from said lands their principal value, and would work and would be to your orators an irreparable injury.

"That the officers and agents of said Iron Cliffs Company and said Cleveland Cliffs Iron Company, who are engaged in and carrying out the said scheme and plan to defraud your orators, and to mine and remove the iron ore from said lands under the cover and by the use of the name of the Pioneer Iron Company, are, so far as they are known to your orators, William G. Mather, who is the president of said Iron [466] Cliffs *Company and also president of said Cleveland Cliffs Iron Company, and Murray M. Duncan, who, your orators are informed and believe, and upon information and belief charge the truth to be, is the managing agent of the said Iron Cliffs Company and of the said Cleveland Cliffs Iron Company. That said Duncan and said Mather and their confederates, as aforesaid, well

know that the corporate existence of the said Pioneer Iron Company has long since been terminated and said corporation dissolved, and that the rights and privileges granted in said lease of date September 17, 1857, have reverted to the said Charles T. Harvey and his grantees; notwithstanding which said Duncan, under the pretense that he is acting as agent of said Pioneer Iron Company, is engaged in superintending and directing said work which is being done on said lands by various persons who are laborers acting under his orders."

The prayer of the bill is—

"(1) That by the decree of this honorable court, all the rights and privileges in the mineral and stone granted in said lease, executed by the said Charles T. Harvey as aforesaid, to the said Pioneer Iron Company, be declared to be terminated and of no binding force or effect as against your orators or their said lands.

"(2) That in so far as it affects your orators' said lands, said lease be canceled and the cloud upon your orators' title as aforesaid be removed, and your orators' title to all the iron ore and marble in and upon their said lands be quieted and confirmed in your orators.

"(3) That the said William G. Mather, Murray M. Duncan, the said Iron Cliffs Company, and the said Cleveland Cliffs Iron Company, and their officers, directors, agents, attorneys, and employees, be perpetually enjoined and restrained from setting up in the name of said Pioneer Iron Company or in any other manner any right or title, under said lease from said Charles T. Harvey to said Pioneer Iron Company, in or to your orators' said lands, and entering upon or removing from said lands any *iron ore or marble, and for such other and [467] such further relief as to the court shall seem meet and proper."

One of the defendants, Murray M. Duncan, answering separately, took issue upon the allegations of the bill, and denied specially that the Pioneer Company is dissolved, or any of its rights or property under the lease or conveyance terminated, and avers that the said Pioneer Iron Company is still the owner of the property rights and interests granted and conveyed; admits that he, as an agent of the said company, has actively engaged in conducting operations on some of the lands covered by the conveyance, for the purpose of discovering iron ore to be used in the furnaces of the Pioneer Iron Company, and that if ore sufficient in quantity and quality is discovered on the premises the said Pioneer Iron Company intends immediately to purchase the right to the surface, as required in the agreement, and intends to

continue explorations until it finds ore on said lands for the use of its furnaces, or discovers the nonexistence of such ore; and further says that he has no personal interest in the lands set forth in the bill, but in all his actions is merely the agent of the Pioneer Iron Company, and not the agent of any other corporation or person whatsoever.

The Iron Cliffs Company and Cleveland Cliffs Iron Company and William G. Mather answer together, taking issue upon the allegations of the bill, admitting the existence of the lease of the Pioneer Iron Company, and aver that the entering and explorations on the lands were made and have been carried on by the Pioneer Iron Company, and deny that the charter of said company has expired; admit that said company through its agents has continued to carry on the operations begun by the Pioneer Iron Company under the direction of William G. Mather, as one of the officers of said company, and deny any interest in the matter set forth in the bill except as some or all of them may be stockholders or officers in the Pioneer Iron Company.

After issue joined and proofs taken, the bill of complaint was amended so as to charge that the defendants claim and pretend [468] that under the provisions of number 142 of the Public Acts of 1889, and under number 60 of the Public Acts of 1899 of the state of Michigan, said Pioneer Iron Company has been reorganized, and that by reason of said act such reorganized company had the right to mine ore under the said lease. The defendants answered the amendment, and admitted that in April, 1901, the Pioneer Iron Company had caused to be filed in the office of the secretary of state and in the office of the clerk of Marquette county certain perfected articles of incorporation of the said company in renewal of the original organization of said company, and under said reorganization, as well as previous filings, claimed to be a valid corporation. The record discloses that certain articles of association undertaking to reorganize the Pioneer Iron Company were adopted October 18, 1889, and filed in the office of the secretary of state, April 8, 1900, and amended articles were filed on April 8, 1901.

And, raising a Federal question, William G. Mather made the following answer:

"And this defendant, William G. Mather, answering for himself, says he owns in his own right and as trustee 3,940 shares of stock of said company; and that if any decree be rendered in this case by the court in any way declaring a forfeiture or termination or expiration of said ninety-nine-year lease, or in any way affecting the rights

of the Pioneer Iron Company thereunder, that said Pioneer Iron Company not being made a party to this proceeding, he as such stockholder, and said Pioneer Iron Company would thereby be deprived of its and his property without due process of law, in violation of the provisions of the 14th Amendment of the Constitution of the United States, which forbids any state to deprive any person of life or liberty or property without due process of law; and this defendant avers that any decision or findings of the court in any way limiting, terminating, changing, modifying, annulling, or diminishing the value of any of the rights of the Pioneer Iron Company under said ninety-nine-year lease, and *as ex-[469] pressed therein, would be void and of no effect under said provision of said Amendment of the Constitution of the United States."

Upon hearing, the circuit court, after setting forth certain findings, entered the following decree:

"Now, therefore, in consideration of the foregoing findings and determinations of the court concerning the particular matters set forth in the complainants' bill of complaint, it is ordered, adjudged, and decreed that the defendants, their counselors, attorneys, solicitors, and agents, and each and every of them, whether acting in their individual or representative capacity, immediately vacate and remove from the lands described in the bill of complaint, and that they and each of them be and they hereby are perpetually enjoined from further entering upon the said lands of the complainants for the purpose of exploring for or taking therefrom any minerals or iron ore, or for any purpose whatever, without the consent and authority of the complainants."

This decree, upon appeal, was affirmed by the supreme court of Michigan. 96 N. W. 468.

From this judgment a writ of error was sued out to this court.

Messrs. James H. Hoyt and Elihu Root argued the cause, and, with *Messrs. Hoyt, Dustin, & Kelley*, filed a brief for plaintiffs in error:

It is not always necessary that the Federal question should appear affirmatively on the record or in the opinion, if an adjudication of such question were necessarily involved in the disposition of the case by the state court.

Kaukauna Water Power Co. v. Green Bay & M. Canal Co. 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 281.

The Federal question is sufficiently set up and claimed if such Federal question was fully considered in the opinion of the court,

and was ruled upon against the plaintiffs in error.

San Jose Land & Water Co. v. San Jose Ranch Co. 189 U. S. 177-180, 47 L. ed. 765-768, 23 Sup. Ct. Rep. 487.

• No particular form of words is necessary to be used in order that the Federal question may be said to be involved.

Dewey v. Des Moines, 173 U. S. 199, 43 L. ed. 667, 19 Sup. Ct. Rep. 379.

In the case of *Roby v. Colehour*, 146 U. S. 153, 159, 160, 36 L. ed. 922, 924, 925, 13 Sup. Ct. Rep. 47, this court refused so technically to construe pleadings as to require a dismissal of the writ of error, where the intention to assert the Federal claim was evident.

Messrs. Scott W. Shaul and Benton Hanchett argued the cause, and, with **Mr. Arch B. Eldredge**, filed a brief for defendants in error:

A question not Federal was raised and was decided against the plaintiffs in error, which is sufficient to sustain the judgment.

Harrison v. Morton, 171 U. S. 38, 47, 43 L. ed. 63, 66, 18 Sup. Ct. Rep. 742; *Pierce v. Somers R. Co.* 171 U. S. 641, 43 L. ed. 316, 19 Sup. Ct. Rep. 64; *Cook County v. Calumet & C. Canal & Dock Co.* 138 U. S. 635, 651, 34 L. ed. 1110, 1115, 11 Sup. Ct. Rep. 435; *White v. Leovy*, 174 U. S. 91, 96, 43 L. ed. 907, 909, 19 Sup. Ct. Rep. 604; *Remington Paper Co. v. Watson*, 173 U. S. 443, 43 L. ed. 762, 19 Sup. Ct. Rep. 456; *McQuade v. Trenton*, 172 U. S. 636, 639, 43 L. ed. 582, 19 Sup. Ct. Rep. 292; *Chappell Chemical & Fertilizer Co. v. Sulphur Mines Co.* 172 U. S. 465, 471, 43 L. ed. 517, 519, 19 Sup. Ct. Rep. 265; *Capital Nat. Bank v. First Nat. Bank*, 172 U. S. 425, 43 L. ed. 502, 18 Sup. Ct. Rep. 202; *Giles v. Teasley*, 193 U. S. 146, 160, 48 L. ed. 655, 658, 24 Sup. Ct. Rep. 359; *Eustis v. Bolles*, 150 U. S. 361, 369, 370, 37 L. ed. 1111, 1113, 14 Sup. Ct. Rep. 131; *California Powder Works v. Davis*, 151 U. S. 389, 393, 38 L. ed. 206, 207, 14 Sup. Ct. Rep. 350.

The Federal right must have been specially set up or claimed by the Iron Cliffs Company itself.

Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co. 172 U. S. 475, 487, 488, 43 L. ed. 521, 525, 19 Sup. Ct. Rep. 247; *Yazoo & M. Valley R. Co. v. Adams*, 180 U. S. 1, 14, 45 L. ed. 395, 404, 21 Sup. Ct. Rep. 240; *Sully v. American Nat. Bank*, 178 U. S. 289, 297, 44 L. ed. 1072, 1076, 20 Sup. Ct. Rep. 935.

That such claim was made by the Iron Cliffs Company cannot be left to inference by this court.

Kipley v. Illinois, 170 U. S. 182, 186, 42 L. ed. 998, 1001, 18 Sup. Ct. Rep. 550; *Michigan Sugar Co. v. Michigan (Michigan 197 U. S.*

Sugar Co. v. Dix) 185 U. S. 112, 113, 114, 46 L. ed. 829, 830, 22 Sup. Ct. Rep. 581; *F. G. Oxley Stave Co. v. Butler County*, 166 U. S. 648, 654, 41 L. ed. 1149, 1151, 17 Sup. Ct. Rep. 709; *Union Mut. L. Ins. Co. v. Kirchoff*, 169 U. S. 103, 109, 110, 42 L. ed. 677, 680, 18 Sup. Ct. Rep. 260; *Levy v. Superior Court*, 167 U. S. 175, 177, 178, 42 L. ed. 126, 127, 17 Sup. Ct. Rep. 769; *Keokuk & H. Bridge Co. v. Illinois*, 175 U. S. 626, 634, 44 L. ed. 299, 302, 20 Sup. Ct. Rep. 205; *Dewey v. Des Moines*, 173 U. S. 193, 198-200, 43 L. ed. 665-667, 19 Sup. Ct. Rep. 379; *Chapin v. Fye*, 179 U. S. 127, 129, 45 L. ed. 119, 121, 21 Sup. Ct. Rep. 71; *Spies v. Illinois (Ex parte Spies)* 123 U. S. 131, 191, 31 L. ed. 80, 91, 8 Sup. Ct. Rep. 21; *French v. Hopkins*, 124 U. S. 524, 31 L. ed. 536, 8 Sup. Ct. Rep. 589; *Chappell v. Bradshaw*, 128 U. S. 132-134, 32 L. ed. 369, 370, 9 Sup. Ct. Rep. 40; *Baldwin v. Kansas*, 129 U. S. 52, 56, 32 L. ed. 640, 641, 9 Sup. Ct. Rep. 193; *Leeper v. Texas*, 139 U. S. 462, 467, 35 L. ed. 225, 226, 11 Sup. Ct. Rep. 579; *Cook County v. Calumet & C. Canal & Dock Co.* 138 U. S. 635, 653, 34 L. ed. 1110, 1116, 11 Sup. Ct. Rep. 435; *Brown v. Massachusetts*, 144 U. S. 573, 579, 36 L. ed. 546, 550, 12 Sup. Ct. Rep. 757; *Kennard v. Nebraska*, 186 U. S. 304, 308, 46 L. ed. 1175, 1177, 22 Sup. Ct. Rep. 879; *Howard v. Fleming*, 191 U. S. 126, 137, 48 L. ed. 121, 125, 24 Sup. Ct. Rep. 49; *San Jose Land & Water Co. v. San Jose Ranch Co.* 189 U. S. 177, 179, 180, 47 L. ed. 765, 766, 768, 23 Sup. Ct. Rep. 487; *Giles v. Teasley*, 193 U. S. 146, 160, 48 L. ed. 655, 658, 24 Sup. Ct. Rep. 359.

The briefs presented to the state court cannot be referred to for the purpose of showing that the Federal question was set up or claimed by the Iron Cliffs Company.

Sayward v. Denny, 158 U. S. 180, 183, 39 L. ed. 941, 942, 15 Sup. Ct. Rep. 777; *Gibson v. Chouteau*, 8 Wall. 314, 19 L. ed. 317; *Zadig v. Baldwin*, 166 U. S. 485, 488, 41 L. ed. 1087, 1088, 17 Sup. Ct. Rep. 639.

The opinion of the circuit court is irrelevant upon the question before this court.

Gregory v. McVeigh, 23 Wall. 294, 305, 306, 23 L. ed. 156, 157; *Fashnacht v. Frank*, 23 Wall. 416, 420, 23 L. ed. 81, 82; *Atherton v. Fowler*, 91 U. S. 143, 146, 23 L. ed. 265, 266; *Fisher v. Perkins (Fisher v. Carrico)* 122 U. S. 522, 525, 30 L. ed. 1192, 1193, 7 Sup. Ct. Rep. 1227.

It clearly appears from the record that the state court based its decree upon facts as having been found by the court, and that such facts having been so found are sufficient to sustain the decree. This court, without inquiring into the soundness of the decision of the state court, refuses to take jurisdiction in such cases.

Klinger v. Missouri, 13 Wall. 257, 263, 20 L. ed. 635, 637; *Murdock v. Memphis*, 20 Wall. 590, 636, 22 L. ed. 429, 444; *Hale v. Akers*, 132 U. S. 554, 564, 565, 33 L. ed. 442, 446, 447, 10 Sup. Ct. Rep. 171; *Beaupre v. Noyes*, 138 U. S. 397, 402, 34 L. ed. 991, 992, 11 Sup. Ct. Rep. 296; *De Saussure v. Gaillard*, 127 U. S. 216, 233, 234, 32 L. ed. 125, 132, 8 Sup. Ct. Rep. 1053; *Dibble v. Bellingham Bay Land Co.* 163 U. S. 63, 69, 41 L. ed. 72, 74, 16 Sup. Ct. Rep. 939; *Pittsburgh & L. A. Iron Co. v. Cleveland Iron Min. Co.* 178 U. S. 270, 279, 44 L. ed. 1065, 1068, 20 Sup. Ct. Rep. 931; *Giles v. Teasley*, 193 U. S. 146, 160, 48 L. ed. 655, 658, 24 Sup. Ct. Rep. 359.

The judgment that the Pioneer Iron Company is not a necessary party does not present any Federal question, and is not subject to review.

Murdock v. Memphis, 20 Wall. 590, 636, 638, 22 L. ed. 429, 444, 445; *Avery v. Popper*, 179 U. S. 305, 315, 45 L. ed. 203, 207, 21 Sup. Ct. Rep. 94; *Hale v. Akers*, 132 U. S. 554, 564, 33 L. ed. 442, 446, 10 Sup. Ct. Rep. 171; *Beaupre v. Noyes*, 138 U. S. 397, 401, 402, 34 L. ed. 991, 992, 993, 11 Sup. Ct. Rep. 296; *Telluride Power Transmission Co. v. Rio Grande Western R. Co.* 175 U. S. 639, 647, 44 L. ed. 305, 309, 20 Sup. Ct. Rep. 245.

The court will not, in this case, inquire and determine whether, under the Constitution and statutes of Michigan, the Pioneer Iron Company could be reorganized, and also whether, under proceedings attempted for the purpose, a reorganization was accomplished.

Telluride Power Transmission Co. v. Rio Grande Western R. Co. 175 U. S. 639, 647, 44 L. ed. 305, 308, 20 Sup. Ct. Rep. 245; *Dower v. Richards*, 151 U. S. 658, 663, 38 L. ed. 305, 307, 14 Sup. Ct. Rep. 452; *Israel v. Arthur*, 152 U. S. 355, 362, 38 L. ed. 474, 478, 14 Sup. Ct. Rep. 583.

Messrs. S. W. Shaull, Arch B. Eldredge, H. F. Pennington, Charles R. Brown, and Benton Hanchett also filed a brief for defendants in error.

Mr. Justice **Day** delivered the opinion of the court:

The Federal question, from which alone this court can take jurisdiction, is alleged to arise from the adverse decision made upon the answer of William G. Mather, setting up, in substance, that in proceeding to determine the case and render a decree without the presence of the Pioneer Iron Company as a party defendant in the action the said company and Mather, as a stockholder therein, were deprived of property without due process of law, in violation of the 14th Amendment to the Constitution of the United

States. It is elementary that, unless such Federal right set up in the state court was denied the plaintiff in error, this court has no jurisdiction. An examination of the opinion and decision of the supreme court *of Michigan shows the court held, [471] among other things, that the lease to the Pioneer Iron Company and the rights acquired thereby were appurtenant to the furnaces then existing upon the lands, and that it acquired no right to mine more ore than was necessary to supply such furnaces. That, as the right to mine the ore under the lease was appurtenant to the blast furnaces erected and intended to manufacture the iron so mined, the abandonment and destruction of the furnaces destroyed the right to mine the ore under the lease. The Pioneer Company, after the execution of the ninety-nine-year lease, having found ore in nonpaying quantities, had abandoned explorations, and for forty-three years had made no attempt to mine on the lands. That in 1866 the Pioneer Iron Company conveyed to the Iron Cliffs Company, for a period of ten years, all its iron works, buildings, lands, and property rights. The Iron Cliffs Company afterwards became the owner of all the stock of the Pioneer Company, and thereafter carried on the furnace business. That the Pioneer Iron Company was regarded as merged in the Iron Cliffs Company, and never thereafter made or filed any reports as required by the laws of the state of Michigan. That the complainants and those under whom they claim right and title, beginning about the year 1870, spent large sums of money in exploring and developing the lands and opening valuable mines thereon, and that the rights thus acquired, with the knowledge of those in interest, had worked an estoppel of any claim of right under the lease. For these, among other reasons, the supreme court affirmed the decree of the circuit court.

It is apparent that the questions decided in the state supreme court were of a non-Federal character, and give no right of review here unless it is true that in this judgment the Pioneer Iron Company has been concluded and its property rights taken without giving it an opportunity of being heard in the case. It is fundamental that no person can be deprived of property rights by any decree in a case wherein he is not a party. Not being made a party to the suit, the rights of the *Pioneer Iron Com-[472] pany cannot be affected in any way by the decision of the court. *Finley v. Bank of United States*, 11 Wheat. 304, 307, 6 L. ed. 480; *New Orleans Waterworks Co. v. New Orleans*, 164 U. S. 471, 480, 41 L. ed. 518, 523, 17 Sup. Ct. Rep. 161.

But it is urged that, notwithstanding the

Pioneer Iron Company is not a party to the record, its rights are necessarily adjudged in the decision, which affects the lease granted to it, and under which the defendants in their answer claim to act. But we cannot concede this proposition. It may be answered primarily that the Pioneer Iron Company cannot thus be denied its rights. The affirmative relief granted to the complainant must be on the case made in the bill, its amendment, and the testimony supporting the allegations therein made. The bill proceeds upon the theory that under the laws of the state of Michigan the charter of the Pioneer Iron Company had expired in 1887,—thirty years from the date of its organization; and there was the most careful avoidance, in the pleadings of the complaint, of any recognition of the existence as a going corporation of the Pioneer Iron Company. It was charged in the bill that its corporate existence had ended, and, so far from making it a party, the complainants refrained from recognizing it as an existing corporation, and the relief sought was against the corporations and persons named and made defendants in their own right, and not as agents of the Pioneer Iron Company, but who were alleged and found to be using the name of that corporation as a cover for wrongful acts of their own. The mere fact that the defendants sought to justify their acts as agents of the Pioneer Iron Company would not warrant the court in awarding a decree against that company or its agents, neither being made a party to the record. Nor, in our opinion, did the judgment rendered have this effect. In the case of *Tindal v. Wesley*, 167 U. S. 204, 42 L. ed. 137, 17 Sup. Ct. Rep. 770, where a suit was brought in South Carolina to recover possession of certain real property in that state, one of the defendants answered that he had no personal interest in the property except as secretary of the state of South Carolina, in which capacity alone he [473] had acquired *the control of the property. It was argued that in that event the suit could not be maintained, because it was in fact an action against the state within the meaning of the 11th Amendment, and the judgment of the court concluded the state. To this contention this court, speaking by Mr. Justice Harlan, made answer:

"It is said that the judgment in this case may conclude the state. Not so. It is a judgment to the effect only that, as between the plaintiff and the defendants, the former is entitled to possession of the property in question, the latter having shown no valid authority to withhold possession from the plaintiff; that the assertion by the defendants of a right to remain in possession is without legal foundation. The state not

being a party to the suit, the judgment will not conclude it. Not having submitted its rights to the determination of the court in this case, it will be open to the state to bring any action that may be appropriate to establish and protect whatever claim it has to the premises in dispute. Its claim, if it means to assert one, will thus be brought to the test of the law as administered by tribunals ordained to determine controverted rights of property; and the record in this case will not be evidence against it for any purpose touching the merits of its claim."

So in this case, notwithstanding the answer of the defendants justifying as agents of the Pioneer Iron Company, the bill made neither the company nor any agent of it as such a party to the proceedings. The mere fact that the claim is made that the Pioneer Iron Company will be concluded can have no effect upon it so long as it has not submitted its rights to adjudication by voluntary proceedings on its part, or been brought into court by proper process. It is true the defendants claim the charter of the company has been renewed, and that it is still a going corporation. It is conceded that at the date of its origin the Constitution of the state of Michigan prohibited the organization of corporations for a period greater than thirty years. That the supreme court of Michigan did *not intend [474] to adjudicate that the Pioneer Iron Company if reorganized was concluded by the decree of the circuit court, is shown by the language used in the conclusion of its opinion:

"The Constitution at the date of its organization and at the expiration of its charter expressly prohibited the organization of corporations beyond the period of thirty years. No provisions then existed, either by the Constitution or by the statute, authorizing a reorganization of corporations which had expired by limitation. A constitutional amendment was adopted in 1889, authorizing the legislature to provide by general laws for one or more extensions of the term of such corporations, and also for the reorganization 'for a further period, not exceeding thirty years, of such corporations whose terms have expired by limitation, on the consent of not less than four fifths of the capital.' Pursuant to this authority the legislature in 1889 passed an act authorizing such reorganization. 2 Comp. Laws, § 7035. Very important questions are raised by counsel as to the effect of this reorganization statute, the validity of the act of reorganization by the Pioneer Iron Company, as to whether the Pioneer Iron Company was in position to avail itself of this statute, and also the effect upon the

ninety-nine-year lease should the reorganization be held to be valid. Inasmuch, however, as these questions are not essential to a decision of the case, we refrain from determining them."

But it is said the supreme court affirmed the decree of the lower court, in which the defendants were enjoined in a representative capacity, and that this includes them as agents of the Pioneer Iron Company, and that when the agents of the company are enjoined the decree amounts to a judgment against the corporation which they represent. But in view of the pleadings, as already stated, and the claim made and insisted upon by the complainants that there was no Pioneer Iron Company in existence, we think the language in the decree has reference to the injunction and order against the corporations and individuals made defendants and their attorneys, solicitors, and agents, in their representative capacity, that [475] is, *as representing the defendants in any of the ways mentioned. The decree was rendered after finding in favor of the complainants' theory of the case, and had the effect to require the defendants to the bill, their agents and attorneys, to vacate the premises, and enjoined them from further mining thereon. It is utterly inconsistent with the proceedings and the decree to enlarge the judgment so as to include agents of the Pioneer Iron Company. If it should hereafter be insisted that the rights of that company or its agents are concluded, a Federal question might arise if such effect shall be given to the decree in this action. In our view of this case there is nothing in the proceedings or decree in anywise conclusive of the rights of the Pioneer Iron Company, if it is held to be a living corporation, or any of its duly authorized agents acting in its behalf.

We therefore find that no Federal question arises upon this record. *The proceedings in this court will be dismissed for want of jurisdiction.*

UNITED STATES, Petitioner,

v.

GEORGE E. CADARR, Edward Parker,
John J. Keating, and John N. Myers.

(See S. C. Reporter's ed. 475-481.)

Criminal law—limitation of actions—failure of grand jury to act—repeal of statute by implication.

The further prosecution of a criminal offense is

NOTE.—On repeal of statutes by implication—see notes to *State v. Massey*, 4 L. R. A. 309; *First Nat. Bank v. Weidenbeck*, 38 C. C. A. 136; and *United States v. 356 Caddles of Tobacco*, 20 L. ed. U. S. 235.

842

not barred by the failure of the grand jury to act within nine months from the date when the accused were held to bail to await such action, although it is provided by D. C. Code, § 939 (31 Stat. at L. 1189, 1342, chap. 854), that under such circumstances, unless the court enlarges the time, "the prosecution of such charge shall be deemed to have been abandoned, and the accused shall be set free, or his bail discharged, as the case may be," but this section must be deemed to operate merely as ending the pending prosecution, and not as repealing *pro tanto* the general statute of limitations contained in U. S. Rev. Stat. § 1044 (U. S. Comp. Stat. 1901, p. 725), prescribing three years as the limitation for all offenses not capital.

[No. 438.]

Argued February 28, March 1, 1905. Decided April 3, 1905.

ON WRIT of Certiorari to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District, sustaining a motion to quash an indictment because it was not returned within nine months of the day when the accused were held to bail to await the action of the grand jury. *Reversed* and remanded with directions to reverse the judgment of the Supreme Court of the District, and to remand the cause for further proceedings.

See same case below, 24 App. D. C. 143.

The facts are stated in the opinion.

Assistant Attorney General **McReynolds** argued the cause, and, with *Mr. William R. Harr*, filed a brief for petitioner:

A simple direction that the prisoner "shall be discharged" for failure to bring him to trial within the time specified does not operate as an acquittal, and bar further prosecution.

Re Edwards, 35 Kan. 99, 10 Pac. 539; *State v. Fley*, 2 Brev. 338, 4 Am. Dec. 583; *State v. Williams*, 35 S. C. 163, 14 S. E. 309; *State v. Garthwaite*, 23 N. J. L. 143; *Apgar v. Woolston*, 43 N. J. L. 67; *Waller v. Com.* 84 Va. 492, 5 S. E. 364; *Re Bege-row*, 133 Cal. 349, 56 L. R. A. 513, 85 Am. St. Rep. 178, 65 Pac. 828, 136 Cal. 293, 68 Pac. 773; *Byrd v. State*, 1 How. (Miss.) 163; *Re Garvey*, 7 Colo. 502, 4 Pac. 758.

The fact that D. C. Code, § 939, provides that "the prosecution of the charge shall be deemed to have been abandoned," furnishes no argument in support of the contention that a discharge bars further prosecution. An actual abandonment does not have that effect. Even a formal *nolle prosequi* leaves the accused liable to a new indictment, and to all the consequences of his offense, as if there had been no abortive prosecution.

1 Chitty, Crim. Law, 480; 1 Bishop, Crim. Proc. 3d ed. § 1395; *Goddard v. Smith*, 6

197 U. S.

Mod. *262; *Dealy v. United States*, 152 U. S. 542, 38 L. ed. 546, 14 Sup. Ct. Rep. 680.

Statutes providing for the discharge of a prisoner for failure to prosecute do not operate of themselves, but require that he demand and receive an order of court to make them effective.

Stewart v. State, 13 Ark. 720; *Dillard v. State*, 65 Ark. 404, 46 S. W. 533; *People v. Hawkins*, 127 Cal. 372, 59 Pac. 697; *McGuire v. Wallace*, 109 Ind. 284, 10 N. E. 111; *State v. Cox*, 65 Mo. 29; *Ex parte Walton*, 2 Whart. 501; *Bennett v. State*, 27 Tex. 701; *Hernandez v. State*, 4 Tex. App. 425.

They are not statutes of limitation; failure to comply with them is a mere irregularity.

People v. Ruloff, 5 Park. Crim. Rep. 77. Discharge is a matter of discretion.

Patterson v. State, 49 N. J. L. 326, 8 Atl. 305; *State v. Nugent*, 71 Mo. 136; *Re Edwards*, 35 Kan. 99, 10 Pac. 539.

Mr. H. Prescott Gatlery argued the cause and filed a brief for respondents:

In order to support the theory of the government it is absolutely necessary to ignore one of the most important clauses of the section,—the prosecution of such charge shall be deemed to have been abandoned. There is no rule of statutory construction that would justify the court in doing this.

Washington Market Co. v. Hoffman, 101 U. S. 112, 115, 25 L. ed. 782, 783; *Mackall v. District of Columbia*, 16 App. D. C. 301.

The following cases support the contention of the respondents:

Jackson v. State, 76 Ga. 551; *Stewart v. State*, 13 Ark. 720; *Johnson v. State*, 42 Ohio St. 209; *State v. Wear*, 145 Mo. 162, 46 S. W. 1099; *McGuire v. Wallace*, 109 Ind. 284, 10 N. E. 111; *Re Edwards*, 35 Kan. 103, 10 Pac. 539.

Mr. Justice Day delivered the opinion of the court:

The respondents were indicted for conspiracy in the supreme court of the District of Columbia on March 31, 1902. On April 4, 1902, Cadarr, Keating, and Myers were arraigned, and entered pleas of not guilty. On April 7, 1902, Parker entered a plea of not guilty; on May 1, 1902, he withdrew this plea, and filed a motion to quash. The ground of this motion was that the indictment was not returned to the court within nine months from the 25th day of April, 1901, on which day the defendants were held to bail to await the action of the grand jury on the charge of conspiracy, the time for taking action in the case not having been extended by the court or any judge thereof, as provided in § 939 of the act to establish a code for the District of Columbia, approved

March 3, 1901. The motion was sustained, and it was directed that Parker's bail be discharged, and all the defendants were allowed to go without day.

Upon appeal by the United States, the court of appeals affirmed this judgment. Thereupon this writ of certiorari was granted.

This case raises the question whether § 939 of the Code of the District of Columbia is intended to bar further prosecution of crimes and offenses where the grand jury has failed to act thereon within the period named in the statute, or whether *the fail-[477] ure to take such action is intended to and does end further prosecution, so as to discharge the accused from bail, or from imprisonment, in cases of commitment. The supreme court, whose judgment was sustained by the court of appeals, construed the statute as one of limitations, and held that failure to take action within the period limited was a final bar to further prosecution. The section directly involved is number 939 of the District of Columbia Code, and is as follows:

"Sec. 939. *Abandonment of prosecution.*—If any person charged with a criminal offense shall have been committed or held to bail to await the action of the grand jury, and within nine months thereafter the grand jury shall not have taken action on the case, either by ignoring the charge or by returning an indictment into the proper court, the prosecution of such charge shall be deemed to have been abandoned, and the accused shall be set free, or his bail discharged, as the case may be; *Provided, however,* That the supreme court of the District of Columbia, holding a special term as a criminal court, or, in vacation, any justice of said court, upon good cause shown in writing, and when practicable, upon due notice to the accused, may, from time to time, enlarge the time for the taking action in such case by the grand jury." 31 Stat. at L. 1189, 1342, chap. 854.

The general statute of limitations is in force in the District, and is § 1044, Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 725), which is as follows:

"No person shall be prosecuted, tried, or punished for any offense not capital, except as provided in section one thousand and forty-six, unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed."

It is the contention of respondents' counsel that § 939 operates as a special statute of limitation for cases within its terms wherein the accused has been arrested and committed to prison or released on bail. On

the other hand, the government contends that it is not a statute of limitation, but is intended to limit the time within which [478] the grand jury must act *upon a charge upon which the accused has been arrested and committed or admitted to bail. At the common law, and in the absence of special statutes of limitations, the mere failure to find an indictment will not operate to discharge the accused from the offense, nor will a *nolle prosequi* entered by the government, or the failure of the grand jury to indict. It is doubtless true that in some cases the power of the government has been abused, and charges have been kept hanging over the heads of citizens, and they have been committed for unreasonable periods, resulting in hardship. With a view to preventing such wrong to the citizen, statutes have been passed in many states similar to the one under consideration, in aid of the constitutional provisions, national and state, intended to secure to the accused a speedy trial. These statutes differ so much in purpose and phraseology that we cannot derive much aid from decisions under them in determining the correct construction of the one under consideration. With a few exceptions, they relate to the bringing to trial of the accused after indictment found, and are intended to speed the trial of the cause. Whether the failure to bring on the trial within the time limited shall have the effect of discharging the accused from further prosecution for the crime or offense, or shall operate merely to put an end to the pending prosecution, depends upon the terms used in the different statutes. Generally speaking, where the statute has provided that the discharge shall be from imprisonment or bail, without other language, it has been held not to operate as a statute of limitation. On the other hand, where the statute has provided that the failure to prosecute shall discharge the accused so far as relates to the offense, or from the crime, or he shall be acquitted of the offense charged in the indictment, failure to prosecute has been held to work a final discharge from the offense. Of the former class of cases are *State v. Garthwaite*, 23 N. J. L. 143; of the latter class are *Ex parte McGehan*, 22 Ohio St. 442; *Com. v. Cawood*, 2 Va. Cas. 527; *State v. Wear*, 145 Mo. 162, 46 S. W. 1099; *Re Edwards*, 35 Kan. 99-103, 10 Pac. 539.

[479] *Turning to the particular statute under consideration, we find it is one in terms dealing with the status of the accused before indictment, after he has been committed or held to bail, and limits the time within which the grand jury may take action in such cases, whether the same results

in ignoring the charge or the return of an indictment, and for the failure of the grand jury to take action within the time limited it is provided "that the prosecution of such charge shall be deemed to have been abandoned, and the accused shall be set free or his bail discharged, as the case may be." This statute is not one of limitations, having effect upon the time in which the particular case may be prosecuted after the commission of the crime, but relates solely to the right of action by the grand jury as to one who has been committed or held to bail, wherein it is provided that the grand jury must act within the time named or the accused shall be set free, if imprisoned, or his bail discharged, if out on bond. We think this act was not intended to amount to a repeal *pro tanto* of the statute of limitation, as contained in § 1044. For failure to indict within the time limited it is not provided, as in the cases where the statute has been construed to finally discharge the accused, that he shall be discharged from the offense, or that prosecution shall be forever barred, or he shall be deemed acquitted of the charge, but the result of the failure to prosecute has reference solely to the right in the pending prosecution to be freed, if imprisoned, or released from bail, if under bond. If it had been the purpose of Congress to work so radical a change in the law as to end the right of further prosecution for the offense, we think it would have used language apt for that purpose, and the failure so to do indicates the intention to deal only with delays in action by the grand jury against persons under arrest or bonds. It is delay in the action of the grand jury, not the cutting down of the time of prosecution for offenses, that is aimed at in this statute. Much stress is laid in the argument of counsel for the respondents upon the expression, "the prosecution of such charge shall be deemed to *have been abandoned." [480] But having reference to the previous part of the section, "such charge" relates to the one under which the accused has been committed or held to bail. The section prescribes the time within which the grand jury must act, and failing so to do, it is decreed that the prosecution shall be deemed to have been abandoned, and the effect upon the accused is not that he shall be discharged from prosecution for the offense, but that he shall be set free, if imprisoned, or his bail discharged, if released on bond. The statute, it is observed, acts upon persons committed to prison, and, with like effect, upon those not incarcerated, but only held to bail. We think it would require clear and specific language to indicate a legislative intent to bar the prosecution of

all offenses for the failure of the grand jury to act within nine months of the arrest of the accused, when the latter is at large upon bond. Again, if the contention of counsel for the accused is adopted, one will be discharged from further prosecution if the grand jury does not act upon the case, but if the grand jury does act, and the charge against the accused is found to be unwarranted, he is still subject to indictment until the three years of the statute of limitations have run, while the person whose case has not been wholly investigated will be forever released from the offense. Furthermore, § 1044 does not apply to capital offenses, for such are expressly excluded from the operation of that section; but § 939, under consideration, makes no exception, and applies alike to all offenses, and would operate to discharge a person accused of murder as well as one accused of petty theft. But, it is urged, § 939 permits the court to control and extend the time for taking action by the grand jury, thereby indicating the purpose of Congress to make this statute one of limitation. But we do not think the control of the time for taking action before the grand jury, given in this paragraph, enlarges the statute so as to make it applicable beyond the effect prescribed, which is upon the liberty of the accused or his freedom from the requirement to give bail. It is urged that if the construction insisted upon by the government is given to this statute the accused may be discharged for failure of the grand jury to act, and then immediately rearrested, so that the statute will be defeated of its purpose to protect the accused. The question of whether one who has made application to the court, and been discharged for failure to find an indictment against him within the time limited, could again be arrested without indictment, is not involved in this case. The question is, Is the prosecution of the offense finally barred by this statute, so that the accused may not be held to answer upon an indictment found after the nine months' period has elapsed? It is urged by counsel for the respondents that the power given the court to enlarge the time for taking action by the grand jury is not limited, and that the time may be extended beyond the period of three years fixed by the general statute of limitations. We cannot agree to this contention. We think the general statute of limitations has not been repealed or modified by this section. The purpose of statutes of limitation is to finally bar all prosecution, and the purpose of the act under consideration, as we view it, is to control the prosecution by requiring action by the grand jury, and,

in default thereof, release the person of the accused or discharge him from bail, so far as the pending prosecution is concerned. While the construction of this section is not free from difficulty, we think the view herein expressed best effectuates the purpose and intention of Congress in enacting this statute, viewed in the light of the language used and the objects intended. This view of the case renders it unnecessary to pass upon other questions raised in the record.

The judgment of the Court of Appeals will be reversed, and the cause remanded with directions to reverse the judgment of the Supreme Court of the District of Columbia, and remand the cause to that court for further proceedings in accordance with this opinion.

*Ex parte: In re COMMONWEALTH OF MASSACHUSETTS, Petitioner. [482]

(See S. C. Reporter's ed. 482-488.)

Prohibition — mandamus — certiorari — power of Supreme Court to grant where not possessing original or appellate jurisdiction.

In cases over which the Supreme Court of the United States possesses neither original nor appellate jurisdiction, it cannot grant prohibition, mandamus, or certiorari as ancillary thereto.

[No. 15, Original.]

Argued February 27, 28, 1905. Decided April 10, 1905.

PETITION for writs of prohibition, mandamus, and certiorari to restrain the justices of the Supreme Court of the District of Columbia from taking further proceedings or entertaining jurisdiction in an equity cause pending in that court. *Rule discharged; petition denied.*

Statement by Mr. Chief Justice Fuller:

By an act of Congress of the United States approved July 27, 1861 (12 Stat. at L. 276, chap. 21), it was provided:

"That the Secretary of the Treasury be, and he is hereby, directed, out of any money in the Treasury not otherwise appropriated, to pay to the governor of any state, or to

NOTE.—On superintending control and supervisory jurisdiction of the superior over the inferior or subordinate tribunal—see note to State *ex rel.* Fourth Nat. Bank v. Johnson, 51 L. R. A. 33.

As to the original jurisdiction of court of last resort in mandamus case—see note to People *ex rel.* Kocourek v. Chicago, 58 L. R. A. 833.

his duly authorized agents, the costs, charges, and expenses properly incurred by such state for enrolling, subsisting, clothing, supplying, arming, equipping, paying, and transporting its troops employed in aiding to suppress the present insurrection against the United States, to be settled upon proper vouchers, to be filed and passed upon by the proper accounting officers of the Treasury."

On March 20, 1888, the legislature of Massachusetts passed the following resolution:

"Resolved, That the governor and council are hereby authorized to employ the agent of the commonwealth for the prosecution of war claims against the United States, to [483] prosecute *also the claim of the commonwealth for a refund of the direct tax paid under act of Congress approved August 5th, in the year 1861, and of the interest paid upon war loans during the period from 1861 to 1865, also to fix his compensation, which shall be paid out of any amount received therefrom."

On July 12, 1899, the executive council of the commonwealth passed a resolution authorizing the attorney general to employ John B. Cotton to prosecute said claim. Mr. Cotton was a citizen of the District of Columbia.

Thereupon a form of contract was prepared and executed by the then governor of Massachusetts, in behalf and under the seal of the commonwealth, and by Cotton; and a duplicate original thereof was deposited with the Secretary of the Treasury of the United States.

The prosecution of the claim was at once entered upon, and after five years was finally adjudicated, audited, and passed.

On or about May 2, 1904, the Treasury Department issued and delivered to Cotton, as the duly authorized agent of the commonwealth of Massachusetts, war settlement warrant No. 11,343, payable "to the governor of the state of Massachusetts, or order," for the sum of \$1,611,740.85, and addressed, "P. O. address, c. o. John B. Cotton, Agent and Att'y, Washington, D. C."

Mr. Cotton notified the state attorney general of the delivery of the warrant to him, and that he was entitled to a lien upon the warrant for the amount of his fees under his contract; and the governor was informed to the same effect. Mr. Cotton also notified the Secretary of the Treasury that he claimed a lien upon the warrant for compensation in accordance with his contract. Subsequently the governor, Hon. John L. Bates, addressed a communication to the Secretary of the Treasury, in which he demanded that the warrant be canceled, and that a duplicate thereof be forwarded to [484] him as governor of the *commonwealth. The

Secretary declined to comply with the demand. Later Mr. Cotton filed a bill in the supreme court of the District of Columbia against "Leslie M. Shaw, Secretary of the Treasury, and John L. Bates, governor of the commonwealth of Massachusetts," in which he asserted his right to an attorney's lien upon the papers of his client, the commonwealth of Massachusetts, including the warrant in question, and prayed, among other things, that said Leslie M. Shaw might be restrained and enjoined from canceling the warrant which had been delivered to him, and from drawing or issuing a duplicate thereof to said Bates, and "that the defendant John L. Bates may be restrained and enjoined from asking, demanding, or receiving from the defendant Leslie M. Shaw, or any of his assistants, subordinates, or clerks, a second or duplicate warrant as aforesaid."

The state of Massachusetts was not named as a party to this suit, and no relief was prayed against the state.

Upon the filing of this bill one of the justices of the supreme court of the District of Columbia entered a rule on the Secretary of the Treasury, requiring him to show cause why the relief prayed against him should not be granted, which was duly served, but has not yet come on for hearing. No process was served upon defendant Bates, who has since ceased to be governor, and he has never appeared in the suit, nor has the commonwealth of Massachusetts intervened therein in any way.

The commonwealth of Massachusetts then filed a petition in this court, on leave, for writs of prohibition, mandamus, and certiorari, to restrain the justices of the supreme court of the District of Columbia from taking further proceedings or entertaining jurisdiction in the equity suit.

In response to a rule entered on that petition, the chief justice and associate justices of the supreme court of the District of Columbia showed cause, and submitted, for reasons set forth, that, as the case stood, the court ought not to be prevented from exercising jurisdiction.

Messrs. Frederick H. Nash and Herbert Parker argued the cause and filed a brief for petitioner:

Probably this court has inherent power to issue the writ of prohibition to restrain excesses of jurisdiction by inferior Federal courts whose decrees are subject to its supervision. This valuable and ancient weapon ought not to be lacking to the judicial power of the United States. That this court has inherent powers cannot be doubted.

Re Vidal, 179 U. S. 126, 45 L. ed. 118, 21 Sup. Ct. Rep. 48; *Ex parte Joins*, 191 U. S.

93, 48 L. ed. 110, 24 Sup. Ct. Rep. 27; *Anderson v. Dunn*, 6 Wheat. 204, 227, 5 L. ed. 242, 247; *Ex parte Robinson*, 19 Wall. 505, 22 L. ed. 205.

Express authority to issue the writ may be found in U. S. Rev. Stat. § 716 (U. S. Comp. Stat. 1901, p. 580). This statute has been construed by this court to intend, not the exclusion of power to issue such writs unless they are necessary for the exercise of its appellate jurisdiction, but the grant of power to issue them when agreeable to the usages and principles of law, as well as when necessary for the exercise of its jurisdiction.

Re Chetwood, 165 U. S. 443, 41 L. ed. 782, 17 Sup. Ct. Rep. 385.

In every case in this court where the remedy of prohibition has been denied, there has been a meritorious reason for denying it, without dealing with the court's power to issue it.

Ex parte City Bank, 3 How. 292, 11 L. ed. 603; *Ex parte Gordon*, 1 Black, 503, 17 L. ed. 134; *Bronson v. La Crosse & M. R. Co.* 1 Wall. 405, 17 L. ed. 616; *United States v. Hoffman*, 4 Wall. 158, 18 L. ed. 354; *Ex parte Graham*, 10 Wall. 541, 19 L. ed. 981; *Ex parte Warmouth*, 17 Wall. 64, 21 L. ed. 543; *Ex parte Easton*, 95 U. S. 68, 24 L. ed. 373; *Ex parte Gordon*, 104 U. S. 515, 26 L. ed. 814; *Ex parte Detroit River Ferry Co.* 104 U. S. 519, 26 L. ed. 815; *Ex parte Hagar*, 104 U. S. 520, 26 L. ed. 816; *Ex parte Slayton*, 105 U. S. 451, 26 L. ed. 1066; *Ex parte Pennsylvania*, 109 U. S. 174, 27 L. ed. 894, 3 Sup. Ct. Rep. 84; *Ex parte Boyer*, 109 U. S. 629, 27 L. ed. 1056, 3 Sup. Ct. Rep. 434; *Chesapeake & O. R. Co. v. White*, 111 U. S. 134, 28 L. ed. 378, 4 Sup. Ct. Rep. 353; *Ex parte Phenix Ins. Co.* 118 U. S. 610, 30 L. ed. 274, 7 Sup. Ct. Rep. 25; *Re Baiz*, 135 U. S. 403, 34 L. ed. 222, 10 Sup. Ct. Rep. 854; *Re Cooper*, 138 U. S. 404, 34 L. ed. 993, 11 Sup. Ct. Rep. 289; *Re Garnett*, 141 U. S. 1, 35 L. ed. 631, 11 Sup. Ct. Rep. 840; *Re Fassett*, 142 U. S. 479, 35 L. ed. 1087, 12 Sup. Ct. Rep. 295; *Re Cooper*, 143 U. S. 472, 36 L. ed. 232, 12 Sup. Ct. Rep. 453; *Re Engles*, 146 U. S. 357, 36 L. ed. 1004, 13 Sup. Ct. Rep. 281; *Re Morrison* (*Morrison v. District Court*) 147 U. S. 14, 37 L. ed. 60, 13 Sup. Ct. Rep. 246; *Re Rice*, 155 U. S. 396, 39 L. ed. 198, 15 Sup. Ct. Rep. 149; *Re New York & Porto Rico S. S. Co.* 155 U. S. 523, 39 L. ed. 246, 15 Sup. Ct. Rep. 183; *Re Alix*, 166 U. S. 136, 41 L. ed. 948, 17 Sup. Ct. Rep. 522; *Re Huguley Mfg. Co.* 184 U. S. 297, 46 L. ed. 549, 22 Sup. Ct. Rep. 455; *Ex parte Joins*, 191 U. S. 93, 48 L. ed. 110, 24 Sup. Ct. Rep. 27.

In case of need the writ of mandamus, under authority of § 716, should issue in aid of a court's appellate jurisdiction whenever
197 U. S.

appellate jurisdiction exists, whether it has been invoked by appeal or not.

Barber Asphalt Paving Co. v. Morris, 67 L. R. A. 761, 132 Fed. 945.

Since the common law has been adopted with respect to the District of Columbia, the highest court of appellate jurisdiction within the District has the same power over the inferior courts that the highest court of Maryland had, at the time of the creation of the District of Columbia, over its subordinate tribunals.

United States v. Schurz, 102 U. S. 378, 26 L. ed. 167.

At the time the District of Columbia was created, the highest court of Maryland had all the powers of the court of King's bench in England.

Runkel v. Winemiller, 4 Harr. & M'H. 429, 1 Am. Dec. 411; *Price v. State*, 8 Gill, 295; *Kendall v. United States*, 12 Pet. 524, 620, 631, 9 L. ed. 1181, 1219, 1223.

The common law of Maryland remained in force in the District of Columbia.

Kendall v. United States, 12 Pet. 614, 621, 9 L. ed. 1216, 1219.

The power of the proper tribunals in the District of Columbia to issue writs of prohibition has never been taken away by statute.

Smith v. Whitney, 116 U. S. 167, 175, 29 L. ed. 601, 6 Sup. Ct. Rep. 570; *United States ex rel. Deffer v. Kimball*, 7 App. D. C. 499.

If this court declines to issue a writ of prohibition, then the petitioner's only remedy is a writ of mandamus to command the judges of the supreme court of the District of Columbia to dismiss the suit.

Re Parker, 131 U. S. 221, 33 L. ed. 123, 9 Sup. Ct. Rep. 708; *Ex parte Chateaugay Ore & Iron Co.* 128 U. S. 544, 32 L. ed. 508, 9 Sup. Ct. Rep. 150; *Ex parte Parker*, 120 U. S. 737, 30 L. ed. 818, 7 Sup. Ct. Rep. 767; *Ex parte Morgan*, 114 U. S. 174, 29 L. ed. 135, 5 Sup. Ct. Rep. 825; *Ex parte Burtis*, 103 U. S. 238, 26 L. ed. 392; *Ex parte Denver & R. G. R. Co.* 101 U. S. 711, 25 L. ed. 872; *Ex parte Flippin*, 94 U. S. 348, 350, 24 L. ed. 194, 195; *Re Hohorst*, 150 U. S. 653, 37 L. ed. 1211, 14 Sup. Ct. Rep. 221; *Virginia v. Rives* (*Ex parte Virginia*) 100 U. S. 313, 25 L. ed. 667; *Virginia v. Paul*, 148 U. S. 107, 37 L. ed. 386, 13 Sup. Ct. Rep. 536. See also *Ex parte Bradley*, 7 Wall. 364, 375, 19 L. ed. 214, 218; *Ex parte Newman*, 14 Wall. 152, 165, 20 L. ed. 877, 879; *Ex parte Robinson*, 19 Wall. 505, 22 L. ed. 205; *Re Washington & G. R. Co.* 140 U. S. 91, 35 L. ed. 339, 11 Sup. Ct. Rep. 673; *Gaines v. Rugg*, 148 U. S. 228, 37 L. ed. 432,

13 Sup. Ct. Rep. 611; *Re Grossmayer*, 177 U. S. 48, 44 L. ed. 665, 20 Sup. Ct. Rep. 535.

Messrs. J. Spalding Flannery and Frederic D. McKenney argued the cause, and, with *Messrs. William Hitz and William Frye White*, filed a brief for respondents:

A prohibition cannot issue from this court in cases where there is no appellate power given by law, nor any special authority to issue the writ.

Ex parte Gordon, 1 Black, 503, 506, 17 L. ed. 134, 135; *Ex parte City Bank*, 3 How. 292, 11 L. ed. 603.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

This court has no original jurisdiction over this controversy, in any view, because it is not a controversy between a state and a citizen of another state. *Hepburn v. Ellzey*, 2 Cranch, 445, 2 L. ed. 332; *Hooe v. Jamieson*, 166 U. S. 395, 41 L. ed. 1049, 17 Sup. Ct. Rep. 596. And it has not appellate jurisdiction, because, since the passage of the act of February 9, 1893 (27 Stat. at L. 434, chap. 74), establishing the court of appeals for the District of Columbia, this court, generally speaking, and not including cases arising under the bankruptcy law (*Audubon v. Shufeldt*, 181 U. S. 575, 45 L. ed. 1009, 21 Sup. Ct. Rep. 735), cannot review the judgments and decrees of the supreme court of the District, directly by appeal or writ of error.

[488] *By § 716 of the Revised Statutes, U. S. Comp. Stat. 1901, p. 580, this court and the circuit and the district courts "have power to issue all writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

By § 688, U. S. Comp. Stat. 1901, p. 565, prohibition may issue "to the district courts when proceeding as courts of admiralty and maritime jurisdiction," but there is no similar provision in respect of other courts. And it has been repeatedly held, as to the circuit courts, that they have no power, under § 716, to issue writs of prohibition and mandamus, except when necessary in the exercise of their existing jurisdiction. *Bath County v. Amy*, 13 Wall. 248, 20 L. ed. 541; *M'Clung v. Silliman*, 6 Wheat. 601, 5 L. ed. 341.

This is equally true of this court; that is to say, that in cases over which we possess neither original nor appellate jurisdiction we cannot grant prohibition or mandamus or certiorari as ancillary thereto.

Rule discharged; petition denied.

IN THE MATTER OF the Application of
ALBERT HEFF, for a Writ of Habeas
Corpus.

(See S. C. Reporter's ed. 488-509.)

Indian allottees—emancipation from Federal control.

1. An Indian allottee, on the receipt of his first patent under the act of February 8, 1887 (24 Stat. at L. 388, chap. 119), must be deemed within the provision of § 6 of that act, that, "upon the completion of said allotments and the patenting of the lands to said allottees," each allottee shall have the benefits of, and be subject to, the laws of the state where he resides, in view of the further grant of citizenship which that section extends to every allottee, and of the fact that the issue of the final patent provided for by § 5 was to be delayed for twenty-five years, when it was to be issued to the first patentee or his heirs.
2. Congress was not given the power, by the commerce clause of the Federal Constitution, to penalize by the act of January 30, 1897 (29 Stat. at L. 506, chap. 109), the sale of liquor within a state to an Indian to whom an allotment had been made under the act of February 8, 1887, which grants the allottees the privilege of citizenship, and gives them the benefit of, and requires them to be subject to, the civil and criminal laws of the state where they reside; since this emancipation from Federal control is not affected by the fact that the statute provides that the Indian title shall not be alienated or encumbered for twenty-five years, when a final patent shall issue, and stipulates that the grant of citizenship shall not impair their right to tribal or other property.

[No. 14, Original.]

Argued January 9, 10, 1905. Decided April 10, 1905.

HABEAS CORPUS to inquire into a detention under a conviction in the District Court of the United States for the District of Kansas of selling liquor within the state to an Indian allottee. *Petitioner ordered discharged from imprisonment for lack of jurisdiction in the District Court over the offense.*

Statement by Mr. Justice **Brewer**:

On October 15, 1904, petitioner was convicted in the district court of the United States, district of Kansas, under an indictment charging that he did "unlawfully sell, give away, and dispose of certain malt, spirituous, and vinous liquors, at the town of

NOTE.—On the powers of Congress over the Indians—see note to *Worcester v. Georgia*, 8 L. ed. U. S. 484.

On the power of the United States to punish crimes committed by or against Indians—see note to *State v. Campbell*, 21 L. R. A. 169.

Horton, in the county of Brown, in the state and district of Kansas, to John Butler, to wit, two quarts of beer, more or less, and he, the said John Butler, being then and there an Indian, a member of the Kickapoo tribe of Indians and a ward of the government, under the charge of O. C. Edwards, an Indian superintendent, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America." Upon such conviction he was sentenced to imprisonment in the county jail of Shawnee county, Kansas, for a period of four months, and to pay a fine in the sum of \$200 and the costs of the prosecution. The court of appeals of the

[490] eighth circuit *having decided the question involved (*Farrell v. United States*, 49 C. C. A. 183, 110 Fed. 942) adversely to his contention, he presented this application for a writ of habeas corpus directly to this court.

The act of Congress, January 30, 1897 (29 Stat. at L. 506, chap. 109), provides:

"That any person who shall sell, give away, dispose of, exchange, or barter any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or other intoxicating liquor of any kind whatsoever, or any essence, extract, bitters, preparation, compound, composition, or any article whatsoever, under any name, label, or brand, which produces intoxication, to any Indian to whom allotment of land has been made while the title to the same shall be held in trust by the government, or to any Indian a ward of the government under charge of any Indian superintendent or agent, or any Indian, including mixed bloods, over whom the government, through its departments, exercises guardianship, . . . shall be punished by imprisonment for not less than sixty days, and by a fine of not less than one hundred dollars for the first offense and not less than two hundred dollars for each offense thereafter."

The act of Congress, February 8, 1887 (24 Stat. at L. 388, chap. 119), is entitled "An Act to Provide for the Allotment of Lands in Severalty to Indians on the Various Reservations, and to Extend the Protection of the Laws of the United States and the Territories over the Indians, and for Other Purposes." Section 1 of that act provides:

"That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said

reservation, or any part thereof, to be surveyed, or resurveyed if necessary, *and to [491] allot the lands in said reservation in severalty to any Indian located thereon in quantities as follows:."

"Sec. 4. That where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, act of Congress, or executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in this act for Indians residing upon reservations; and when such settlement is made upon unsurveyed lands, the grant to such Indians shall be adjusted upon the survey of the lands so as to conform thereto; and patents shall be issued to them for such lands in the manner and with the restrictions as herein provided."

Section 5 reads:

"That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the state or territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or encumbrance whatsoever; *Provided*, That the President of the United States may in any case, in his discretion, extend the period. And, if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void."

Section 6 is as follows:

*"That upon the completion of said allot- [492] ments and the patenting of the land to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of, and be subject to, the laws, both civil and criminal, of the state or territory in which they may reside; and no territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United

States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

Mr. A. E. Crane argued the cause and filed a brief for petitioner:

John Butler, having received an allotment of land in severalty under the act of Congress of February 8, 1887, was not a ward of the government, but a citizen of the United States and of the state of Kansas.

State ex rel. Tompton v. Denoyer, 6 N. D. 586, 72 N. W. 1015; *State ex rel. Crawford v. Norris*, 37 Neb. 299, 55 N. W. 1086; *Walla-Note-The-Tynin v. Carter*, 6 Idaho, 85, 53 Pac. 106; *United States v. Rickert*, 106 Fed. 5; *Re Now-Ge-Zhuck* (Kan.) 76 Pac. 877; *Boyd v. Nebraska*, 143 U. S. 162, 36 L. ed. 109, 12 Sup. Ct. Rep. 375; *Draper v. United States*, 164 U. S. 240, 246, 41 L. ed. 419, 421, 17 Sup. Ct. Rep. 107.

A citizen is one who owes the government allegiance, service, and money by way of taxation, and to whom the government in turn grants and guarantees liberty of person and conscience, the right of acquiring and possessing property, of marriage, and the social relations of suit and defense, and security in person, estate, and reputation.

United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588; *Scott v. Sandford*, 19 How. 476, 15 L. ed. 730; *Lyons v. Cunningham*, 66 Cal. 42, 4 Pac. 938; *Blanck v. Pausch*, 113 Ill. 60.

The United States and the state of Kansas cannot legislate on the same subject.

People v. Bray, 105 Cal. 344, 27 L. R. A. 158, 38 Pac. 731; *United States v. Ward*, McCahon, 604, Appx.; *State v. Campbell*, 53 Minn. 354, 21 L. R. A. 169, 55 N. W. 553; *The Kansas Indians* (*Blue Jacket v. Johnson County*) 5 Wall. 737, 18 L. ed. 667.

Citizenship is not affected by tribal relations.

French v. French (Tenn. Ch. App.) 52 S. W. 517; *Raymond v. Raymond*, 28 C. C. A. 38, 55 U. S. App. 89, 83 Fed. 723; *United States v. Rogers*, 4 How. 567, 11 L. ed. 1105.

When an Indian becomes a citizen of the

United States he also becomes a citizen of the state wherein he resides.

Gassies v. Ballon, 6 Pet. 761, 8 L. ed. 573.

Indians when off their reservations, or when they have severed their tribal relations, or become citizens of the United States, are subject to the laws of the state or territory in which they reside.

State v. Williams, 13 Wash. 335, 43 Pac. 15; *People v. Ketchum*, 73 Cal. 635, 15 Pac. 353; *State v. Howard*, 33 Wash. 250, 74 Pac. 382; *State v. Newell*, 84 Me. 465, 24 Atl. 943; *Stevens v. Thatcher*, 91 Me. 70, 39 Atl. 282; *United States v. Hurshman*, 53 Fed. 543; *Re Now-Ge-Zhuck* (Kan.) 76 Pac. 877; 16 Am. & Eng. Enc. Law, 2d ed. pp. 222, 223.

The jurisdiction of the Federal government over Indian tribes rests, not upon the ownership of and sovereignty over the country in which they reside, but upon the fact that, as wards of the general government, they are the subjects of Federal authority within the state.

State v. Campbell, 53 Minn. 354, 21 L. R. A. 169, 55 N. W. 553; *United States v. Kagama*, 118 U. S. 375, 30 L. ed. 228, 6 Sup. Ct. Rep. 1109.

The state of Kansas has the right to regulate the conduct of the citizens of the state, and in so doing has the right to prohibit the sale of intoxicating liquor to an Indian.

State v. Wise, 70 Minn. 99, 72 N. W. 843; *State v. Lee*, 137 Mo. 143, 38 S. W. 583; *Brechbill v. Randall*, 102 Ind. 528, 52 Am. Rep. 695, 1 N. E. 362; *New v. Walker*, 108 Ind. 365, 58 Am. Rep. 40, 9 N. E. 386; *Western U. Teleg. Co. v. Pendleton*, 95 Ind. 12, 48 Am. Rep. 692; *Hockett v. State*, 105 Ind. 250, 55 Am. Rep. 201, 5 N. E. 181; *Metropolitan Bd. of Excise v. Barrie*, 34 N. Y. 666; *Cooley*, Const. Lim. ¶ 572; *United States v. Dewitt*, 9 Wall. 41, 19 L. ed. 593; *License Tax Cases*, 5 Wall. 462, 475, 18 L. ed. 497, 502; *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394.

Congress intended to surrender the person of the allottee Indian to the state, and retain only control over his land. No restriction was placed upon an allottee's rights as a citizen, and none upon the right of a state to legislate concerning him.

Re Now-Ge-Zhuck (Kan.) 76 Pac. 879; *Beck v. Flournoy Livestock & Real Estate Co.* 12 C. C. A. 497, 27 U. S. App. 618, 65 Fed. 35.

The jurisdiction of Congress over the Indians has always been based upon the fact that they are wards of the government.

United States v. Kagama, 118 U. S. 375, 30 L. ed. 228, 6 Sup. Ct. Rep. 1109; *State v. Campbell*, 53 Minn. 354, 21 L. R. A. 169, 55 N. W. 553.

After Congress gave the state of Kansas

jurisdiction of the Indian allottees it lost all control over them, and it could not regain jurisdiction of them without the consent of the state.

Ft. Leavenworth R. Co. v. Lowe, 114 U. S. 525, 29 L. ed. 264, 5 Sup. Ct. Rep. 995, 27 Kan. 760; *United States v. Stahl*, McCahon, 606 Appx.; *Clay v. State*, 4 Kan. 49; *Sinks v. Reese*, 19 Ohio St. 306, 2 Am. Rep. 397.

Citizenship of Indian allottees is inconsistent with guardianship of Congress.

15 Am. & Eng. Enc. Law, 2d ed. p. 20.

The Indian must be a tribal Indian before Congress can exercise jurisdiction over him.

United States v. Thomas, 151 U. S. 585, 38 L. ed. 279, 14 Sup. Ct. Rep. 426; *United States v. Holliday*, 3 Wall. 416, 18 L. ed. 185.

Indians may become citizens of the United States in three different ways: First, allotment under the provisions of the act of Congress of February 8, 1887; second, allotment under any law or treaty; third, voluntarily taking up, within the territorial limits of the United States, a residence separate and apart from any tribe of Indians therein, and adopting the habits of civilized life.

United States v. Kopp, 110 Fed. 165.

Completion of the allotments has occurred when the allotting agent has completed the allotments and they have been approved by the Secretary of the Interior. Then the first patents shall be issued, and at that time the allottees will become citizens of the United States. Having become citizens of the United States they also become citizens of the State in which they reside.

Boyd v. Nebraska, 143 U. S. 162, 36 L. ed. 109, 12 Sup. Ct. Rep. 375; *Gassies v. Balton*, 6 Pet. 761, 8 L. ed. 573.

The question whether Indians who have received allotments under the act of Congress of February 8, 1887, are citizens has been decided by a number of courts.

State ex rel. Tompton v. Denoyer, 6 N. D. 586, 72 N. W. 1015; *State ex rel. Crawford v. Norris*, 37 Neh. 299, 55 N. W. 1086; *Wa-La-Note-Tke-Tynin v. Carter*, 6 Idaho, 85, 53 Pac. 106; *United States v. Rickert*, 106 Fed. 5; *Re Now-Ge-Zhuck* (Kan.) 76 Pac. 877; *Farrell v. United States*, 49 C. C. A. 183, 110 Fed. 942; *People v. Bray*, 105 Cal. 344, 27 L. R. A. 158, 38 Pac. 732; *Beck v. Flournoy Livestock & Real Estate Co.* 12 C. C. A. 497, 27 U. S. App. 618, 65 Fed. 35; *Keokuk v. Ulam*, 4 Okla. 5, 38 Pac. 1080; *United States v. Hadley*, 99 Fed. 437; *Eells v. Ross*, 12 C. C. A. 205, 29 U. S. App. 59, 64 Fed. 417.

Solicitor General **Hoyt** argued the cause and filed a brief for respondent:

The leading case on this subject is *United States v. Holliday*, 3 Wall. 407, 18 L. ed. 182, where the act of Congress of February 13, 1862 (12 Stat. at L. 339, chap. 25),

which made it a penal offense for any person to sell spirituous liquors to any Indian under the charge of any Indian superintendent or Indian agent appointed by the United States, was held to be constitutional.

See 6 Rose's Notes, p. 528.

As long as these Indians remain a distinct people, with an existing tribal organization, recognized by the political department of the government, Congress has the power to say with whom and on what terms they shall deal, and what articles shall be contraband.

United States v. 43 Gallons of Whiskey (United States v. Lariviere) 93 U. S. 188, 195, 23 L. ed. 846, 847.

The distinction between regulations of commerce and ordinary criminal legislation is recognized in *United States v. Kagama*, 118 U. S. 375, 30 L. ed. 228, 6 Sup. Ct. Rep. 1109.

It had early been settled that the states were without authority to extend their laws, civil and criminal, over the Indian tribes residing within their limits.

Worcester v. Georgia, 6 Pet. 515, 8 L. ed. 483; *Fellows v. Blacksmith*, 19 How. 366, 15 L. ed. 684; *United States v. Kagama*, 118 U. S. 384, 30 L. ed. 230, 6 Sup. Ct. Rep. 1109.

Citizenship of Indian allottees is not inconsistent with guardianship of Congress.

Cherokee Nation v. Hitchcock, 187 U. S. 307, 308, 47 L. ed. 190, 23 Sup. Ct. Rep. 115; *Lone Wolf v. Hitchcock*, 187 U. S. 567, 47 L. ed. 307, 23 Sup. Ct. Rep. 216; *United States v. Ritchie*, 17 How. 525, 15 L. ed. 236; *United States v. Rickert*, 188 U. S. 432, 47 L. ed. 532, 23 Sup. Ct. Rep. 478.

It does not follow because a person is a citizen that he is in every respect *sui juris*. Infants, insane persons, and married women, although citizens, have always been the subject of special legislation on the part of the states, and it is a common thing for the states to restrict the sale of liquor and other noxious articles to minors.

Crowley v. Christensen, 137 U. S. 86, 91, 34 L. ed. 620, 623, 11 Sup. Ct. Rep. 13.

Prior to the decision of this court in *United States v. Rickert*, above cited, it had been repeatedly and uniformly held by the Federal courts that the act of February 8, 1887, in conferring United States citizenship, as it was assumed, did not change the status of Indian allottees as wards of the government or abolish the reservations.

Eells v. Ross, 12 C. C. A. 205, 29 U. S. App. 59, 64 Fed. 417; *United States v. Logan*, 105 Fed. 240; *United States v. Flournoy Live Stock & R. E. Co.* 69 Fed. 886; *United States v. Mullin*, 71 Fed. 682. See also *United States v. Belt*, 128 Fed. 168; *United States v. Kiya*, 126 Fed. 879; *Re*

Lincoln, 129 Fed. 247; *Mulligan v. United States*, 56 C. C. A. 50, 120 Fed. 98.

The power of the Federal government to protect the Indians is not dependent upon the preservation of tribal relations.

Cherokee Nation v. Southern Kansas R. Co. 135 U. S. 641, 653, 34 L. ed. 295, 300, 10 Sup. Ct. Rep. 965; *Stephens v. Cherokee Nation*, 174 U. S. 445, 484, 43 L. ed. 1041, 1055, 19 Sup. Ct. Rep. 722; *United States v. Kagama*, 118 U. S. 384, 30 L. ed. 230, 6 Sup. Ct. Rep. 1109; *State v. Campbell*, 53 Minn. 354, 21 L. R. A. 169, 55 N. W. 553; *Renfrow v. United States*, 3 Okla. 166, 41 Pac. 88.

The relations of the United States with the Indians being, as this court has repeatedly held, a political matter for the determination of Congress alone, the courts, where the intention of Congress in defining those relations in a particular act is doubtful, will accept and follow the construction which Congress may, in a later act, put upon its prior legislation; *a fortiori*, when a different construction would render the later act unconstitutional.

Johnson v. Southern P. Co. 196 U. S. 1, ante, 363, 25 Sup. Ct. Rep. 158.

In *Ohio v. Thomas*, 173 U. S. 276, 43 L. ed. 699, 19 Sup. Ct. Rep. 453, this court held that a state had no authority to interfere with the administration by Congress of a national soldiers' home located within its limits; nor, in the exercise of its police power, to regulate or prohibit the use of any article of food which had been approved by the management of the home under the authority of Congress.

The necessary inference to be drawn from this decision is that the inmates of a soldiers' home, although generally within the jurisdiction and protection of the state, are nevertheless subject to the regulation and control of Congress. And it inevitably follows that, if the states cannot regulate or prohibit the purchase and use for such inmates of articles of food or drink, Congress may do so; and hence it can pass a law forbidding the sale of liquor to them. If it may do this, simply because of the special interest it has in their welfare, why may it not, for like reasons, legislate for the protection of its Indian wards, who have received allotments of land in severalty under the act of 1887, although, like the old soldiers, they may be citizens of the United States and subject generally to the laws of the state in which they reside?

Mr. Justice **Brewer** delivered the opinion of the court:

The contention of petitioner is that the act of January 30, 1897, is unconstitutional as applied to the sales of liquor to an Indian who has received an allotment and patent of

land under the provisions of the act of February 8, 1887, because it is provided in said act that each and every Indian to whom allotments have been made shall be subject to the laws, both civil and criminal, of the state in which they may reside; and further, that John Butler, having, as is admitted, received an allotment of land in severalty and his patent therefor under the provisions of the act of Congress of February 8, 1887, is no longer a ward of the government, but a citizen of the United States and of the state of Kansas, and subject to the laws, both civil and criminal, of said state.

The relation between the government and the Indians and the rights and obligations consequent thereon have been the subject of frequent consideration by this court. Among the recent cases, in which are found references to many prior adjudications, may be mentioned *Stephens v. Cherokee Nation*, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722; *Minnesota v. Hitchcock*, 185 U. S. 373, 46 L. ed. 954, 22 Sup. Ct. Rep. 650; *Cherokee Nation v. Hitchcock*, 187 U. S. 294, 47 L. ed. 183, 23 Sup. Ct. Rep. 115; *Lone Wolf v. Hitchcock*, 187 U. S. 553, 47 L. ed. 299, 23 Sup. Ct. Rep. 216, and *United States v. Rickert*, 188 U. S. 432, 47 L. ed. 532, 23 Sup. Ct. Rep. 478. In *a general way it may[498] be said that the recognized relation between the government and the Indians is that of a superior and an inferior, whereby the latter is placed under the care and control of the former. *Choctaw Nation v. United States*, 119 U. S. 1, 28, 30 L. ed. 306, 315, 7 Sup. Ct. Rep. 75. In the early dealings of the government with the Indian tribes the latter were recognized as possessing some of the attributes of nations, with which the former made treaties, and the policy of the government was, sometimes by treaties and sometimes by the use of force, to put a stop to the wanderings of these tribes and locate them on some definite territory or reservation, there establishing for them a communal or tribal life. While this policy was in force, and this location of wandering tribes was being accomplished, much of the legislation of Congress ran in the direction of the isolation of the Indians, preventing general intercourse between them and their white neighbors in order that they might not be defrauded or wronged through the superior cunning and skill of those neighbors. The practice of dealing with the Indian tribes as separate nations was changed by a proviso inserted in the Indian appropriation act of March 3, 1871 (16 Stat. at L. 566, chap. 120, carried into § 2079 Rev. Stat.), which reads: "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom

the United States may contract by treaty." From that time on the Indian tribes and the individual members thereof have been subjected to the direct legislation of Congress which, for some time thereafter, continued the policy of locating the tribes on separate reservations and perpetuating the communal or tribal life.

While, during these years, the exercise of certain powers by the Indian tribes was recognized, yet their subjection to the full control of the United States was often affirmed. In *Lone Wolf v. Hitchcock*, 187 U. S. 553, 565, 47 L. ed. 299, 306, 23 Sup. Ct. Rep. 216, it was said: "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political [499] one, not subject to be controlled by the *judicial department of the government." And the conclusion thus reached was supported by the authority of several cases. It is true we ruled, when treaties between the Indian tribes and the United States were the subject of consideration, that "how the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction." *Worcester v. Georgia*, 6 Pet. 515, 582, 8 L. ed. 483, 508. And we also said that the obligations which the United States were under to the Indians called for "such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection." *Choctaw Nation v. United States*, 119 U. S. 1, 28, 30 L. ed. 306, 315, 7 Sup. Ct. Rep. 75. But none of the decisions affirming the protection of the Indians questioned the full power of the government to legislate in respect to them.

Of late years a new policy has found expression in the legislation of Congress,—a policy which looks to the breaking up of tribal relations, the establishing of the separate Indians in individual homes, free from national guardianship and charged with all the rights and obligations of citizens of the United States. Of the power of the government to carry out this policy there can be no doubt. It is under no constitutional obligation to perpetually continue the relationship of guardian and ward. It may at any time abandon its guardianship and leave the ward to assume and be subject to all the privileges and burdens of one *sui juris*. And it is for Congress to determine when and how that relationship of guardianship shall be abandoned. It is not within the power of the courts to overrule the judgment of Congress. It is true there may be a presumption that no radical departure is intended, and courts may wisely insist that the purpose of Congress be made clear by its legislation;

197 U. S.

but when that purpose is made clear the question is at an end.

It may be well to notice some of the legislation of Congress having this end in view. Section 15 of the act of March 3, 1893 (27 Stat. at L. 612, 645, chap. 209), reads:

*"The consent of the United States is here-[500] by given to the allotment of lands in severalty, not exceeding one hundred and sixty acres, to any one individual within the limits of the country occupied by the Cherokees, Creeks, Choctaws, Chickasaws, and Seminoles; and upon such allotments the individuals to whom the same may be allotted shall be deemed to be in all respects citizens of the United States. And the sum of twenty-five thousand dollars, or so much thereof as may be necessary, is hereby appropriated to pay for the survey of any such lands as may be allotted by any of said tribes of Indians to individual members of said tribes; and upon the allotment of the lands held by said tribes respectively, the reversionary interest of the United States therein shall be relinquished and shall cease."

Section 16 created what is known as the Dawes Commission, for extinguishing the national or tribal title to lands within the Indian territory. Pursuant to its authority, an agreement was made with the Choctaw and Chickasaw Nations for the allotment of their lands among the members, which agreement was ratified and approved by the act of Congress of June 28, 1898. 30 Stat. at L. 495, chap. 517. In that agreement it was stipulated (p. 513): "It is further agreed that the Choctaws and Chickasaws, when their tribal governments cease, shall become possessed of all the rights and privileges of citizens of the United States." By the same act an agreement made with the Creek Indians, which contained a similar stipulation, was ratified and approved. In the last treaty with the Kickapoos, to which tribe John Butler, the person to whom the petitioner is charged to have sold the liquor, belonged, a treaty concluded June 28, 1862 (Revision of Indian Treaties, art. 8, p. 449), it was provided:

"Art. 3. At any time hereafter, when the President of the United States shall have become satisfied that any adults, being males and heads of families, who may be allottees under the provision of the foregoing article, are sufficiently intelligent and prudent to control their affairs and interests, he may, at *the requests of such per-[501] sons, cause the land severally held by them to be conveyed to them by patent in fee simple, with power of alienation; and may, at the same time, cause to be . . . [set

853

apart and placed to their credit severally], their proportion of the cash value of the credits of the tribe, principal and interest, then held in trust by the United States, and also, as the same may be received, their proportion of the proceeds of the sale of lands under the provisions of this treaty. And on such patents being issued, and such payments ordered to be made by the President, such competent persons shall cease to be members of said tribe, and shall become citizens of the United States; and thereafter the lands so patented to them shall be subject to levy, taxation, and sale, in like manner with the property of other citizens: *Provided*, That before making any such application to the President, they shall appear in open court, in the district court of the United States for the district of Kansas, and make the same proof and take the same oath of allegiance as is provided by law for the naturalization of aliens; and shall also make proof, to the satisfaction of said court, that they are sufficiently intelligent and prudent to control their affairs and interests; that they have adopted the habits of civilized life, and have been able to support, for at least five years, themselves and families." [13 Stat. at L. 624.]

A similar clause is found in the treaty of April 19, 1862 [12 Stat. at L. 1191], between the United States and the Pottawatomic Indians. Revision of Indian Treaties, 683, 685. It was not uncommon in the district court of the United States for the district of Kansas, in the years following these treaties, to see Indians coming into the district court and taking the oath of allegiance, as required by these provisions. We make these references to recent treaties, not with a view of determining the rights created thereby, but simply as illustrative of the proposition that the policy of the government has changed, and that an effort is being made to relieve some of the Indians from their tutelage and endow them with the full rights of citizenship, thus terminating between them and the government the *relation of guardian and ward, and that the statute we are considering is not altogether novel in the history of congressional legislation.

Now the act of 1887 was passed twenty-five years after the treaty of 1862 with the Kickapoos, and must be construed in the light of that treaty. By the treaty it was declared that at the instance of the President, and upon compliance with specified provisions, certain of the Indians should be considered as competent persons, should cease to be members of the tribe and become citizens of the United States. The act of 1887, in like manner, provides

that, at the instance of the President, a reservation may be surveyed and individual tracts allotted to the Indians, and that upon approval of the allotments by the Secretary of the Interior patents shall issue, subject to a condition against alienation and encumbrances during a period of twenty-five years, or longer, if the President deems it wise. Section 6 then declares that the "Indians to whom allotments have been made shall have the benefit of, and be subject to, the laws, both civil and criminal, of the state or territory in which they may reside, and no territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law."

It is urged that this clause becomes operative only when the final patent provided for by § 5 is issued; but there are many reasons why such contention is unsound. In the first place, it is hardly to be supposed that Congress would legislate twenty-five years in advance in respect to the general status of these Indians. If they were to continue in the same relation to the government that they hitherto occupied, it would seem as though Congress would have said nothing and waited until near the expiration of twenty-five years before determining what should be such status. Second, the language of the first sentence of § 6 forbids the construction contended for. It is "that upon the completion of said allotments and the patenting of the lands to said allottees." Now the allotting and the patenting are joined together as though occurring *at or near the same time. Further, when the first patent is issued the recipient ceases to be an allottee, and becomes a patentee. Again, the second patent does not always go to the holder of the first patent, because, as provided by § 5, it may go to the first patentee or his heirs. And finally, the last sentence indicates that the whole section deals with present conditions and present rights. It reads: "And every Indian born within the territorial limits of the United States, to whom allotments shall have been made under the provisions of this act, . . . is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, . . . without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property." This confers citizenship upon the allottee, and not upon the patentee, while, at the same time securing to him his right to tribal or other property. So far as his political status is concerned, the allottee is declared to be a citizen,—not that he will be a citizen after twenty-five years have passed and a second patent

shall have been issued. That citizenship is limited to the allottees born within the territorial limits of the United States was obviously intended to exclude from that privilege such allottees, if any there should be, who had recently come into this country from the Dominion of Canada or elsewhere.

This question has been presented to several state and some Federal courts, and the ruling universally has been to the same effect. *State ex rel. Tompton v. Denoyer*, 6 N. Dak. 586, 72 N. W. 1014; *State ex rel. Crawford v. Norris*, 37 Neb. 299, 55 N. W. 1086; *Wa-La-Note-Tke-Tynin v. Carter*, 6 Idaho, 85, 53 Pac. 106; *Re Now-Ge-Zhuck* (Kan.) 76 Pac. 877; *United States v. Rickert*, 106 Fed. 5; *Farrell v. United States*, 49 C. C. A. 183, 110 Fed. 942, 947. In the first of these cases this declaration is made: "Such Indians and persons of Indian descent, so residing upon lands allotted to them in severalty, and upon which the preliminary patents have been issued, are citizens of the United States, and qualified electors of this state." See also *Boyd v. Nebraska*, 143 U. S. 135, 162, 36 L. ed. 103, 109, 12 Sup. Ct. Rep. 375, 382, in which it [504] is said: "The act of Congress approved February 8, 1887 (24 Stat. at L. 388, chap. 119), was much broader, and by its terms made every Indian situated as therein referred to, a citizen of the United States."

In reference to this matter the learned solicitor general makes these observations:

"Were it not for the fact that every court that has considered this language at all has assumed it to mean that an Indian becomes entitled to the benefit of, and subject to, the laws of the state in which he resides upon the receipt of his first patent, the natural inference would be that Congress intended those consequences to attach only when the allotments referred to had been fully completed and the final patent issued. But, in spite of the array of cases upon this subject, it will be found, upon examination, that in none of them was the provision referred to carefully analyzed and discussed, and that from first to last it has been merely a matter of assumption.

"Upon the subject of citizenship, § 6 provides that 'every Indian born within the territorial limits of the United States, to whom allotments shall have been made under the provisions of this act, or under any law or treaty, . . . is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens.'

subject to the laws of the state or territory in which he resides. As a matter of constitutional law, an Indian appears to be entitled to the benefit of, and to be subject to, the laws of the state in which he resides the moment he becomes a citizen of the United States. By virtue of the 14th Amendment a citizen of the United States becomes, by residence therein, a citizen of the state, and entitled to all the rights, privileges, and immunities of other citizens of the state, and to the equal protection of its laws. *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394."

*We do not doubt that the construction [505] placed by these several courts upon this section is correct, and that John Butler, at the time the defendant sold him the liquor, was a citizen of the United States and of the state of Kansas, having the benefit of, and being subject to, the laws, both civil and criminal, of that state. Under these circumstances could the conviction of the petitioner in the Federal court of a violation of the act of Congress of January 30, 1897, be sustained? In this Republic there is a dual system of government, national and state. Each within its own domain is supreme, and one of the chief functions of this court is to preserve the balance between them, protecting each in the powers it possesses, and preventing any trespass thereon by the other. The general police power is reserved to the states, subject, however, to the limitation that in its exercise the state may not trespass upon the rights and powers vested in the general government. The regulation of the sale of intoxicating liquors is one of the most common and significant exercises of the police power. And so far as it is an exercise of the police power it is within the domain of state jurisdiction. It is true the national government exacts licenses as a condition of the sale of intoxicating liquors, but that is solely for the purposes of revenue, and is no attempted exercise of the police power. A license from the United States does not give the licensee authority to sell liquor in a state whose laws forbid its sale, and neither does a license from a state to sell liquor enable the licensee to sell without paying the tax and obtaining the license required by the Federal statute. *License Cases*, 5 How. 504, 12 L. ed. 256; *McGuire v. Massachusetts*, 3 Wall. 387, 18 L. ed. 165; *License Tax Cases*, 5 Wall. 462, 18 L. ed. 497. Now the act of 1897 is not a revenue statute, but plainly a police regulation. It will not be doubted that an act of Congress attempting as a police regulation to punish the sale of liquor by one citizen of a state to another within the territorial

"It would seem that Congress intended citizenship of the United States to attach at the same time that the Indian becomes
197 U. S.

[506] limits of that state would be an invasion of the state's jurisdiction, and could not be sustained; and it would be immaterial what the antecedent status of either buyer or seller *was. There is in these police matters no such thing as a divided sovereignty. Jurisdiction is vested entirely in either the state or the nation, and not divided between the two.

In *Kansas Indians*, 5 Wall. 737 (*Blue Jacket v. Johnson County*), 18 L. ed. 667, the question was whether lands of Shawnee Indians held in severalty were subject to state taxation, and it was held that they were not, although in the last treaty with the Shawnees, the one authorizing the allotments, there was no express stipulation for exemption from taxation. The court said (p. 755, L. ed. p. 672):

"If the tribal organization of the Shawnees is preserved intact, and recognized by the political department of the government as existing, then they are a 'people distinct from others,' capable of making treaties, separated from the jurisdiction of Kansas, and to be governed exclusively by the government of the Union. If under the control of Congress, from necessity there can be no divided authority. If they have outlived many things, they have not outlived the protection afforded by the Constitution, treaties, and laws of Congress. It may be that they cannot exist much longer as a distinct people in the presence of the civilization of Kansas; 'but, until they are clothed with the rights and bound to all the duties of citizens,' they enjoy the privilege of total immunity from state taxation."

If it be true that there can be no divided authority over the property of the Indian, *a fortiori* must it be true as to his political status and rights.

Subjection to both state and national law in the same matter might often be impossible. The power to punish a sale to an Indian implies an equal power to punish a sale by an Indian. If by national law a sale to or by an Indian was punished solely by imprisonment and by state law solely by fine, how could both laws be enforced in respect to the same sale? The question is not whether a particular right may be enforced in either a court of the state or one of the nation, but whether two sovereignties can create independent duties and compel obedience. In *United States v. Dewitt*, 9 Wall. 41, 19 L. ed. 593, the *question was whether the 29th section of the internal revenue act of March 2, 1867 (14 Stat. at L. 484, chap. 169), which established a police regulation in respect to the mixing for sale, or the selling, of naphtha and illuminating oils, was enforceable with-

in the limits of a state, and it was held that it was not, the court saying (p. 45, L. ed. p. 594):

"As a police regulation, relating exclusively to the internal trade of the states, it can only have effect where the legislative authority of Congress excludes, territorially, all state legislation, as, for example, in the District of Columbia. Within state limits it can have no constitutional operation."

Re Now-Ge-Zhuck, 76 Pac. 877, decided by the supreme court of Kansas, referred to an allottee under the act of February 8, 1887, and in respect to the power of the state to enforce its laws over such allottee that court said:

"An Indian upon whom has been conferred citizenship, and who enjoys the protection of the laws of the state, should be punished for a transgression of them. This we are to presume Congress contemplated. It being shown by the agreed facts that petitioner was an allottee to whom a patent had been issued, and further shown that the allotments had been made and completed as provided by the act of February 8, 1887, the laws of the state were operative, and the state had jurisdiction to arrest and punish petitioner for the offense by him committed."

It is true the same act may often be a violation of both the state and Federal law, but it is only when those laws occupy different planes. Thus, a sale of liquor may be a violation of both the state and Federal law, in that it was made by one who had not paid the revenue tax and received from the United States a license to sell, and also had not complied with the state law in reference to the matter of state license. But in that case the two laws occupy different planes,—one that of revenue and the other that of police regulation. There is no suggestion in the present case of a violation of the internal revenue law of the nation, but the conviction is sought to be *upheld under the act of 1897, a mere[508] statute of police regulation.

But it is contended that, although the United States may not punish under the police power the sale of liquor within a state by one citizen to another, it has power to punish such sale if the purchaser is an Indian. And the power to do this is traced to that clause of § 8, art. 1, of the Constitution which empowers Congress "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." It is said that commerce with the Indian tribes includes commerce with the members thereof, and Congress, having power to regulate commerce between the white men and the Indians, continues to

retain that power, although it has provided that the Indian shall have the benefit of and be subject to the civil and criminal laws of the state, and shall be a citizen of the United States, and therefore a citizen of the state. But the logic of this argument implies that the United States can never release itself from the obligations of guardianship; that, so long as an individual is an Indian by descent, Congress, although it may have granted all the rights and privileges of national, and therefore state, citizenship, the benefits and burdens of the laws of the state, may at any time repudiate this action and reassume its guardianship, and prevent the Indian from enjoying the benefit of the laws of the state, and release him from obligations of obedience thereto. Can it be that because one has Indian, and only Indian, blood in his veins, he is to be forever one of a special class over whom the general government may, in its discretion, assume the rights of guardianship which it has once abandoned, and this whether the state or the individual himself consents? We think the reach to which this argument goes demonstrates that it is unsound.

[509] But it is said that the government has provided that the Indian's title shall not be alienated or encumbered for twenty-five years, and has also stipulated that the grant of citizenship shall not deprive the Indian of his interest in tribal or other property; but these are mere property rights, and do not affect the civil or political status of the allottees. In *United States v. Rickert*, 188 U. S. 432, 47 L. ed. 532, 23 Sup. Ct. Rep. 478, we sustained the right of the government to protect the lands thus allotted and patented from any encumbrance of state taxation. Undoubtedly an allottee can enforce his right to an interest in the tribal or other property (for that right is expressly granted); and equally clear is it that Congress may enforce and protect any condition which it attaches to any of its grants. This it may do by appropriate proceedings in either a national or a state court. But the fact that property is held subject to a condition against alienation does not affect the civil or political status of the holder of the title. Many a tract of land is conveyed with conditions subsequent. A minor may not alienate his lands; and the proper tribunal may, at the instance of the rightful party, enforce all restraints upon alienation.

But it is unnecessary to pursue this discussion further. We are of the opinion that, when the United States grants the privileges of citizenship to an Indian, gives to him the benefit of, and requires him to be subject to, the laws, both civil and crim-

inal, of the state, it places him outside the reach of police regulations on the part of Congress; that the emancipation from Federal control, thus created, cannot be set aside at the instance of the government without the consent of the individual Indian and the state, and that this emancipation from Federal control is not affected by the fact that the lands it has granted to the Indian are granted subject to a condition against alienation and encumbrance, or the further fact that it guarantees to him an interest in tribal or other property.

The district Court of Kansas did not have jurisdiction of the offense charged, and therefore *the petitioner is entitled to his discharge from imprisonment.*

Mr. Justice **Harlan** dissented.

*GEORGE S. WHITAKER and Mary I. [510]
Whitaker, *Plffs. in Err.*,
v.

THOMAS McBRIDE and William Killgore.

(See S. C. Reporter's ed. 510-516.)

Public lands—riparian proprietors—rights to unsurveyed island.

1. A rule of local law that the owner of land bordering on a river owns to the center of the channel inures to the benefit of a patentee from the United States as against one claiming to enter as a homestead an unsurveyed island in such river, where the omission to survey the island was not due to fraud or mistake, and subsequent applications for a survey have been refused by the Land Department.
2. A patentee from the United States government has all the rights of a riparian owner in the channel lying opposite his banks, although his land may be itself surrounded by two channels of the river.

[No. 135.]

Submitted January 18, 1905. Decided April 10, 1905.

IN ERROR to the Supreme Court of the State of Nebraska to review a judgment which, reversing the judgment of the District Court of Buffalo County in that state, upheld the title of the patentees from the Federal government of lands bordering on a river to an unsurveyed island in such river. *Affirmed.*

See same case below, 65 Neb. 137, 90 N. W. 966.

Statement by Mr. Justice **Brewer**:

This was an action commenced on June 27, 1898, in the district court of Buffalo

county, Nebraska, and terminated by a decision of the supreme court of the state. 65 Neb. 137, 90 N. W. 966. The facts found by the district court are that McBride and Killgore were respectively the owners and in possession of tracts of land bordering on the Platte river, one on the north and the other on the south side thereof. Between these two tracts, and in the main channel of the Platte river, is an island, containing 511] about 22 acres. This island had *been in the possession of McBride and Killgore for more than ten years prior to the bringing of the action, but during that time they were contending as to how much of the land each was entitled to. It had never been surveyed by the government.

It appeared in evidence that Whitaker, in 1897, settled on the island, claiming the right to enter the same as a homestead; that application to the Land Department of the government to have the island surveyed was, in 1897, refused, the Department declining to take any action in the matter. These lands were a part of the Fort Kearney Military Reservation, which was surveyed and sold under a special act of Congress, dated July 21, 1876 (19 Stat. at L. 94, chap. 220), the patent to McBride, who had entered his tract as a homestead, bearing date March 28, 1885. There was testimony tending to show that the island was at the time of the survey of the reservation frequently covered with water, and that since then—perhaps owing to the construction of bridges and dykes—overflows had been less frequent and the land better adapted to occupation and cultivation. The decree directed by the supreme court was adverse to Whitaker, and quieted the title to McBride and Killgore to the island, giving to each one half.

Messrs. E. E. Brown and Francis G. Hamer submitted the cause for plaintiffs in error:

If the island in question could not be sold until surveyed, then it has not been sold, because it has not been surveyed, and no one has any title to it.

Horne v. Smith, 159 U. S. 40, 40 L. ed. 68, 15 Sup. Ct. Rep. 988.

It is clearly within the power of the Secretary of the Interior and the Commissioner of the General Land Office to direct the survey of the island in question.

Kirwan v. Murphy, 189 U. S. 35, 47 L. ed. 698, 23 Sup. Ct. Rep. 599.

The United States owns the island.

United States v. Mission Rock Co. 189 U. S. 393, 47 L. ed. 865, 23 Sup. Ct. Rep. 606.

Not until the legal title has passed from

the United States will the courts inquire into the circumstances preceding or attending the transfer, for the purpose of deciding which of two conflicting claimants have the superior equity.

McDonald v. Union P. R. Co. (Neb.) 97 N. W. 440; *Shepley v. Cowan*, 91 U. S. 330, 23 L. ed. 424; *Rector v. Gibbon*, 111 U. S. 290, 28 L. ed. 432, 4 Sup. Ct. Rep. 605.

Courts do not assume the administration of the public land laws, but they may declare their effect.

Kirwan v. Murphy, 189 U. S. 35, 47 L. ed. 698, 23 Sup. Ct. Rep. 599.

The general policy of the government is in favor of the occupation of public lands, to the end that they may be taken for homes.

Coon v. Freel, 16 Land Dec. 202; *Leon v. Grijalva*, 3 Land Dec. 362; *Re Mirabal*, 20 Land Dec. 347; *Brown v. Shields*, 21 Land Dec. 101.

McBride and Killgore had no lawful right to fence up this land belonging to the United States. The settlement made by Whitaker was lawful.

Stoddard v. Neigel, 7 Land Dec. 340; *Norton v. Westbrook*, 9 Land Dec. 455; *Stovall v. Heenan*, 12 Land Dec. 382; *Cathran v. Davis*, 5 Land Dec. 250.

If in *Kirwan v. Murphy*, 189 U. S. 35, 47 L. ed. 698, 23 Sup. Ct. Rep. 599, there was a right to survey between the meander line and the water line of the lake, there is a right to survey the island in this case. In both cases the United States owns land which is not surveyed.

It could only have been held in *United States v. Mission Rock Co.* 189 U. S. 393, 47 L. ed. 865, 23 Sup. Ct. Rep. 606, that the United States owned the rocks, because there was no affirmative evidence in any deed of conveyance that it had conveyed them.

The islands are unsurveyed. This being true, the islands cannot be a part of the lots owned by McBride and Killgore. The boundaries of these lots are determined by reason of the fact that they are unsurveyed. The meander line is not their boundary. The stream is their boundary.

Sphung v. Moore, 120 Ind. 356, 22 N. E. 319; *Horne v. Smith*, 159 U. S. 40, 40 L. ed. 68, 15 Sup. Ct. Rep. 988.

Whether it be on one side or the other of the thread of the stream, the island when formed is an accretion to the soil in the bed of the river. The riparian owner does not take the accretion, for the reason that it was not added to his land.

East Omaha Land Co. v. Hanson, 117 Iowa, 96, 90 N. W. 706; *Holman v. Hodges*, 112 Iowa, 714, 58 L. R. A. 673, 84 Am. St. Rep. 367, 84 N. W. 950; *Victoria v. Schott*,

9 Tex. Civ. App. 332, 29 S. W. 681; *Cooley v. Golden*, 117 Mo. 33, 21 L. R. A. 300, 23 S. W. 104; *Morris v. Brooke*, 53 Am. Rep. 215, note; *People v. Warner*, 116 Mich. 228, 74 N. W. 705; *Indiana v. Kentucky*, 136 U. S. 479, 34 L. ed. 329, 10 Sup. Ct. Rep. 1051.

The state court has no moral or legal right to attempt to oust the United States Land Department from the discharge of its duties. If it has no jurisdiction, then its judgment is void. If void, it may be attacked collaterally or directly. It affects nothing and creates nothing. It should be considered as if there had never been any attempt to render it, and as if it had never been pronounced or written.

Black, Judgm. § 170; Freeman, Judgm. § 117.

The Nebraska supreme court does not hesitate to declare its own judgment void (*Johnson v. Parrotte*, 46 Neb. 51, 64 N. W. 363); nor does it hesitate to declare the judgment of the district court void under proper circumstances (*Banking House of A. Castetter v. Dukes* [Neb.] 97 N. W. 805).

The plaintiff in an action of ejectment must rely for a recovery upon the strength of his own title, and not on the want of title in his adversary.

Abbott v. Coates, 62 Neb. 247, 86 N. W. 1058; *Frazee v. Nelson*, 179 Mass. 456, 88 Am. St. Rep. 391, 61 N. E. 40; *Doe ex dem. Anniston City Land Co. v. Edmondson*, 127 Ala. 445, 30 So. 61; *Burt v. Florida S. R. Co.* 43 Fla. 339, 31 So. 265; *Winters v. Hainer*, 107 Tenn. 337, 64 S. W. 44; *Malone v. Arends*, 116 Ala. 19, 22 So. 500; *Wilson v. Carrico*, 155 Ind. 570, 58 N. E. 847; *Creech v. Childers*, 156 Mo. 338, 56 S. W. 1106; *Smith v. Haskins*, 22 R. I. 6, 45 Atl. 741; *Stiff v. Cobb*, 126 Ala. 381, 85 Am. St. Rep. 38, 28 So. 402; *Hammond v. Shepard*, 186 Ill. 235, 57 N. E. 867.

An action to recover possession of real property can only be brought by the holders of the legal title.

Hearn v. Jones (Tenn. Ch. App.) 64 S. W. 344; *Sutton v. Clark*, 59 S. C. 440, 38 S. E. 150; *McCrellis v. Wells* (Tenn. Ch. App.) 64 S. W. 293; *Remsen v. Hyams*, 35 Misc. 345, 71 N. Y. Supp. 1002; *Perrior v. Peck*, 167 N. Y. 582, 60 N. E. 1118; *Hale v. Morgan* (Tenn. Ch. App.) 63 S. W. 506; *Roberts v. Haines*, 112 Ga. 842, 38 S. E. 119; *Adams v. Johnson*, 63 Kan. 886, 65 Pac. 662; *Stowell v. Spencer*, 190 Ill. 453, 60 N. E. 800; *Sanford v. Herron*, 161 Mo. 176, 84 Am. St. Rep. 703, 61 S. W. 839; *Illinois Steel Co. v. Bilot*, 109 Wis. 430, 83 Am. St. Rep. 905, 84 N. W. 855, 85 N. W. 402; *Cowdery v. Johnson*, 113 Ga. 981, 39 S. E. 478.

Where the defendant is in possession of land not under color of title, the plaintiff

cannot eject him therefrom without showing title and right of possession in himself.

McVey v. Carr, 159 Mo. 648, 60 S. W. 1034

The island is unsurveyed. If it is unsurveyed, then it is unsold.

Horne v. Smith, 159 U. S. 40, 40 L. ed. 68, 15 Sup. Ct. Rep. 988; *Kerwan v. Murphy*, 189 U. S. 35, 47 L. ed. 698, 23 Sup. Ct. Rep. 599.

The patent conveys only the land which is surveyed, and when it is clear from the plat that the tract surveyed terminated at a particular body of water, the patent carries no land beyond it.

Horne v. Smith, 159 U. S. 40, 40 L. ed. 68, 15 Sup. Ct. Rep. 988; *Lammers v. Nissen*, 4 Neb. 245; *Glenn v. Jeffrey*, 75 Iowa, 20, 39 N. W. 160; *Schlosser v. Hemphill*, 118 Iowa, 452, 90 N. W. 842.

The United States government does not guarantee the integrity of its officers or the validity of their acts. They are but the servants of the law, and if they depart from its requirements the government is not bound.

Moffat v. United States, 112 U. S. 24, 28 L. ed. 623, 5 Sup. Ct. Rep. 10.

Cases have happened in which by mistake the meander line described by a surveyor in the field notes of his survey did not approach the water line intended to be portrayed. Such mistakes, of course, do not bind the government.

Mitchell v. Smale, 140 U. S. 406, 35 L. ed. 442, 11 Sup. Ct. Rep. 819, 840; *St. Paul & P. R. Co. v. Schurmeir*, 7 Wall. 272, 19 L. ed. 74; *Granger v. Swart*, Woolw. 88, Fed. Cas. No. 5,685; *Glenn v. Jeffrey*, 75 Iowa, 20, 39 N. W. 160.

Where there is a meander line not far from a stream, it indicates and points to the stream; but if there is no body of water there, then the meander line itself becomes a boundary. Under this rule the island in question is the property of the United States, subject to such right as the plaintiff in error George S. Whitaker may have. It never became the property of McBride and Killgore.

Horne v. Smith, 159 U. S. 40, 40 L. ed. 68, 15 Sup. Ct. Rep. 988; *Niles v. Cedar Point Club*, 175 U. S. 300, 44 L. ed. 171, 20 Sup. Ct. Rep. 124; *Fuller v. Shedd*, 161 Ill. 462, 33 L. R. A. 146, 52 Am. St. Rep. 380, 44 N. E. 286; *Whitney v. Detroit Lumber Co.* 78 Wis. 240, 47 N. W. 425; *Grant v. Hemphill*, 92 Iowa, 218, 59 N. W. 263, 60 N. W. 618; *French Live Stock Co. v. Springer*, 35 Or. 312, 58 Pac. 102.

All of the land in dispute is part of the unsurveyed domain of the United States, to which no one can obtain title except through

the regular methods adopted by the general government for the disposition of the public lands.

Fuller v. Shedd, 161 Ill. 462, 33 L. R. A. 146, 52 Am. St. Rep. 380, 44 N. E. 286; *Barnhart v. Ehrhart*, 33 Or. 274, 54 Pac. 195.

Wherever there is a question as to whether title to land once the property of the United States has passed from the United States, such question must be resolved by the laws of the United States.

Wilcox v. Jackson, 13 Pet. 498, 10 L. ed. 264.

Mr. **M. P. Kinkaid** submitted the cause for defendants in error. Messrs. *E. C. Calkins* and *H. M. Sinclair* were on the brief:

A survey by the government of its lands cannot be questioned in a collateral proceeding.

West v. Cochran, 17 How. 403, 15 L. ed. 110; *Knight v. United Land Asso.* 142 U. S. 161, 35 L. ed. 974, 12 Sup. Ct. Rep. 258; *Cragin v. Powell*, 128 U. S. 691, 32 L. ed. 566, 9 Sup. Ct. Rep. 203; *Steel v. St. Louis Smelting & Ref. Co.* 106 U. S. 447, 27 L. ed. 226, 1 Sup. Ct. Rep. 389; *United States v. San Jacinto Tin Co.* 10 Sawy. 639, 23 Fed. 279, Affirmed in 125 U. S. 273, 31 L. ed. 747, 8 Sup. Ct. Rep. 850; *United States v. Flint*, 4 Sawy. 61, Fed. Cas. No. 15,121, Affirmed in 98 U. S. 61, 25 L. ed. 93; *Henshaw v. Bissell*, 18 Wall. 255, 21 L. ed. 835; *Stanford v. Taylor*, 18 How. 409, 15 L. ed. 453; *Haydel v. Dufresne*, 17 How. 23, 15 L. ed. 115; *Jackson ex dem. Anderson v. Clark*, 1 Pet. 628, 7 L. ed. 290; *Niswanger v. Saunders*, 1 Wall. 424, 17 L. ed. 599; *Snyder v. Sickles*, 98 U. S. 203, 25 L. ed. 97; *Frasher v. O'Connor*, 115 U. S. 102, 29 L. ed. 311, 5 Sup. Ct. Rep. 1141; *Gazzam v. Phillips*, 20 How. 372, 15 L. ed. 958; *Pollard v. Dwight*, 4 Cranch, 421, 2 L. ed. 666; *Taylor v. Brown*, 5 Cranch, 234, 3 L. ed. 88; *M'Iver v. Walker*, 9 Cranch, 177, 3 L. ed. 696; *Craig v. Radford*, 3 Wheat. 594, 4 L. ed. 467; *Ellicott v. Pearl*, 10 Pet. 412, 9 L. ed. 475; *Russell v. Maxwell Land Grant Co.* 158 U. S. 253, 39 L. ed. 971, 15 Sup. Ct. Rep. 827.

An unrestricted grant of lands bounded upon a non-navigable stream carries with it title to the center of the stream.

Hardin v. Jordan, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838; *Packer v. Bird*, 137 U. S. 661, 34 L. ed. 819, 11 Sup. Ct. Rep. 210; *St. Louis v. Rutz*, 138 U. S. 226, 34 L. ed. 941, 11 Sup. Ct. Rep. 337; *Mitchell v. Smale*, 140 U. S. 406, 35 L. ed. 442, 11 Sup. Ct. Rep. 819, 840; *St. Paul & P. R. Co. v. Schurmeir*, 7 Wall. 272, 19 L. ed. 74; *Jefferis v. East Omaha Land Co.* 134 U. S. 178, 33 L. ed. 872, 10 Sup. Ct.

Rep. 518; *Butler v. Grand Rapids & I. R. Co.* 85 Mich. 246, 24 Am. St. Rep. 84, 48 N. W. 569, 159 U. S. 87, 40 L. ed. 85, 15 Sup. Ct. Rep. 991; *Wiggenhorn v. Kountz*, 23 Neb. 690, 8 Am. St. Rep. 150, 37 N. W. 603; *Clark v. Cambridge & A. Irrig. & Improv. Co.* 45 Neb. 798, 64 N. W. 239; *Re Christensen*, 25 Land Dec. 413; *Re Glissman*, 25 Land Dec. 474.

Mr. Justice **Brewer** delivered the opinion of the court:

The decision of the supreme court of the state was that the owner of lands bordering on a river owns to the center of the channel, and takes title to any small bodies of land on his side of the channel that have not been surveyed or sold by the government. It is the settled rule that the question of the *title of a riparian owner is one[512] of local law. In *Hardin v. Jordan*, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838, the matter was discussed at some length, the authorities cited, and the conclusion thus stated by Mr. Justice Bradley, delivering the opinion of the court (p. 384, L. ed. p. 434, Sup. Ct. Rep. p. 813):

"In our judgment the grants of the government for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be construed as to their effect according to the law of the state in which the lands lie."

See also *Shively v. Bowlby*, 152 U. S. 45, 38 L. ed. 347, 14 Sup. Ct. Rep. 548; *Lowndes v. Huntington*, 153 U. S. 19, 38 L. ed. 618, 14 Sup. Ct. Rep. 758; *Grand Rapids & I. R. Co. v. Butler*, 159 U. S. 87, 92, 40 L. ed. 85, 87, 15 Sup. Ct. Rep. 991; *St. Anthony Falls Water Power Co. v. St. Paul Water Comrs.* 168 U. S. 349, 42 L. ed. 497, 18 Sup. Ct. Rep. 157; *Kean v. Calumet Canal & Improv. Co.* 190 U. S. 452, 47 L. ed. 1134, 23 Sup. Ct. Rep. 651; *Hardin v. Shedd*, 190 U. S. 508, 47 L. ed. 1156, 23 Sup. Ct. Rep. 685.

If there were no island in this case it would not, under these authorities, be questioned that the title of the riparian owners extended to the center of the channel. How far does the fact that there is this unsurveyed island in the river abridge the scope of the rule? In seeking an answer to this question these facts must be borne in mind. The official surveys made by the government are not open to collateral attack in an action at law between private parties. *Stoneroad v. Stoneroad*, 158 U. S. 240, 39 L. ed. 966, 15 Sup. Ct. Rep. 822; *Russell v. Maxwell Land Grant Co.* 158 U. S. 253, 39 L. ed. 971, 15 Sup. Ct. Rep. 827; *Horne v. Smith*, 159 U. S. 40, 40 L. ed. 68, 15 Sup. Ct. Rep. 988. A meander line is not a line of boundary, but one designed to point out the sinuosity of the bank or shore, and a means of ascertaining the quantity of land

in the fraction which is to be paid for by the purchaser. *St. Paul & P. R. Co. v. Schurmeir*, 7 Wall. 272, 19 L. ed. 74; *Hardin v. Jordan*, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838; *Horne v. Smith*, 159 U. S. 40, 40 L. ed. 68, 15 Sup. Ct. Rep. 988. The Fort Kearney reservation was a single body of land, whose survey was directed by a special act of Congress, and there is nothing to show that, in making the survey, there was any intentional wrong on the part of the surveyors. Evidently the survey of the entire tract was completed before the lands, or any part of them, were offered for sale. According to statements in the brief of counsel for plaintiff in error as well as in the opinion of the Secretary of the Interior in *Re Christensen*, 25 Land.

[513] Dec. 413, *there were several islands in the Platte river within the reservation not surveyed. The Secretary says that it does not appear why the lines of survey were not extended over these islands, but in the brief of counsel, as well as in the opinion of the supreme court it is stated that the instructions issued by the Land Department to the surveyors were to survey all islands of 21 acres and upwards. The reason of the Department, or of the surveyors (which ever may have been responsible for the omission to survey these small islands), for these omissions is not disclosed. Possibly they may have been regarded as having no stability as tracts of land, but as mere sandbars, which are frequently found in western waters, and are of temporary duration, existing to-day and gone to-morrow. Be that as it may, there is nothing to indicate any fraud or mistake on the part of the surveyors. Doubtless this island of about 22 acres was regarded as coming within their instructions, and very likely at the time of the survey did not contain even 21 acres. Further, an application for a survey of this island was refused, and this refusal was repeated once or twice. The Secretary of the Interior based his action on the decision of this court in *Grand Rapids & I. R. Co. v. Butler*, 159 U. S. 87, 40 L. ed. 85, 15 Sup. Ct. Rep. 991, and held that the Department was precluded from a survey and sale of an island after the lands on the adjacent banks of the river had been surveyed and sold. In the *Grand Rapids Case* it appeared that the land on the east bank of Grand river had been surveyed in 1831, and that on the west bank of the river in 1837, and also that included in this last survey were four islands. Upon these surveys the adjacent land and the islands were sold and patented to private parties. In 1855 a parcel of ground in the river was, under instructions from the surveyor general, surveyed and marked "is-

197 U. S.

land No. 5," and for that island a patent was issued to the railroad company. We held that the patent to the riparian owner issued before the date of the last survey conveyed to him the title to the island, saying (p. 95, L. ed. p. 88, Sup. Ct. Rep. p. 994): **"We have no doubt upon the evidence*[514] *that the circumstances were such at the time of the survey as naturally induced the surveyor to decline to survey this particular spot as an island. There is nothing to indicate mistake or fraud, and the government has never taken any steps predicated on such a theory; and did not survey the so-called island No. 5 until twenty-five years after the survey of 1831, and nearly twenty years after that of 1837."*

These considerations furnish a sufficient answer to the question, and sustain the decision of the supreme court of Nebraska.

It is further contended that the land of one of these patentees is itself part of an island, and that therefore he has no riparian rights. It is sufficient reply to this contention that the government surveyed and patented the lands up to the banks of the channel in which the island in controversy is situated, and a patentee, although his land may be itself surrounded by two channels of the river, has all the rights of a riparian owner in the channel lying opposite his banks.

Nothing herein stated conflicts with *Horne v. Smith*, 159 U. S. 40, 40 L. ed. 68, 15 Sup. Ct. Rep. 988; *Niles v. Cedar Point Club*, 175 U. S. 300, 44 L. ed. 171, 20 Sup. Ct. Rep. 124; *French-Glenn Live Stock Co. v. Springer*, 185 U. S. 47, 46 L. ed. 800, 22 Sup. Ct. Rep. 563; or *Kirwan v. Murphy*, 189 U. S. 35, 47 L. ed. 698, 23 Sup. Ct. Rep. 599. In the first of those cases it appeared that the survey stopped at a bayou, and did not extend to the main channel of the Indian river, a mile distant; and we held that the line of that bayou must be considered as the boundary of the grant; that it could not be extended over the unsurveyed land between the bayou and the main channel of the Indian river; that it was a case of an omission from the survey of land that ought to have been surveyed, and that such omission did not operate to transfer unsurveyed land to the patentee of the surveyed land bordering on the bayou. In the second we held that, as the survey showed a meander line bordering on a tract of swamp or marsh lands, the grant by patent terminated at the meander line, and did not carry the swamp lands lying between it and the shores of Lake Erie. In the third, it appeared that there was no body of water in front of the meandered line, *and we held that that line[515]

must, therefore, be the limit of the grant, and the fact that outside the side lines extended there was a body of water did not operate to extend the grant into any portion of that body of water. In the last of these cases the complainants, the owners of 859.38 acres as shown by the descriptions in their patents of fractional lots, claimed by reason thereof to be the owners of 1,202 acres lying between the meandered lines and a lake, and sought by injunction to restrain the Land Department from making a survey of these latter lands. We held that injunction would not lie, and that the officers of the government could not be restrained from making a survey; that the rights of the complainants could be settled, after a survey and transfer of the legal title from the government, by an action at law.

It is suggested in one of the briefs that this island extends up or down the river beyond the side lines of the tracts belonging to these riparian proprietors. A plat which is in evidence seems to support this statement, but the finding of the trial court, which is not disturbed by the supreme court, is to the effect that it lies between the tracts of the riparian proprietors. Of course, their title is only to the land which is in front of their banks, and not beyond the side lines in either direction.

It must also be noticed that the government is not a party to this litigation, and nothing we have said is to be construed as a determination of the power of the government to order a survey of this island, or of the rights which would result in case it did make such survey. As we reserve the rights of the United States we do not even impliedly sanction the intimation contained in the opinion of the court below that, under the decision in *Hardin v. Jordan*, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838, although, on non-navigable waters, riparian rights were not conferred by the state law, nevertheless the land beyond the banks passed to the state in virtue of the patents of the United States to the lot owners. Upon that question we express no opinion.

Our conclusion, therefore, is that by the law of Nebraska, as interpreted by its highest court, the riparian proprietors are *the owners of the bed of a stream to the center of the channel; that the government, as original proprietor, has the right to survey and sell any lands, including islands in a river or other body of water; that if it omits to survey an island in a stream, and refuses, when its attention is called to the matter, to make any survey thereof, no citizen can overrule the action of the Depart-

ment, assume that the island ought to have been surveyed, and proceed to occupy it for the purposes of homestead or pre-emption entry. In such a case the rights of riparian proprietors are to be preferred to the claims of the settler.

We see no error in the judgment of the Supreme Court of Nebraska, and it is affirmed.

FRED RASSMUSSEN, *Plff. in Err.*,

v.

UNITED STATES.

(See S. C. Reporter's ed. 516-536.)

Jury trial in Alaska—right to common-law jury of twelve.

Alaska was so incorporated into the United States by the treaty under which it was acquired, and by such subsequent congressional legislation as the act of July 20, 1868, chap. 186, § 107 (15 Stat. at L. 167, U. S. Comp. Stat. 1901, p. 2277), concerning internal revenue taxation, and the act of July 27, 1868, chap. 273 (15 Stat. at L. 240), extending the laws of the United States relating to customs, commerce, and navigation over Alaska and establishing a collection district therein, as to render repugnant to U. S. Const. 6th Amend. the provision of the act of June 6, 1900, § 171 (31 Stat. at L. 358, chap. 786), that in trials for misdemeanors in Alaska six jurors shall constitute a legal jury.

[No. 51.]

*Argued and submitted November 4, 1904.
Decided April 10, 1905.*

IN ERROR to the District Court of the United States for the District of Alaska to review a conviction of a misdemeanor by a jury of six persons. *Reversed* and remanded, with directions to set the verdict aside and grant a new trial.

The facts are stated in the opinion.

Mr. **Robert W. Jennings** submitted the cause for plaintiff in error. Mr. *W. E. Crews* was with him on the brief.

Assistant Attorney General **Robb** argued the cause and filed a brief for defendant in error.

Mr. Justice **White** delivered the opinion of the court:

The plaintiff in error was indicted for violating § 127 of the Alaska Code, prohibiting the keeping of a disreputable house, and punishing the offense by a fine or imprisonment in the county jail.

NOTE.—On the power of Congress over the territories—see note to *First Nat. Bank v. Yankton County*, 25 L. ed. U. S. 1046.

As stated in the bill of exceptions, when [519] the case was called *the court announced "that the cause would be tried before a jury composed of six jurors," in accordance with § 171 of the Code for Alaska adopted by Congress, wherein, among other things, it was provided as follows (31 Stat. at L. 358, chap. 786): "That hereafter in trials for misdemeanors six persons shall constitute a legal jury." To this announcement by the court an exception was duly preserved. A jury of six persons was then impaneled, when the objection was renewed and a demand made for a common-law jury, which was refused, and an exception was again taken.

To a verdict and judgment of conviction this writ is prosecuted directly to this court, reliance for a reversal being had on the violation of the Constitution alleged to have resulted from the trial of the case by a jury of six persons, and upon other errors of law which, it is asserted, the court committed in the course of the trial.

At the threshold of the case lies the constitutional question whether Congress had power to deprive one accused in Alaska of a misdemeanor of trial by a common-law jury; that is to say, whether the provision of the act of Congress in question was repugnant to the 6th Amendment to the Constitution of the United States.

At the bar the government did not deny that offenses of the character of the one here prosecuted could only be tried by a common-law jury, if the 6th Amendment governed. The government, moreover, did not dispute the obvious and fundamental truth that the Constitution of the United States is dominant where applicable. The validity of the provision in question is, therefore, sought to be sustained upon the proposition that the 6th Amendment to the Constitution did not apply to Congress in legislating for Alaska. And this rests upon two contentions, which we proceed separately to consider.

1st. *Alaska was not incorporated into the United States, and therefore the 6th Amendment did not control Congress in legislating for Alaska.*

[520] *If the premise, that is, the status of Alaska, be conceded, the conclusion deduced from it is established by the previous rulings of this court. In *Dorr v. United States*, 195 U. S. 138, ante, 128, 24 Sup. Ct. Rep. 808, the question was whether the 6th Amendment was controlling upon Congress in legislating for the Philippine Islands. Applying the principles which caused a majority of the judges who concurred in *Downes v. Bidwell*, 182 U. S. 244, 45 L. ed. 1088, 21 Sup. Ct. Rep. 770, to think that the uniformity clause

of the Constitution was inapplicable to Porto Rico, and following the ruling announced in *Hawaii v. Mankichi*, 190 U. S. 197, 47 L. ed. 1016, 23 Sup. Ct. Rep. 787, it was decided that, whilst by the treaty with Spain the Philippine Islands had come under the sovereignty of the United States and were subject to its control as a dependency or possession, those islands had not been incorporated into the United States as a part thereof, and therefore Congress, in legislating concerning them, was subject only to the provisions of the Constitution applicable to territory occupying that relation. The power to acquire territory without incorporating it into the United States as an integral part thereof, as we have said, was sustained upon the reasoning expounded in the opinion of three, if not of four, of the judges who concurred in the judgment in *Downes v. Bidwell*, that reasoning being in effect adopted in the *Dorr Case* as the basis of the ruling there made, the court saying (p. 143, ante, p. 130, Sup. Ct. Rep. p. 110):

"Until Congress shall see fit to incorporate territory ceded by treaty into the United States, we regard it as settled by that decision [*Downes v. Bidwell*] that the territory is to be governed under the power existing in Congress to make laws for such territories, and subject to such constitutional restrictions upon the powers of that body as are applicable to the situation."

And in view of the status of the Philippine Islands it was decided that the 6th Amendment was not applicable to those islands, and therefore Congress, when it legislated concerning them, was not controlled by the provisions of that amendment. It would serve no useful purpose to re-express the reasons supporting this conclusion, and we content ourselves with quoting *the summing up made by the court in [521] the opinion in the *Dorr Case*, as follows (p. 149, ante, p. 133, Sup. Ct. Rep. p. 813):

"We conclude that the power to govern territory, implied in the right to acquire it, and given to Congress in the Constitution in article 4, § 3, to whatever other limitations it may be subject, the extent of which must be decided as questions arise, does not require that body to enact for ceded territory, not made a part of the United States by congressional action, a system of laws which shall include the right of trial by jury, and that the Constitution does not, without legislation and of its own force, carry such right to territory so situated."

We are brought, then, to determine whether Alaska has been incorporated into the United States as a part thereof, or is simply held, as the Philippine Islands are

held, under the sovereignty of the United States as a possession or dependency.

Concerning the test to be applied to determine whether in a particular case acquired territory has been incorporated into and forms a part of the United States, we do not deem it necessary to review the general subject, again contenting ourselves by quoting a brief passage from the opinion in *Dorr v. United States*, summing up the reasons which controlled in determining that the Philippine Islands were not incorporated, viz. (p. 143, ante, p. 130, Sup. Ct. Rep. p. 810):

"If the treaty-making power could incorporate territory into the United States without congressional action, it is apparent that the treaty with Spain, ceding the Philippines to the United States, carefully refrained from so doing; for it is expressly provided that (article 9) 'the civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress.' In this language it is clear that it was the intention of the framers of the treaty to reserve to Congress, so far as it could be constitutionally done, a free hand in dealing with these newly acquired possessions.

"The legislation upon the subject shows that not only has Congress hitherto refrained from incorporating the Philippines [522] into the United States, but in the act of 1902, providing for temporary civil government (32 Stat. at L. 691, chap. 1369), there is express provision that § 1891 of the Revised Statutes of 1878 shall not apply to the Philippine Islands."

This brings us to consider the treaty by which Alaska was acquired, and the action of Congress concerning that acquisition, for the purpose of ascertaining whether, within the criteria referred to in *Downes v. Bidwell* and adopted and applied in *Dorr v. United States*, Alaska was incorporated into the United States.

The treaty concerning Alaska, instead of exhibiting, as did the treaty respecting the Philippine Islands, the determination to reserve the question of the status of the acquired territory for ulterior action by Congress, manifested a contrary intention, since it is therein expressly declared, in article 3, that:

"The inhabitants of the ceded territory . . . shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States; and shall be maintained and protected in the free enjoyment of their liberty, property and religion." [15 Stat. at L. 542.]

This declaration, although somewhat changed in phraseology, is the equivalent, as

pointed out in *Downes v. Bidwell*, of the formula employed from the beginning to express the purpose to incorporate acquired territory into the United States,—especially in the absence of other provisions showing an intention to the contrary. And it was doubtless this fact conjoined with the subsequent legislation of Congress which led to the following statement concerning Alaska made in the opinion of three, if not four, of the judges who concurred in the judgment of affirmance in *Downes v. Bidwell* (p. 335, L. ed. p. 1125, Sup. Ct. Rep. p. 805):

"Without referring in detail to the acquisition from Russia of Alaska, it suffices to say that that treaty also contained provisions for incorporation, and was acted upon exactly in accord with the practical construction applied in the case of the acquisition from Mexico, as just stated."

*Presumably it was also a consideration [523] of the character of the rights conferred by the treaty by which Alaska was acquired, and the legislation of Congress concerning that territory, to which we shall hereafter refer, which caused Mr. Justice Gray, in his concurring opinion in *Downes v. Bidwell*, to say (p. 345, L. ed. p. 1128, Sup. Ct. Rep. p. 809):

"The cases now before the court do not touch the authority of the United States over the territories, in the strict and technical sense, being those which lie within the United States, as bounded by the Atlantic and Pacific Oceans, the Dominion of Canada, and the Republic of Mexico, and the territories of Alaska and Hawaii, but they relate to territory in the broader sense, acquired by the United States by war with a foreign state."

That Congress, shortly following the adoption of the treaty with Russia, clearly contemplated the incorporation of Alaska into the United States as a part thereof, we think plainly results from the act of July 20, 1868, concerning internal revenue taxation, chap. 186, § 107 (15 Stat. at L. 167, U. S. Comp. Stat. 1901, p. 2277), and the act of July 27, 1868, chap. 273, extending the laws of the United States relating to customs, commerce, and navigation over Alaska, and establishing a collection district therein. 15 Stat. at L. 240. And this is fortified by subsequent action of Congress, which it is unnecessary to refer to.

Indeed, both before and since the decision in *Downes v. Bidwell* the status of Alaska as an incorporated territory was and has been recognized by the action and decisions of this court. By the 15th section of the judiciary act of March 3, 1891 (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, pp. 549, 550), it was made the duty of this

court to assign the several territories of the United States to particular circuits; and in execution of this law this court, by an order promulgated May 11, 1891, assigned the territory of Alaska to the ninth judicial circuit. *The Coquitlam v. United States*, 163 U. S. 346, 41 L. ed. 184, 16 Sup. Ct. Rep. 1117. That case was a suit in admiralty, brought by the United States in the district court of Alaska for the forfeiture of the steamer Coquitlam, because

[524] of a violation of the revenue laws *of the United States. From a decree rendered in favor of the United States an appeal was prosecuted to the circuit court of appeals for the ninth circuit. The United States challenged the jurisdiction of the circuit court of appeals upon the grounds: (1) That the district court of Alaska was not a district court within the meaning of the 6th section of the judiciary act of 1891, and was not a district court belonging to the ninth circuit; (2) that the district court of Alaska was not the supreme court of a territory within the meaning of the order of this court. The circuit court of appeals certified the question of jurisdiction. After fully reviewing the legislation of Congress relating to Alaska, and stating the general appellate power of the circuit courts of appeal over judgments and decrees of the district and circuit courts, it was decided that under the authority granted to the circuit courts of appeal by the 15th section of the judiciary act of March 3, 1891, to review judgments of the supreme court of any territory assigned to such circuit by this court, the circuit court of appeals of the ninth circuit possessed appellate jurisdiction over the cause. In the course of the opinion it was declared (p. 352, L. ed. p. 186, Sup. Ct. Rep. p. 1119):

"Alaska is one of the territories of the United States. It was so designated in that order [referring to the order of this court assigning to the ninth circuit], and has always been so regarded. And the court established by the act of 1884 is the court of last resort within the limits of that territory. It is, therefore, in every substantial sense, the supreme court of that territory."

In *Binns v. United States*, 194 U. S. 486, 48 L. ed. 1087, 24 Sup. Ct. Rep. 816, the question was this: The Penal Code for Alaska imposed certain license taxes. The plaintiff in error was convicted for not paying such a tax, and the case was brought to this court on the contention that the act of Congress levying the tax was repugnant to the clause of the Constitution requiring uniformity throughout the United States, as licenses of the character complained of

were imposed only in Alaska. After referring to the statements concerning *Alas-[525] ka contained in the concurring opinions in *Downes v. Bidwell*, the one written by Mr. Justice Gray and the other by Mr. Justice White, and after approvingly citing the passage from the *Coquitlam Case* above referred to, the court declared it to be settled that Alaska had been undoubtedly incorporated into the United States, and hence conceded that the license complained of was invalid if levied by Congress under the general grant in the Constitution of the power of taxation. The legislation in question was, however, sustained on the exceptional ground that Congress had therein merely exerted its authority as a local legislature for Alaska.

It follows, then, from the text of the treaty by which Alaska was acquired, from the action of Congress thereunder, and the reiterated decisions of this court, that the proposition that Alaska is not incorporated into and a part of the United States is devoid of merit, and therefore the doctrine settled as to unincorporated territory is inapposite and lends no support to the contention that Congress in legislating for Alaska had authority to violate the express commands of the 6th Amendment.

This brings us to the second proposition, which is—

2d. *That even if Alaska was incorporated into the United States, as it was not an organized territory, therefore the provisions of the 6th Amendment were not controlling on Congress when legislating for Alaska.*

We do not stop to demonstrate from original considerations the unsoundness of this contention and its irreconcilable conflict with the essential principles upon which our constitutional system of government rests. Nor do we think it is required to point out the inconsistency which would arise between various provisions of the Constitution if the proposition was admitted, or the extreme extension on the one hand, and the undue limitation on the other, of the powers of Congress which would be occasioned by conceding it. This is said, because, in our opinion, the unsoundness of the proposition is conclusively established by a long line of decisions. *Webster v. Reid*.

11 *How. 437, 13 L. ed. 761; *Reynolds v.* [526] *United States*, 98 U. S. 154, 25 L. ed. 246; *Callan v. Wilson*, 127 U. S. 540, 3 L. ed. 223, 8 Sup. Ct. Rep. 1301; *American Pub. Co. v. Fisher*, 166 U. S. 464, 41 L. ed. 1079, 17 Sup. Ct. Rep. 618; *Springville v. Thomas*, 166 U. S. 707, 41 L. ed. 1172, 17 Sup. Ct. Rep. 717; *Thompson v. Utah*, 170 U. S. 345, 42 L. ed. 1064, 18 Sup. Ct. Rep. 620; *Capital Traction Co. v. Hof*, 174 U. S. 1, 43 L. ed. 873, 19 Sup. Ct. Rep. 580; *Black v.*

Jackson, 177 U. S. 349, 44 L. ed. 801, 20 Sup. Ct. Rep. 648.

The argument by which the decisive force of the cases just cited is sought to be escaped is that, as when the cases were decided there was legislation of Congress extending the Constitution to the District of Columbia or to the particular territory to which a case may have related, therefore the decisions must be taken to have proceeded alone upon the statutes, and not upon the inherent application of the provisions of the 5th, 6th, and 7th Amendments to the District of Columbia or to an incorporated territory. And, upon the assumption that the cases are distinguishable from the present one upon the basis just stated, the argument proceeds to insist that the 6th Amendment does not apply to the territory of Alaska, because § 1891 of the Revised Statutes only extends the Constitution to the organized territories, in which, it is urged, Alaska is not embraced.

Whilst the premise as to the existence of legislation declaring the extension of the Constitution to the territories with which the cases were respectively concerned is well founded, the conclusion drawn from that fact is not justified. Without attempting to examine in detail the opinions in the various cases, in our judgment it clearly results from them that they substantially rested upon the proposition that where territory was a part of the United States the inhabitants thereof were entitled to the guaranties of the 5th, 6th, and 7th Amendments, and that the act or acts of Congress purporting to extend the Constitution were considered as declaratory merely of a result which existed independently by the inherent operation of the Constitution. It is true that, in some of the opinions, both the application of the Constitution and the statutory provisions declaring such application were referred to, but in others no refer-

[527]erence to such statutes was made, *and the cases proceeded upon a line of reasoning leaving room for no other view than that the conclusion of the court was rested upon the self-operative application of the Constitution. *Springville v. Thomas*, 166 U. S. 707, 41 L. ed. 1172, 17 Sup. Ct. Rep. 717; *Thompson v. Utah*, 170 U. S. 343, 42 L. ed. 1061, 18 Sup. Ct. Rep. 620; *Capital Traction Co. v. Hof*, 174 U. S. 1, 43 L. ed. 873, 19 Sup. Ct. Rep. 580; *Black v. Jackson*, 177 U. S. 349, 44 L. ed. 801, 20 Sup. Ct. Rep. 648.

And this result of the cases will be made clear by a brief reference to some of the opinions. In *Thompson v. Utah*, considering a law of the state of Utah, which provided that a jury in a criminal cause should consist of only eight persons, the statute

was held to be *ex post facto* and void in its application to felonies committed before the territory became a state, "because in respect of such crimes the Constitution of the United States gave the accused, at the time of the commission of his offense, the right to be tried by a jury of twelve persons, and made it impossible to deprive him of his liberty except by the unanimous verdict of such a jury."

In *Springville v. Thomas* it was contended that the territorial legislature of Utah was empowered by Congress, in the organic act of the territory, to dispense with unanimity of the jurors in rendering a verdict in a civil case. The court said (p. 708, L. ed. p. 1173, Sup. Ct. Rep. p. 718): "In our opinion the 7th Amendment secured unanimity in finding a verdict as an essential feature of trial by jury in common-law cases, and the act of Congress could not impart the power to change the constitutional rule, and could not be treated as attempting to do so."

Again, in *Capital Traction Co. v. Hof*, 174 U. S. 1, 43 L. ed. 873, 19 Sup. Ct. Rep. 580, no reference whatever being made to the statute of February 21, 1871, extending the provisions of the Constitution to the District of Columbia (16 Stat. at L. 419, chap. 62), it was declared (p. 5, L. ed. p. 874, Sup. Ct. Rep. p. 582): "It is beyond doubt, at the present day, that the provisions of the Constitution of the United States securing the right of trial by jury, whether in civil or criminal cases, are applicable to the District of Columbia."

And in *Black v. Jackson*, 177 U. S. 349, 44 L. ed. 801, 20 Sup. Ct. Rep. 648, speaking of a law of the territory of Oklahoma, it was said (p. 363, L. ed. p. 807, Sup. Ct. Rep. p. 653):

"And it also fails to recognize the pro-[528]visions of the 7th Amendment securing the right of trial by jury in 'suits at common law,' where the value in controversy exceeds \$20. That amendment, so far as it secures the right of trial by jury, applies to judicial proceedings in the territories of the United States. *Webster v. Reid*, 11 How. 437, 460, 13 L. ed. 761, 770; *American Pub. Co. v. Fisher*, 166 U. S. 464, 466, 41 L. ed. 1079, 1080, 17 Sup. Ct. Rep. 618; *Springville v. Thomas*, 166 U. S. 707, 41 L. ed. 1172, 17 Sup. Ct. Rep. 717. So that a court of a territory authorized, as Oklahoma was, to pass laws not inconsistent with the Constitution of the United States (26 Stat. at L. 81, 84, chap. 182, § 6) could not proceed in a 'common-law' action as if it were a suit in equity, and determine by mandatory injunction rights for the protection or enforcement of which there was a plain and adequate remedy at law according to the

established distinctions between law and equity."

As it conclusively results from the foregoing considerations that the 6th Amendment to the Constitution was applicable to Alaska, and as of course, being applicable, it was controlling upon Congress in legislating for Alaska, it follows that the provision of the act of Congress under consideration, depriving persons accused of a misdemeanor in Alaska of a right to trial by a common-law jury, was repugnant to the Constitution and void. Having disposed of the constitutional question, we deem it unnecessary to review the other alleged errors.

The judgment must therefore be reversed, and the case remanded, with directions to set aside the verdict and grant a new trial.

And it is so ordered.

Mr. Justice **Harlan**, concurring:

My views in reference to what are called the Insular Questions have been fully expressed in the opinions filed by me in *Downes v. Bidwell*, 182 U. S. 244, 375, 45 L. ed. 1088, 1140, 21 Sup. Ct. Rep. 770; *Hawaii v. Mankichi*, 190 U. S. 197, 226, 47 L. ed. 1016, 1026, 23 Sup. Ct. Rep. 787; *Dorr v. United States*, 195 U. S. 138, 154, ante, 128, 134, 24 Sup. Ct. Rep. 808. I adhere to what has been said in those [529] opinions, and do not care to restate here the grounds upon which I proceeded in former cases.

The particular question arising in the present case is whether that section of the act of Congress of June 6th, 1900, chap. 786 [31 Stat. at L. 321], relating to Alaska, which provides "that hereafter in trials for misdemeanors six persons shall constitute a legal jury," is consistent with the Constitution of the United States. I content myself in this case with stating only the general reasons for the conclusion which I have reached on that question.

Immediately upon the ratification in 1867 of the treaty by which Alaska was acquired from Russia, that territory, as I think, came under the complete sovereign jurisdiction and authority of the United States, and, without any formal action on the part of Congress in recognition or enforcement of the treaty, and whether Congress wished such a result or not, the inhabitants of that territory became at once entitled to the benefit of all the guaranties found in the Constitution of the United States for the protection of life, liberty, and property.

After such ratification no person charged with the commission of a crime against the United States in that territory could be legally tried therefor, otherwise than by what

this court has adjudged to be the jury of the Constitution.

The constitutional requirement that "the trial of all crimes, except in cases of impeachment, shall be by jury," means, as this court has adjudged, a trial by the historical, common-law jury of twelve persons, and applies to all crimes against the United States committed in any territory, however acquired, over which, for purposes of government, the United States has sovereign dominion.

No tribunal or person can exercise authority involving life or liberty, in any territory of the United States, organized or unorganized, except in harmony with the Constitution.

Congress cannot suspend the operation of the Constitution in any territory after it has come under the sovereign authority of the United States, nor by any affirmative enactment, or *by mere nonaction, can Con-[530]gress prevent the Constitution from being the supreme law for any peoples subject to the jurisdiction of the United States.

The power conferred upon Congress to make needful rules and regulations respecting the territories of the United States does not authorize Congress to make any rule or regulation inconsistent with the Constitution or violative of any right secured by that instrument.

The proposition that a people subject to the full authority of the United States for purposes of government may, under any circumstances, or for any period of time, long or short, be governed as Congress pleases to ordain, without regard to the Constitution, is, in my judgment, inconsistent with the whole theory of our institutions.

If the Constitution does not become the supreme law in a territory acquired by treaty, and whose inhabitants are under the dominion of the United States, until Congress, in some distinct form, shall have expressed its will to that effect, it would necessarily follow that, by positive enactment, or simply by nonaction, Congress, under the theory of "incorporation," and although a mere creature of the Constitution, could forever withhold from the inhabitants of such territory the benefit of the guaranties of life, liberty, and property as set forth in the Constitution. I cannot assent to any such doctrine. I cannot agree that the supremacy of the Constitution depends upon the will of Congress.

As these are my views upon the underlying questions presented by the record, I cannot concur in all the reasoning in the opinion of the court. But I entirely concur in the judgment holding the act of Congress in question to be void. I do so,

not upon the ground that Alaska had been previously "incorporated" into the United States by the legislation of Congress, but upon the ground that the right of the accused to a trial by the jury of the Constitution became complete immediately upon the acquisition of Alaska by treaty, and before any legislation upon the subject by Congress,—indeed, *without any power in Congress to add to or impair or destroy that right.

Mr. Justice **Brown**, concurring:

I am disposed to concur in the conclusion of the court upon the ground that, by the treaty of cession with Russia, it was provided that "the inhabitants of the ceded territory . . . shall be admitted to the enjoyment all the rights, advantages, and immunities of citizens of the United States; and shall be maintained and protected in the free enjoyment of their liberty, property, and religion." I am inclined to think, though with some doubt, that those words include a right to a trial by a jury, as understood among us from the adoption of the Constitution. I certainly should not dissent if the case were put upon that ground.

The tenor of the opinion, however, is such that I should be doing an injustice to myself if I failed to express my views upon the doctrine of incorporation. My position regarding the applicability of the Constitution to newly acquired territory is contained in the opinion delivered by me in *Downes v. Bidwell*, 182 U. S. 244, 45 L. ed. 1088, 21 Sup. Ct. Rep. 770. It is simply that the Constitution does not apply to territories acquired by treaty until Congress has so declared, and that in the meantime, under its power to regulate the territories, it may deal with them regardless of the Constitution, except so far as concerns the natural rights of their inhabitants to life, liberty, and property.

A different view, however, was expressed in a concurring opinion by Mr. Justice White, to the effect that when Congress "incorporated" territory into the United States it resulted that in governing such territory "all the limitations of the Constitution which are applicable to Congress in exercising this authority necessarily limit its power on this subject. It follows, also, that every provision of the Constitution which is applicable to the territories is also controlling therein, . . . and the determination of what particular provision of the Constitution is applicable, generally

[532]speaking, in all cases, *involves an inquiry into the situation of the territory, and its relation to the United States." The question was thus briefly stated: "Had Porto Rico, at the time of the passage of the act

in question, been incorporated into and become an integral part of the United States?" If it had, the inference was that the Constitution applied in all its force.

This, however, was not the opinion of the court; it was certainly not the opinion of the justice who announced the conclusion and judgment of the court; it was wholly disclaimed by the four dissenting justices, who held that the Constitution applied the moment the territory was ceded and became the property of the United States, and that no act of incorporation was necessary. It was simply the individual opinion of three members of the court. The point was not pressed upon our attention in the briefs or arguments of counsel in that case. It is but faintly suggested in the briefs in this case. It has never since that time received the indorsement of this court, and in my opinion is wholly unnecessary to the disposition of this case.

My own view is, and has been, that Congress in dealing with newly acquired territory is unfettered by the Constitution, unless it formally or by implication extends the Constitution to it; and that it may accept a cession of territory, institute a temporary government there, as it has done in a large number of instances, without thereby extending the Constitution over it. In the general act (Rev. Stat. § 1891) Congress did declare that "the Constitution, and all laws of the United States which are not locally inapplicable, shall have the same force and effect within all the *organized* territories, and in every territory hereafter organized, as elsewhere within the United States." If the act of May 17, 1884, providing a civil government for Alaska (23 Stat. at L. 24, chap. 53), be regarded as *organizing* a territory there, it would follow that such territory at once fell within Rev. Stat. § 1891, and the Constitution was extended to it without further action. The first article declares that Alaska "shall constitute a civil and judicial district, the *government of which shall be organized [533], and administered as hereinafter provided." Had the opinion treated the territory as organized under this act, I should not have dissented from this view, since § 1891 would have applied to it.

Congress did undoubtedly provide a permanent civil government for Alaska by the act of June 6, 1900 (31 Stat. at L. 321, chap. 786), but it evidently did not regard the Constitution as extended to it by any previous act, since it provided in § 171 for trials of misdemeanors by a jury of six.

There are so many difficulties connected with the applicability of the Constitution that it has seemed to me that the only true test was whether Congress intended to ap-

ply it or not in the particular case. When is a territory incorporated so as to make the Constitution applicable in all its provisions? That some action on the part of Congress is necessary to extend the Constitution to the territories was settled in *Downes v. Bidwell*, but shall such action be direct, or may it be indirect by way of incorporation? May Congress, in organizing or incorporating a territory, restrict the application of the Constitution to it, or must it give it all? What is an organized as distinguished from an incorporated territory? Does not the acceptance of a cession of territory and the appointment of a civil governor work an incorporation of the territory as territory of the United States? If the acceptance of territory as territory of the United States be not an incorporation, what language is necessary to effect that result? Apparently, acceptance of the territory is insufficient in the opinion of the court in this case, since the result that Alaska is incorporated into the United States is reached, not through the treaty with Russia, or through the establishment of a civil government there, but from the act of July 20, 1868, concerning internal revenue taxation, and the act of July 27, 1868, extending the laws of the United States relating to the customs, commerce, and navigation over Alaska, and establishing a collection district there. Certain other acts are cited, notably the judiciary act of March 3, 1891, making it the duty of this [534] court to assign *the several territories of the United States to particular circuits. But no mention is made either of the act of May 17, 1884, providing a civil government for Alaska, or the act of June 6, 1900, making further provision for a civil government and establishing a complete code of laws. These seem to me the vital acts upon the status of Alaska; yet they are completely ignored in the opinion of the court, and the fact of incorporation is sought to be established by what seem to me remote inferences from immaterial statutes. Indeed, I regard the whole theory of the extension of the Constitution by the incorporation of territory as a new departure in Federal jurisprudence, and that the true answer to the question whether the Constitution applies to a territory is to be found in the fact whether Congress has extended the Constitution to it or not.

That the mere act of incorporating territory into the United States does not of its own force carry the Constitution there, regardless of the wishes of Congress, is evident from the case of *Hawaii v. Mankichi*, 190 U. S. 197, 47 L. ed. 1016, 23 Sup. Ct. Rep. 787, wherein it was held that, notwithstanding the island had been annexed to the United States "as a part of the territory of 197 U. S.

the United States, and subject to the sovereign dominion thereof," yet it was possible for Congress to declare that "the municipal legislation of the Hawaiian Islands, not enacted for the fulfilment of the treaties so extinguished, and not inconsistent with this joint resolution, nor contrary to the Constitution of the United States, nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine."

While the government provided by this resolution was temporary in its character, and a mere continuance of existing laws, the act itself was as complete an incorporation of the islands as it was possible for language to make it. The resolution declared that "said cession" of the Republic of Hawaii "is accepted, ratified, and confirmed, and that the said Hawaiian Islands and their dependencies be, and they are hereby, annexed as a part of the territory of the United States, and are *subject to the sov-[535] creign dominion thereof." In view of this language I do not see how it is possible to escape the conclusion that there was a plain incorporation by Congress of these islands, and an extension of sovereignty over them. Notwithstanding this, however, we held that the conviction of one who, between the date of the Newlands resolution and the date of establishing a civil government, had been tried on information and convicted by a nonunanimous jury, was legal, though not in compliance with the 5th and 6th Amendments to the Constitution, upon the ground that the Constitution was not formally extended to them until the territory was organized, June 14, 1900 (31 Stat. at L. 141, chap. 339, § 5). This case shows the impossibility of applying the doctrine of incorporation without an accurate definition of the term. Hitherto we have been content to divide our territories into the organized and unorganized; but now we are asked to introduce a new classification of "incorporated" territories, without attempting to define what shall be deemed an incorporation. The word appears to me simply to introduce a new element of confusion, and to be of no practical value. Rev. Stat. § 1891, declaring that the Constitution shall have force and effect within all the organized territories and in every territory hereafter organized, seems to meet the requirements of every case, and to be operative wherever Congress does not in the organization restrict the application of the Constitution in some particular.

In *Dorr v. United States*, 195 U. S. 138, ante, 128, 24 Sup. Ct. Rep. 808, the question was presented, as stated by Mr. Justice Day, whether, "in the ab-

sence of a statute of Congress expressly conferring the right, trial by jury is a necessary incident of judicial procedure in the Philippine Islands, where demand for trial by that method has been made by the accused and denied by the courts established in the islands." In discussing the case it was said that not only has Congress hitherto refrained from incorporating the Philippine Islands into the United States, but in the act of 1902, providing for temporary civil government (32 Stat. at L. 691, chap. 1369), there was an express provision that Rev.

[536] Stat. § 1891, *should not apply to the Philippine Islands. This is the section giving force and effect to the Constitution of the United States, not locally inapplicable, within the organized territories. The case simply holds that, as Congress did not extend the right of trial by jury to the Philippine Islands, and had not so incorporated them as to make the provision apply by implication, the right did not exist. The cases of *The Coquitlam*, 163 U. S. 346, 41 L. ed. 184, 16 Sup. Ct. Rep. 1117, and *Binns v. United States*, 194 U. S. 486, 48 L. ed. 1087, 24 Sup. Ct. Rep. 816, are too obviously inapplicable to require comment.

I do not dissent from the conclusion of the court in this case, but I do dissent from the proposition that Congress may not deal with territories as it pleases, until it has seen fit to extend the provisions of the Constitution to them, which, once done, in my view, is irrevocable. I regret that the disputed doctrine of incorporation should have been made the mainstay of the opinion of the court, when the case might so easily have been disposed of upon grounds which would have evoked no utterance of disapproval.

UNITED STATES *ex rel.* MARTIN A. KNAPP, Judson C. Clements, James D. Yoemans, Charles A. Prouty, and Joseph W. Fifer, Interstate Commerce Commissioners, *Plffs. in Err.*,
v.

LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY.†

(See S. C. Reporter's ed. 536-543.)

Mandamus—original jurisdiction of Federal circuit court under judiciary act—under Act to Regulate Commerce.

1. A Federal circuit court has no jurisdiction under the act of March 3, 1887 (24 Stat. at

†This case is reported by the Official Reporter under the title of "Knapp v. Lake Shore & M. S. R. Co."

L. 552, chap. 373), of original proceedings seeking relief by mandamus.

2. Jurisdiction, in a Federal circuit court, of an original proceeding by mandamus to compel an interstate carrier to make the report which the Interstate Commerce Commission is authorized by the Act to Regulate Commerce to require, cannot be inferred from the grant of authority to the Commission to enforce that act, or from the direction to district attorneys of the United States or the Attorney General to institute all necessary proceedings for the enforcement of its provisions.

[No. 251.]

Argued February 28, 1905. Decided April 10, 1905.

IN ERROR to the Circuit Court of the United States for the Northern District of Ohio to review a judgment which dismissed for lack of jurisdiction a petition for a mandamus to compel an interstate carrier to make the report which the Interstate Commerce Commission is authorized by the Act to Regulate Commerce to require. *Affirmed.*

The facts are stated in the opinion.

Mr. L. A. Shaver and Assistant Attorney General McReynolds argued the cause and filed a brief for plaintiffs in error.

Mr. George C. Greene argued the cause and filed a brief for defendant in error.

Mr. Justice McKenna delivered the opinion of the court:

Petition for mandamus filed in the circuit court of the United States for the northern district of Ohio by the Interstate Commerce Commissioners against the Lake Shore & Michigan Southern Railway Company. The railway company moved to dismiss the petition on the ground that the court had no original jurisdiction to issue a writ of mandamus. The motion was granted and the writ dismissed. A certificate was duly made showing that a question of jurisdiction was in issue, and recites that the court acted not only on the motion of the railroad, but on its own motion, in dismissing the petition for want of jurisdiction.

The petition alleges that the railroad company is a corporation created by the laws of the states of New York, Pennsylvania, Ohio, Michigan, Indiana, and Illinois, and has its principal place of business in the state of Ohio, and is a common carrier engaged in interstate commerce, and as such is subject to the provisions of the Act of Congress to Regulate Commerce [24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154].

That under § 20 of said act the Interstate

Commerce Commission is authorized to require any common carrier subject to the act to make reports of certain matters and [541] things, *and in pursuance thereof the Commission made an order on the 3d of June, 1903, prescribing the manner and form in which said reports should be made and the contents thereof, and directed each common carrier to file the same on or before the 15th. A copy of the order was served on the railroad company, but the company failed and neglected to make out and return a report in full, in that it failed to set forth in the report made and returned by it the data or information called for, namely, "the tonnage, ton-mileage, earnings, and receipts per ton per mile on grain, hay, cotton, live stock, dressed meats, anthracite coal, bituminous coal, and lumber carried in carload lots; and that said data or information required by the Commission to be given in said report by respondent is necessary to enable the Commission to perform the duties and carry out the objects for which it was created, in the interest of the public, and that promptness by carriers in furnishing the same on or before the 15th day of September of each year, as required by the Commission, is essential for the purpose, among others, of enabling the Commission to make a full and complete annual report to Congress, which, by § 21 of said Act to Regulate Commerce, is required to be transmitted to said body on or before December 1st of each year."

It is also alleged that there is no adequate remedy except that afforded by mandamus.

It is admitted that under the judiciary act of 1789 (1 Stat. at L. 73, chap. 20) and the act of 1875, as construed by this court, a circuit court of the United States has no jurisdiction of an original proceeding seeking relief by mandamus. And counsel, not to minimize the admission, quotes the cases in which that has been laid down and the text books which have expressed the doctrine as settled. But it is suggested that under the act of 1887 (24 Stat. at L. 552, chap. 373) a different ruling should be made. No change in language is pointed out which would justify such change in ruling, but we are urged to that radical course in view of the modern development of proceedings by mandamus, and the very great [542] importance of the remedy thereby. We *are not impressed by the invocation. We are unable to understand how language conferring jurisdiction on a court can take a new meaning from the circumstances suggested. Difference in remedies is conspicuous in our jurisprudence, and some remedies are of that nature that they can be enforced only under exceptional circumstances and under special grants of power. Of this kind is

mandamus, and if Congress had intended by the act of 1887 to confer power on the circuit courts to issue mandamus in an original proceeding, Congress would not have employed the language which had been construed from the foundation of the government not to give such jurisdiction. We adhere, therefore, to the prior cases.

2. Congress has undoubtedly power to authorize a circuit court to issue a mandamus in an original proceeding. *Kendall v. United States*, 12 Pet. 524, 9 L. ed. 1181; *United States v. Schurz*, 102 U. S. 378, 26 L. ed. 167. But has Congress done so, as contended, by §§ 12 and 20 of the Interstate Commerce Act as amended? Under § 12 the Commission is given the authority to inquire into the management of the business of common carriers subject to the act, and has the right to obtain from the carriers full and complete information to enable it to perform its duties. It is also authorized to enforce the provisions of the act. By § 20 the Commission may require annual reports, and fix the time and prescribe the manner in which such reports shall be made. And it is made the duty of any district attorney of the United States to whom the Commission may apply, to institute in the proper court and to prosecute under the direction of the Attorney General all necessary proceedings for the enforcement of the provisions of this act. It is hence contended that the power of the Commission to require the report stated in the petition is undoubted, and, having power to order the report to be made, the Commission has the power to enforce obedience to the order.

But in what way? Manifestly only in such way as the courts have jurisdiction to give. All powers are given in view of that jurisdiction, and the amendments of the Interstate Commerce *Act are so framed. Ju-[543] risdiction to issue mandamus is conferred by § 6 to enforce the filing or publishing by a common carrier of its schedules or tariffs of rates, fares, and charges. And such jurisdiction is also given to the circuit courts and district courts upon the relation of any person or persons, firm or corporation, alleging a violation of any of the provisions of the act, which prevents the relator from having interstate traffic moved on terms as favorable as any other shipper. The remedy is expressly made cumulative of the other remedies provided by the act. It is clear, therefore, when Congress intended to give the power to issue mandamus it expressed that intention explicitly. Such power cannot be inferred from the grant of authority to the Commission to enforce the act, or from the direction to district attorneys or the Attorney General to institute "all necessary proceedings for the enforce-

ment of the provisions" of the act (§ 12). The proceedings meant are, as we have said, those within the jurisdiction of the court. And special remedies are given. For instance, by § 16 a summary proceeding in equity is authorized, and the form of the ultimate order of the court may be that of a "writ of injunction or other proper process, mandatory or otherwise."

Without attempting now to define the extent of that section, we may say, it seems adequate to enable the Commission to enforce any order it is authorized to make.

Judgment affirmed.

Mr. Justice **Harlan** dissented.

[544] *HENRY MUHLKER, *Plff. in Err.*,
v.

NEW YORK & HARLEM RAILROAD
COMPANY and New York Central &
Hudson River Railroad Company.

(See S. C. Reporter's ed. 544-577.)

*Contracts — impairment of obligation —
effect of judicial decisions.*

An owner of real property abutting on a street in New York city, who derived his title from the grantor to the city, in trust for a public highway, of the strip of land constituting the street, and acquired such title when the state courts had decided that one so situated had a contract right to easements of light, air, and access, which could not be taken from him without compensation by the construction of an elevated railroad in the adjoining street, is protected against impairment of his easements of light and air by the substitution by a railroad company, at the subsequent command of the state, as expressed in N. Y. Laws 1892, chap. 339, of an elevated structure in lieu of its surface or partly depressed roadbed, which occupied the street at the time of his purchase, and cut off his access to the street. [Per Justices McKenna, Harlan, Brewer, and Day. Mr. Justice Brown concurs in the result.]

[No. 99.]

*Argued December 12, 13, 1904. Ordered for
reargument January 23, 1905. Reargued
February 24, 27, 1905. Decided April 10,
1905.*

NOTE.—As to what laws are void as impairing obligation of contracts—see notes to *Franklin County Grammar School v. Bailey*, 10 L. R. A. 405; *Fletcher v. Peck*, 3 L. ed. U. S. 162; *McCanna & F. Co. v. Citizens' Trust & Surety Co.* 24 C. C. A. 20; and *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co.* 35 C. C. A. 12.

As to the change of decision of a state court as an unconstitutional impairment of a contract—see notes to *Allen v. Allen*, 16 L. R. A. 646; and *Los Angeles v. Los Angeles City Water Co.* 44 L. ed. U. S. 886.

872

IN ERROR to the Supreme Court of the State of New York to review a judgment dismissing the complaint in an action by an abutting owner to enjoin the use of an elevated railroad structure in front of his premises, unless compensated for the impairment of his easements of light, air, and access, which judgment was entered pursuant to the mandate of the Court of Appeals of that State, which reversed a judgment of the Appellate Division of the Supreme Court, First Department, affirming a decree in favor of plaintiff, entered at a special term held in and for the County of New York. *Reversed* and remanded for further proceedings.

See same case below in Appellate Division of Supreme Court, 60 App. Div. 621, 69 N. Y. Supp. 910, and Court of Appeals, 173 N. Y. 549, 66 N. E. 558.

Statement by Mr. Justice **McKenna**:

Plaintiff sues to enjoin the use of a certain elevated railroad structure on Park avenue, in the city of New York, in front of his premises, unless upon payment of the fee value *of certain easements of light, air, and access, and other rights appurtenant to his premises. He also prays damages for injury sustained from the year 1890 to time of trial. [545]

From the evidence in the case the supreme court found that the plaintiff had been, since 1888, the owner of a lot of land on the northwesterly corner of Park avenue and 115th street, on which he, in 1891, erected a five-story brick building, and that there were appurtenant to said lot and building "certain easements of light, air, and access in and over said Park avenue, in front of said premises." The defendant, The New York & Harlem Railroad Company, is and was during all the times mentioned herein the owner of a railroad and railroad structures in Park avenue, in front of such premises, and the New York Central & Hudson River Railroad Company is the lessee of said railroad structures under a lease dated April 1, 1873, for a term of four hundred and one years; that said railroad, prior to 1872, was operated on two tracks laid upon the surface of said avenue and along the center thereof, in front of said premises.

In pursuance of chapter 72 of the Laws of 1872 certain changes were made in the railroad in front of said premises, between the years 1872 and 1874, whereby the number of tracks was increased from two to four, and were laid along the center of the avenue, and at the south line of said premises were at the surface, and at the north line of said premises were laid in a trench about 5½ feet below the surface. In front of said premises the railroad was bounded

197 U. S.

on both sides by masonry walls about 3 feet high above the surface, and cut off access across said avenue immediately in front of said premises.

The New York Central & Hudson River Railroad Company in 1872 operated its trains over the railroad in front of said premises, and continued to do so until February 16, 1897.

The other facts are expressed in the finding of the court as follows:

"Fourth. That, pursuant to chapter 339 of the Laws of 1892, there was constructed [546] along Park avenue, in front of *plaintiff's said premises, between April, 1893, and March, 1896, a new, permanent, elevated railroad structure of iron and steel; that said railroad in front of plaintiff's said premises is about 59 feet wide, and consists of four tracks laid on a solid roadbed, having a mean elevation of about 31 feet above the surface of said avenue, which roadbed is girded along the sides and in the center by solid iron girders, each 7 feet and 4 inches high, and is supported by iron columns, of which there are six directly in front of plaintiff's said premises; and that the work of constructing said permanent elevated railroad structure was done under the supervision of a board created by said act.

"Fifth. That the defendant the New York Central & Hudson River Railroad Company laid the tracks on said permanent elevated railroad structure about March, 1896, and from said date down to February 16th, 1897, operated thereon in front of said premises trains of cars drawn by steam engines for the carriage of freight and material used in the construction of said structure, for which service said defendant was paid; that said defendant, on February 16, 1897, began to operate regularly and permanently upon said permanent elevated railroad structure in front of plaintiff's said premises its passenger trains, drawn by steam locomotives.

"Sixth. That the rental and fee values of the plaintiff's said premises were damaged by the work of constructing said permanent elevated railroad structure and by the existence of the same from April, 1893, to March, 1896; also by said structure and the operation thereon of trains, as aforesaid, from March, 1896, to February 16, 1899; but that neither of said defendants is liable for such damage.

"Seventh. That said permanent structure and the operation by said defendant the New York Central & Hudson River Railroad Company of passenger trains thereon since February 16th, 1897, are and have been a continuous trespass upon the plaintiff's easements of light and air appurtenant to his said premises, hereinbefore described as hav-

ing a frontage of 76 feet and 10 inches on said Park avenue and a depth of *26 feet on [547] 115th street; that solely in consequence of said trespass, and aside from any other causes, the rental and usable value of said premises was depreciated from February 16, 1897, down to October 10, 1900, in the sum of fourteen hundred dollars (\$1,400) below what said rental value would have been during said period, if there had been no change in defendants' said railroad in Park avenue in front of said premises pursuant to chapter 339 of the Laws of 1892; and that the fee value of said premises has been, and was on October 10, 1900, depreciated thereby in the sum of three thousand dollars (\$3,000) below what said fee value would have been on said date if there had been no change in defendants' railroad as aforesaid.

"Eighth. That the said sums awarded as damages are over and above any and all benefits conferred upon said premises by the changes made, pursuant to chapter 339 of the Laws of 1892, which said benefits result in part from improved access to said premises afforded by said changes, and are offset against the damages to said premises caused by said changes.

"Ninth. That the said sums awarded as damages are exclusive of the damages that would have been occasioned to plaintiff's premises by the maintenance and use of the defendants' railroad and structures had there been no change in the same pursuant to chapter 339 of the Laws of 1892, for which last-mentioned damages the defendants are not liable either jointly or severally.

"Tenth. That this action was commenced by the plaintiff on January 7, 1897, that the plaintiff on April 28, 1892, began an action in this court against the defendant for an injunction and damage by reason of the defendants' railroad structure and the operation of trains thereon in front of the premises described herein, as said railroad existed and was operated on said date; and that said last-mentioned action was discontinued on February 27, 1900."

A decree was entered enjoining the use of the railroad structure and its removal from in front of plaintiff's premises; *but it [548] was provided that the injunction should not become operative if the defendants tender for the purpose of execution by the plaintiff "a form of conveyance and release" to them of the easements of light, air, and access appurtenant to said premises, and tender further the sum of \$3,000, with interest thereon from October 10, 1900. Damages were also adjudged to plaintiff in the sum of \$1,400, with interest from February 16, 1897, and cost. Either party was given the right to move at the foot of the decree for

further directions as to the enforcement of the same.

In the form of the decision and judgment entered, and as to the legal principles involved, the court professed to follow *Lewis v. New York & H. R. Co.* 162 N. Y. 202, 56 N. E. 540.

The judgment was affirmed by the appellate division. It was reversed by the court of appeals (173 N. Y. 549, 66 N. E. 558), and the judgment of that court, upon the remission of the ease, was made the judgment of the supreme court and the complaint dismissed without costs. The case was then brought here.

Mr. **Elihu Root** argued the cause, and, with Messrs. *James C. Bushby* and *L. M. Berkeley*, filed a brief for plaintiff in error.

Mr. **Ira A. Place** argued the cause, and, with Mr. *Thomas Emery*, filed a brief for defendants in error.

Mr. Justice **McKenna**, after stating the case, announced the judgment of the court and delivered the following opinion:

As we have observed, the supreme court followed *Lewis v. New York & H. R. Co.* 162 N. Y. 202, 56 N. E. 540, both in the "form of decision and judgment" and "the legal principles involved." Discussion was not considered necessary. The appellate division affirmed the judgment on the authority of the same case and other cases [561] which had been ruled by it. *The court, by brief expression, pointed out the identity of the cases, and disposed of the defense made by the railroad companies of adverse possession as follows:

"The question of defendants having acquired title by adverse possession was considered by this court in both the *Fries* and *Sander Cases*. [57 App. Div. 577, 68 N. Y. Supp. 670, and 58 App. Div. 622, 69 N. Y. Supp. 155.] In the former it was said: 'For these reasons the deed to the city was valid as against the railroad company, and it had no title to that part of the street in front of the plaintiff's premises, and its only rights, therefore, were those which it had acquired by adverse possession. Within the rule laid down in the case of *Lewis v. New York & H. R. Co.* 162 N. Y. 202, 56 N. E. 540, that adverse possession did not give to the railroad company the right to carry its tracks, which for twenty years had run in a cut, upon a viaduct such as this is above ground, in front of the plaintiff's premises. The *Case of Lewis* applies fully to the one at bar.' In the *Sander Case* this court followed the decision just quoted, the presiding justice dissenting on the sole ground that 'title by adverse possession as to the 24-foot strip, at least, was

established by the evidence.'" [60 App. Div. 621, 69 N. Y. Supp. 910.]

In the case at bar there is a complete change of ruling by the court of appeals. The *Lewis Case* is declared, in so far as it expressed rights of abutting property owners, to have been improvidently decided, and the *Elevated Railroad Cases*, which were made its support, were distinguished. The court rested its ruling on one point, the effect of the act of 1892, under which the structure complained of was erected, the court declaring that act a command to the railroad company in the interest of the public; indeed, made the state the builder of the new structure and the use of it by the railroads mere obedience to law. But it does not follow that private property can be taken, either by the erection of the structure, or its use. This was plainly seen and expressed in the *Lewis Case* as to the use of the structure. It was there said: "When they [the railroads] commenced to use the steel viaduct, they started a new trespass upon the rights of abutting owners." There was no hesitation *then in marking the line [562] between the power of the state and the duty of the railroad, and assigning responsibility to the latter. This was in accordance with principle. The command of the state, the duty of the railroad to obey, may encounter the inviolability of private property. And in performing the duties devolved upon it a railroad may be required to exercise the right of eminent domain. *Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115. See also *Worcester v. Norwich & W. R. Co.* 109 Mass. 103. We do not, therefore, solve the questions in this case by reference to the power of the state and the duty of the railroads; the rights of abutting property owners must be considered, and against their infringement plaintiff urges the contract clause of the Constitution of the United States and the 14th Amendment. The latter is invoked because the act of 1892 does not provide for compensation to property owners, and the former on account of the conditions upon which the strip of land constituting the avenue was conveyed to the city. There were two deeds to the city, one made in 1825 and the other in 1827. That of 1825 was stated to be "in trust, nevertheless, that the same be appropriated and be kept open as parts of public streets and avenues forever, in like manner as the other public streets and avenues in said city are and of right ought to be." The deed of 1827 was also "in trust that the same be left open as public streets for the use and benefit of the inhabitants of said city forever." Plaintiff derives title from Poillon, grantor of the city in the deed of 1827, and hence contends

that he is entitled to enforce the trust created by Poillon's deed to the city. The railroads oppose this contention. They assert title to the land upon which the structure complained of stands by deed and by prescription. The details of these contentions we need not repeat nor discuss. They are stated at length in the *Lewis Case*, and the conclusions there expressed are not disturbed by the decision of the court of appeals in the case at bar. The case is therefore presented to us as to the effect of the [563] deed of *Poillon to the plaintiff and to the city as constituting a contract, and the effect of the act of 1892 as an impairment of that contract, or as taking plaintiff's property without due process of law. These questions were directly passed on and negatived by the court of appeals.

It will be observed from the statement of facts that, before the construction of the viaduct complained of, the railroad ran partly on the surface of the street and partly in a cut or trench, the latter being flanked by masonry walls 3 feet high. The viaduct is a solid roadbed 31 feet above the surface, having iron girders on the sides and in the middle, and supported by iron columns, of which there are six in front of the plaintiff's land. The old construction prevented crossing or access to the tracks. The new construction impairs or destroys the plaintiff's easements of light and air. And such easements the trial court found belonged to plaintiff in common with other abutters upon the public streets of New York, and his damages for their impairment to be, as expressed by Bartlett J., in his dissenting opinion, "\$3,000 fee damages, \$1,400 rental damages, from February 16, 1897, to October 10, 1900," the date of trial; that is, \$4,400 present damage. It is suggested, however,*that the court of appeals did not deny the rights of the abutters, but considered that the most important phase of those rights was that of access, and the plaintiff did not have this over the railroad by reason of the stone wall. The basis of the suggestion, as we understand, is the idea that plaintiff was compensated for the injury of his easements of light and air by an increase of his easement of access without regard to the resulting damage. To do this, however, is to make one easement depend upon another, both of which are inseparable attributes of property and equally necessary to its enjoyment. It is impossible for us to conceive of a city without streets, or any benefit in streets, if the property abutting on them has not attached to it, as an essential and inviolable part, easements of light and air as well as of access. There is something of mockery to give one access to

property which *may be unfit to live on [564] when one gets there. To what situation is the plaintiff brought? Because he can cross the railroad at more places on the street, the state, it is contended, can authorize dirt, cinders, and smoke from 200 trains a day to be poured into the upper windows of his house.

In *Barnett v. Johnson*, 15 N. J. Eq. 481, there is a clear expression of the right of abutting owners to light and air, and of the common practice and sense of the world upon which it is founded. "It is a right," the court said, "founded in such an urgent necessity that all laws and legal proceedings take it for granted; a right so strong that it protects itself, so urgent that, upon any attempt to annul or infringe it, it would set at defiance all legislative enactments and all judicial decisions." And, graphically describing the right, observed further, "is not every window and every door in every house in every city, town, and village the assertion and maintenance of this right?" It has been said *Barnett v. Johnson* anticipated "the principle upon which compensation was at last secured in the *Elevated Railroad Cases* in New York." 1 Lewis Em. Dom. 183.

It is manifest that easements of light and air cannot be made dependent upon the easement of access, and whether they can be taken away in the interest of the public under the conditions upon which the city obtained title to the streets is now to be considered. The answer depends upon the cases of *Story v. New York Elev. R. Co.* 90 N. Y. 122, 43 Am. Rep. 146, and *Lahr v. Metropolitan Elev. R. Co.* 104 N. Y. 268, 10 N. E. 528, known as the *Elevated Railroad Cases*. The *Lahr Case* was decided in 1887. The plaintiff in the case at bar acquired title to his property in 1888.

The first of the *Elevated Railroad Cases* was the *Story Case*, decided in 1882. The plaintiff in the case was the owner of a lot on the corner of Moore and Front streets in the city of New York, on which there were buildings. To their enjoyment light, air, and access were indispensable, and were had through Front street. The defendant was about to construct *a railroad above the [565] surface of that street upon a series of columns, about 15 inches square, 14 feet and 6 inches high, placed 5 inches inside of the sidewalk, with girders from 33 to 39 inches deep, for the support of cross ties for three sets of rails for a steam railroad. The cars were to be of such a construction as to reach within 9 feet of plaintiff's buildings, and trains were to be run every three minutes, and at a rate of speed as high as 18 miles an hour.

The fact of injury to the abutting lot

was found by the trial court, and also that the city of New York was the owner in fee of Front street, opposite plaintiff's lots, and that he was not and never had been seised of the same in fee, nor had any estate therein.

The supreme court said the case involved the question whether the scheme of the defendant amounted to the taking of any property of the plaintiff; if it did, it was said, the judgment was invalid on the ground that the intended act, when performed, would violate, not only the provision of the Constitution, which declared that such property should not be taken without just compensation, but certain statutes by which defendant was bound or owed its existence, and which would not have been upheld unless, in the opinion of the court, they had provided means to secure such compensation.

The plaintiff contended that, as owner of the abutting premises, he had the fee to one half of the bed of the street opposite thereto, and he also contended, if the fee was in the city, he, as abutting owner, had such right to have light and access afforded by the street above the roadbed as entitled him to have it kept open for those uses until by legal process and upon just compensation that right was taken away. The defendant justified its intended acts through the permission of the city. The issue thus made the court passed on, and in doing so assumed that the city owned the fee of the street and that the plaintiff derived his title from the city. It was held that the plaintiff had acquired "the right and privilege [566] of *having the street forever kept open as such;" and that the right thus secured was an incorporated hereditament, which "became at once appurtenant to the lot and formed an 'integral part of the estate' in it," and which followed the estate and constituted a perpetual encumbrance upon the land burdened with it. "From the moment it attached," the court observed, "the lot became the dominant, and the open way or street the servient, tenement." Cases were cited for these propositions. And the extent of the easement was defined to be, not only access to the lot, but light and air from it. The court said: "The street occupies the surface, and to its uses the rights of the adjacent lots are subordinate, but *above the surface* there can be no lawful obstruction to the access of light and air, to the detriment of the abutting owner." And further: "The elements of light and air are both to be derived from the space *over* the land on the *surface* of which the street is constructed, and which is made servient for that purpose." This was emphasized, the court observing: "Before any interest

passed to the city the owner of the land had from it the benefit of air and light. *The public purpose of a street requires of the soil the surface only.*" The easement was declared to be property and within the protection of the constitutional provision for compensation for its diminution by the contemplated structure.

It is, of course, impossible to reproduce the argument of the court by which its conclusions were sustained. It is enough to say that a distinction was clearly made between the rights of abutting owners in the *surface* of the street and their rights in the *space above* the street, and the distinction was also clearly made between damages and a taking. A review was made of the cases upon which those distinctions rested. The power of a city to alter a grade of a street was adverted to, and held not to justify the intended structure. There was no change in the street surface intended, it was said, "but the elevation of a structure useless for street purposes and as foreign thereto" as the house which was held to be an obstruction *in *Corning v. Lowerre*, 6 Johns. [567] Ch. 439, or the freight depot in *Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 224.

The conclusion of the court and the distinctions made by it were repeated in *Lahr v. Metropolitan Elev. R. Co.* 104 N. Y. 271, 10 N. E. 528. The structure complained of in the latter case was also an elevated railroad.

Chief Judge Ruger, speaking for the court, opened his opinion by observing that the action was "the sequel of the *Story Case*," and that its defense seemed to have been conducted upon the theory of endeavoring to secure a re-examination of that case. The endeavor, it was said, must fail, because the doctrine of the *Story Case* had been pronounced after most careful consideration, and after two arguments at the bar, made by most eminent counsel, had apparently exhausted the resources of learning and reasoning in the discussion of the question presented. And it was declared that "it would be the occasion of great public injury if a determination thus made could be inconsiderately unsettled and suffered again to become the subject of doubt and theme of renewed discussion." The doctrine of the *Story Case* was declared to be *stare decisis*, not only upon all the questions involved, but upon all that came logically within the principles decided. There was an enumeration of those principles, as follows:

(1) That an elevated railroad, of the kind described, was a perversion of the use of a street, which neither the city nor the legislature could legalize without providing

compensation for the injury inflicted upon the property of abutting owners.

(2) That abutters upon a public street, claiming title by grant from the municipal authorities, which contained a covenant that streets which could be laid out should continue as other streets, acquired an easement in the bed of the street for ingress and egress to and from their premises, and also for the free and uninterrupted passage and circulation of light and air through and over such street for the benefit of the property situated thereon.

[568] * (3) That such easement was an interest in real estate and constituted property, within the meaning of the Constitution of the state, and could not be taken for a public use without payment of compensation.

(4) That an elevated railroad, upon which cars propelled by steam engines which generated gas, steam, and smoke, and distributed in the air cinders, dust, ashes, and other noxious and deleterious substances, and interrupted the free passage of light and air to and from adjoining premises, constituted a taking of the easement, and rendered the railroad company liable for the damages occasioned by such taking.

The application of these principles was resisted on the ground that the city was the grantor of the plaintiff in the *Story Case*, and could not derogate from the title a property it conveyed, and it was contended, that the case went off on that ground. This was rejected and the principles enumerated held to apply, notwithstanding the land in the street had been taken from plaintiff's grantor by proceedings *in invitum*. And rights of abutting owners were held to rest in contract constituted by the conditions upon which the city received the property.

Equally untenable are the grounds of distinction urged in the case at bar against the application of those principles. What are they? In the *Story* and *Lahr Cases* the railroads were imposed for the first time on the street. In the case at bar the Harlem railroad had occupied the surface of the street, and was changed to the viaduct. But in the *Story* and *Lahr Cases* it was not the fact that the railroads were imposed on the street for the first time that determined the judgment rendered. It was the fact that trains were run upon an elevated structure, interrupting the easements of light and air of the abutting owners. It was this that constituted a use inconsistent with the purpose of the street. It was the "elevation of a structure," to quote again from the *Story Case*, "useless for general street purposes." This situation of the railroad was especially dwelt upon in the 197 U. S.

Story Case, and that case was distinguished thereby from the surface railway cases.

*And in the *Lewis Case* a difference was [569] recognized between the two situations, and a balance struck between damage done by the railroad in one situation and the railroad in the other situation. The *Lewis Case*, we have seen, was overruled by the court of appeals in the case at bar, while the *Story* and *Lahr Cases* were said not to be in point. We think that the *Lewis Case* was an irresistible consequence of the others, and the *Story* and *Lahr Cases* are in point and decisive.

Another distinction is claimed, as we have already observed, between the case at bar and those cases. The act of the railroad in occupying the viaduct, it is said, was the act of the state. But this defense was made in the other cases. It did not give the court much trouble. It is urged, however, now, with an increased assurance. Indeed, it is made the ground of decision, as we have seen by the court of appeals. The court said: "The decisions in the *Elevated Railroad Cases* are not in point. There no attempt was made by the state to improve the street for the benefit of the public. Instead, it granted to a corporation the right to make an additional use of the street, in the doing of which it took certain easements belonging to abutting owners, which it was compelled to compensate them for." And, further, making distinction between those cases and that at bar, said: "The state could not if it would—and probably would not if it could—deprive defendant of its right to operate its trains in the street. But it had the power in the public interest to compel it to run its trains upon a viaduct instead of in the subway." And the court concluded that it was the state, not the railroads, who did the injury to plaintiff's property. The answer need not be hesitating. The permission, or command of the state, can give no power to invade private rights, even for a public purpose, without payment of compensation; and payment of such compensation, when necessary to the performance of the duties of a railroad company, may be, as we have already observed, part of its submission to the command of the state. The railroads paid one half of the expense of the change, "by the command *of [570] the statute, and hence under compulsion of law," to quote from the court of appeals. The public interest, therefore, is made too much of. It is given an excessive, if not a false, quantity. Its use as a justification is open to the objection made at the argument,—it enables the state to do by two acts that which would be illegal if done by

one. In other words, as, under the law of New York, the state can authorize a railroad to occupy the surface of a street, it can subsequently permit or order the railroad to raise its tracks above the street and justify the impairment of property rights by the public interest. It was said in the *Story Case* that "the public purpose of a street requires of the soil the surface only." And this was followed in *Fobes v. Rome, W. & O. R. Co.* 121 N. Y. 505, 8 L. R. A. 453, 24 N. E. 919, where a steam railroad was permitted upon a street without liability for consequential damages to adjoining property. The new principle based upon the public interest destroys all distinction between the surface of the soil of a street and the space above the surface, and, seemingly, leaves remaining no vital remnant of the doctrine of the *Elevated Railroad Cases*. However, we need not go farther than the present case demands. When the plaintiff acquired his title those cases were the law of New York, and assured to him that his easements of light and air were secured by contract as expressed in those cases, and could not be taken from him without payment of compensation.

And this is the ground of our decision. We are not called upon to discuss the power, or the limitations upon the power, of the courts of New York to declare rules of property or change or modify their decisions, but only to decide that such power cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States. And we determine for ourselves the existence and extent of such contract. This is a truism; and when there is a diversity of state decisions the first in time may constitute the obligation of the contract and the measure of rights under it. [571] Hence the importance of the **Elevated Railroad Cases* and the doctrine they had pronounced when the plaintiff acquired his property. He bought under their assurance, and that these decisions might have been different, or that the plaintiff might have balanced the chances of the commercial advantage between the right to have the street remain open and the expectation that it would remain so, is too intangible to estimate. We certainly can estimate the difference between a building with full access of light and air and one with those elements impaired or polluted. But we have already expressed this. We need only add that the right of passage is not all there is to a street, and to call it the primary right is more or less delusive. It is the more conspicuous right, has the importance and

assertion of community interest and ownership, properly has a certain dominance, but it is not more necessary to the making of a city than the rights to light and air, held, though the latter are, in individual ownership and asserted only as rights of private property. The true relation and subordination of these rights, public and private, is expressed, not only by the *Elevated Railroad Cases*, but by other cases. They are collected in 1 Lewis, Eminent Domain, § 91e, and, it is there said, "established beyond question the existence of these rights, or easements, of light, air, and access as appurtenant to abutting lots, and that they are as much property as the lots themselves."

Judgment is reversed and cause remanded for further proceedings not inconsistent with this opinion.

Mr. Justice **Brown** concurs in the result.

Mr. Justice **Holmes**, dissenting:

I regret that I am unable to agree with the judgment of the court, and, as it seems to me to involve important principles, I think it advisable to express my disagreement, and to give my reasons for it.

The plaintiff owns no soil within the limits of the avenue. **The New York & Har-* [572] *lem Railroad Company* at the time of the change was, and long had been, the owner, and the other defendant was the lessee of a railroad with four tracks along the middle of Park avenue, in front of the plaintiff's land, at the south end being at the surface of the avenue, and at the north in a trench about 4½ feet deep, the railroad being bounded on both sides by a masonry wall 3 feet high, which prevented crossing or access to the tracks. This is the finding of the court of first instance, and I take it to be binding upon us. We have nothing to do with the evidence. I take it to mean the same thing as the finding in *Fries v. New York & H. R. Co.* 169 N. Y. 270, 62 N. E. 358, that the defendants had "acquired the right without liability to the plaintiff to have, maintain, and use their railroad and railroad structures as the same were maintained and used prior to February 16, 1897." The material portion of the decision of the court of appeals is that on this state of facts, as was held in the similar case of *Fries v. New York & H. R. Co.*, the plaintiff had no property right which was infringed in such a way as to be anything more than *damnum absque injuria*. The finding that the railroad had the right to maintain the former structures was held to distinguish the case from the *Elevated Rail-*

road Cases, where pillars were planted in the street without right as against the plaintiff. *Story v. New York Elev. R. Co.* 90 N. Y. 122, 160, 170, 178, 43 Am. Rep. 146; *Lahr v. Metropolitan Elev. R. Co.* 104 N. Y. 268, 10 N. E. 528. The other so-called finding, that the new structure infringes the plaintiff's right, is merely a ruling of law that, notwithstanding the facts specifically found, the plaintiff has a cause of action by reason of his being an abutter upon a public street.

The plaintiff's rights, whether expressed in terms of property or of contract, are all a construction of the courts, deduced by way of consequence from dedication to and trusts for the purposes of a public street. They never were granted to him or his predecessors in express words, or, probably, by any conscious implication. If [573] at the outset the New York courts had *decided that, apart from statute or express grant, the abutters on a street had only the rights of the public and no private easement of any kind, it would have been in no way amazing. It would have been very possible to distinguish between the practical commercial advantage of the expectation that a street would remain open and a right *in rem* that it should remain so. See *Stanwood v. Malden*, 157 Mass. 17, 16 L. R. A. 591, 31 N. E. 702. Again, more narrowly, if the New York courts had held that an easement of light and air could be created only by express words, and that the laying out or dedication of a street, or the grant of a house bounding upon one, gave no such easement to abutters, they would not have been alone in the world of the common law. *Keats v. Hugo*, 115 Mass. 204, 216, 15 Am. Rep. 80. The doctrine that abutters upon a highway have an easement of light and air is stated as a novelty in point of authority in *Barnett v. Johnson*, 15 N. J. Eq. 481, 489, and that case was decided in a state where it was held that a like right might be acquired by prescription. *Robeson v. Pittenger*, 2 N. J. Eq. 57, 32 Am. Dec. 412.

If the decisions, which I say conceivably might have been made, had been made as to the common law, they would have infringed no rights under the Constitution of the United States. So much, I presume, would be admitted by everyone. But, if that be admitted, I ask myself what has happened to cut down the power of the same courts as against that same Constitution at the present day. So far as I know the only thing which has happened is that they have decided the *Elevated Railroad Cases*, to which I have referred. It is on that ground alone that we are asked to

review the decision of the court of appeals upon what otherwise would be purely a matter of local law. In other words, we are asked to extend to the present case the principle of *Gelpcke v. Dubuque*, 1 Wall. 175, 17 L. ed. 520, and *Louisiana v. Pilsbury*, 105 U. S. 278, 26 L. ed. 1090, as to public bonds bought on the faith of a decision that they were constitutionally issued. That seems to me a great, unwarranted, and undesirable extension of a doctrine which it took this court a good while to explain. The doctrine now is explained, however, *not to mean that a change in the decision [574] impairs the obligation of contracts (*Burgess v. Seligman*, 107 U. S. 20, 34, 27 L. ed. 359, 2 Sup. Ct. Rep. 10; *Stanly County v. Coler*, 190 U. S. 437, 444, 445, 47 L. ed. 1126, 1131, 1132, 23 Sup. Ct. Rep. 811), and certainly never has been supposed to mean that all property owners in a state have a vested right that no general proposition of law shall be reversed, changed, or modified by the courts if the consequence to them will be more or less pecuniary loss. I know of no constitutional principle to prevent the complete reversal of the *Elevated Railroad Cases* to-morrow if it should seem proper to the court of appeals. See *Central Land Co. v. Laidley*, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80.

But I conceive that the plaintiff in error must go much further than to say that my last proposition is wrong. I think he must say that he has a constitutional right, not only that the state courts shall not reverse their earlier decisions upon a matter of property rights, but that they shall not distinguish them unless the distinction is so fortunate as to strike a majority of this court as sound. For the court of appeals has not purported to overrule the *Elevated Railroad Cases*. It simply has decided that the import and the intent of those cases does not extend to the case at bar. In those cases the defendants had impaired the plaintiff's access to the street. It is entirely possible and consistent with all that they decided to say now that access is the foundation of the whole matter; that the right to light and air is a parasitic right incident to the right to have the street kept open for purposes of travel, and that when, as here, the latter right does not exist the basis of the claim to light and air is gone.

But again, if the plaintiff had an easement over the whole street he got it as a tacit incident of an appropriation of the street to the uses of the public. The legislature and the court of appeals of New York have said that the statute assailed was passed for the benefit of the public us-

ing the street, and I accept their view. The most obvious aspect of the change is that the whole street now is open to travel, and that an impassable barrier along its width [575] has been removed,—in other *words, that the convenience of travelers on the highway has been considered and enhanced. Now still considering distinctions which might be taken between this and the earlier cases, it was possible for the New York courts to hold, as they seem to have held, that the easement which they had declared to exist is subject to the fullest exercise of the primary right out of which it sprang, and that any change in the street for the benefit of public travel is a matter of public right, as against what I have called the parasitic right which the plaintiff claims. *Scranton v. Wheeler*, 179 U. S. 141, 45 L. ed. 126, 21 Sup. Ct. Rep. 48; *Gibson v. United States*, 166 U. S. 269, 41 L. ed. 996, 17 Sup. Ct. Rep. 578.

The foregoing distinctions seem to me not wanting in good sense. Certainly I should have been inclined to adopt one or both of them, or in some way to avoid the earlier decisions. But I am not discussing the question whether they are sound. If my disagreement was confined to that I should be silent. I am considering what there is in the Constitution of the United States forbidding the court of appeals to hold them sound. I think there is nothing; and there being nothing, and the New York decision obviously not having been given its form for the purpose of evading this court, I think we should respect and affirm it, if we do not dismiss the case.

What the plaintiff claims is really property, a right *in rem*. It is called contract merely to bring it within the contract clause of the Constitution. It seems to me a considerable extension of the power to determine for ourselves what the contract is, which we have assumed when it is alleged that the obligation of a contract has been impaired, to say that we will make the same independent determination when it is alleged that property is taken without due compensation. But it seems to me that it does not help the argument. The rule adopted as to contract is simply a rule to prevent an evasion of the constitutional limit to the power of the states, and, it seems to me, should not be extended to a case like this. Bearing in mind that, as I have said, the plaintiff's rights, however expressed, are wholly a construction of the courts, I cannot believe that whenever the 14th Amendment, or Article I., § 10, is set up, we are free to go behind the local decisions on a matter of land law, and, on the ground that we decide what the contract is, declare rights to exist which we should think ought

to be implied from a dedication or location if we were the local courts. I cannot *be- [576] lieve that we are at liberty to create rights over the streets of Massachusetts, for instance, that never have been recognized there. If we properly may do that, then I am wrong in my assumption that, if the New York courts originally had declared that the laying out of a public way conferred no private rights, we should have had nothing to say. But if I am right, if we are bound by local decisions as to local rights in real estate, then we equally are bound by the distinctions and the limitations of those rights declared by the local courts. If an exception were established in the case of a decision which obviously was intended to evade constitutional limits, I suppose I may assume that such an evasion would not be imputed to a judgment which four justices of this court think right.

As I necessarily have dealt with the merits of the case for the purpose of presenting my point, I will add one other consideration. Suppose that the plaintiff has an easement, and that it has been impaired, bearing in mind that his damage is in respect of light and air, not access, and is inflicted for the benefit of public travel, I should hesitate to say that in inflicting it the legislature went beyond the constitutional exercise of the police power. To a certain, and to an appreciable, extent the legislature may alter the law of nuisance, although property is affected. To a certain, and to an appreciable, extent the use of particular property may be limited without compensation. Not every such limitation, restriction, or diminution of value amounts to a taking in a constitutional sense. I have a good deal of doubt whether it has been made to appear that any right of the plaintiff has been taken or destroyed for which compensation is necessary under the Constitution of the United States. *Scranton v. Wheeler*, 179 U. S. 141, 45 L. ed. 126, 21 Sup. Ct. Rep. 48; *Meyer v. *Rich-* [577] *mond*, 172 U. S. 82, 43 L. ed. 374, 19 Sup. Ct. Rep. 106. See *Mugler v. Kansas*, 123 U. S. 623, 668, 31 L. ed. 205, 212, 8 Sup. Ct. Rep. 273; *Marchant v. Pennsylvania R. Co.* 153 U. S. 380, 38 L. ed. 751, 14 Sup. Ct. Rep. 894; *Camfield v. United States*, 167 U. S. 518, 523, 42 L. ed. 260, 261, 17 Sup. Ct. Rep. 864; *People v. D'Oench*, 111 N. Y. 359, 361, 18 N. E. 862; *Sawyer v. Davis*, 136 Mass. 239, 49 Am. Rep. 27; *Com. v. Alger*, 7 Cush. 53. Compare *United States v. Lynah*, 188 U. S. 445, 470, 47 L. ed. 539, 548, 23 Sup. Ct. Rep. 349.

I am authorized to say that the CHIEF JUSTICE, Mr. Justice **White**, and Mr. Justice **Peckham** concur in the foregoing dissent.

STATE OF MISSOURI, *Complainant*,
v.

STATE OF NEBRASKA.

(See S. C. Reporter's ed. 577-618.)

Boundaries between states.

The middle of the channel of the Missouri river, according to its course as it was prior to the avulsion of July 5, 1867, decreed to be the true boundary line between Missouri and Nebraska.

[No. 5, Original.]

March 6, 1905.

ORIGINAL SUIT in equity on bill and cross bill to settle a disputed boundary line between the states of Missouri and Nebraska. Final decree entered establishing the middle of the channel of the Missouri river according to its course prior to July 5, 1867, as the true boundary line.

See same case, *ante*, 372.

This cause coming on for final decree, in pursuance of the opinion of this court filed herein on December 19, 1904, and the stipulation of the respective parties by their counsel filed herein on January 30 1905, which said stipulation is in words and figures as follows, to wit:

"In the opinion of the court in the above-entitled cause, the order and finding of the court having been made as follows:

"It appears from the record that about the year 1895 the county surveyors of Nemaha county, Nebraska, and Atchison county, Missouri, made surveys of the abandoned bed of the Missouri river, ascertained the location of the original banks on either side, and to some extent marked the middle of the old channel. If the two states [578] will agree upon these surveys *and locations as correctly marking the original banks of the river and the middle of the old channel, the court will, by decree, give effect to that agreement; or, if either state desires a new survey, the court will order one to be made, and will cause monuments to be placed so as to permanently mark the boundary lines between the two states. The disposition of the case by final decree is postponed for forty days, in order that the court may be advised as to the wishes of the parties in respect to these details."

"In pursuance whereof now come the parties hereto by their respective counsel, and agree that the said surveys made by the county surveyors of Nemaha county, Ne-

braska, and Atchison county, Missouri, as reported by the commissioners and set forth in the opinion of the court, constitute and be correct boundary lines between the said states, the same constituting the middle of the old channel of Missouri river as found by said court in its opinion.

"It is further agreed between the parties hereto that the monuments marking said boundary line established by the said county surveyors of said counties are not of a permanent character, and many of them have become destroyed or removed, and that in order to mark a permanent boundary line it is necessary and is deemed best that permanent monuments be erected at regular intervals on said line in such manner as will quiet all dispute in reference to said boundary.

"It is further agreed that said permanent monuments can be best established under the supervision of the commissioners heretofore appointed by the court, to wit, Alfred Hazlett and John W. Halliburton; and it is therefore requested by the parties to this cause that the court, by a proper order, direct and require said commissioners to establish or cause to be established under their direction such permanent monuments as may by them be deemed necessary in the premises and in accordance with the order of the court heretofore made, and make a report to the court of their acts and doings therein. In the execution of their powers herein, said commissioners *shall have authority to em-[579]ploy such surveyors and other assistants and procure such material as may be necessary in the establishment of the permanent monuments, marking said boundary line in accordance with the opinion of the court heretofore rendered and this agreement.

"It is further agreed that said commissioners for their services herein shall receive such compensation as may be agreed upon by the respective parties, and if the parties are unable to agree, then such as may be fixed by the court after the services have been performed and due report thereon made.

"On account of the unfavorable condition of the weather during the winter months and of the character of the ground during the spring months, the parties hereto respectfully request the court that said commissioners be granted until the 1st day of May, 1905, in which to make their report.

"State of Missouri, Complainant,

"By Edward C. Crow,

"Attorney General.

"Sam B. Jeffries,

"Assistant Attorney General.

"State of Nebraska, Defendant,

"By F. N. Prout, Attorney General."

And on motion of Herbert S. Hadley, at-

NOTE.—On judicial settlement of state boundary—see note to Nebraska v. Iowa, 36 L. ed. U. S. 798.

On rivers and lakes as state boundaries—see note to Buck v. Ellenbolt, 15 L. R. A. 187.

As to jurisdiction over boundary rivers—see note to Roberts v. Fullerton, 65 L. R. A. 953.

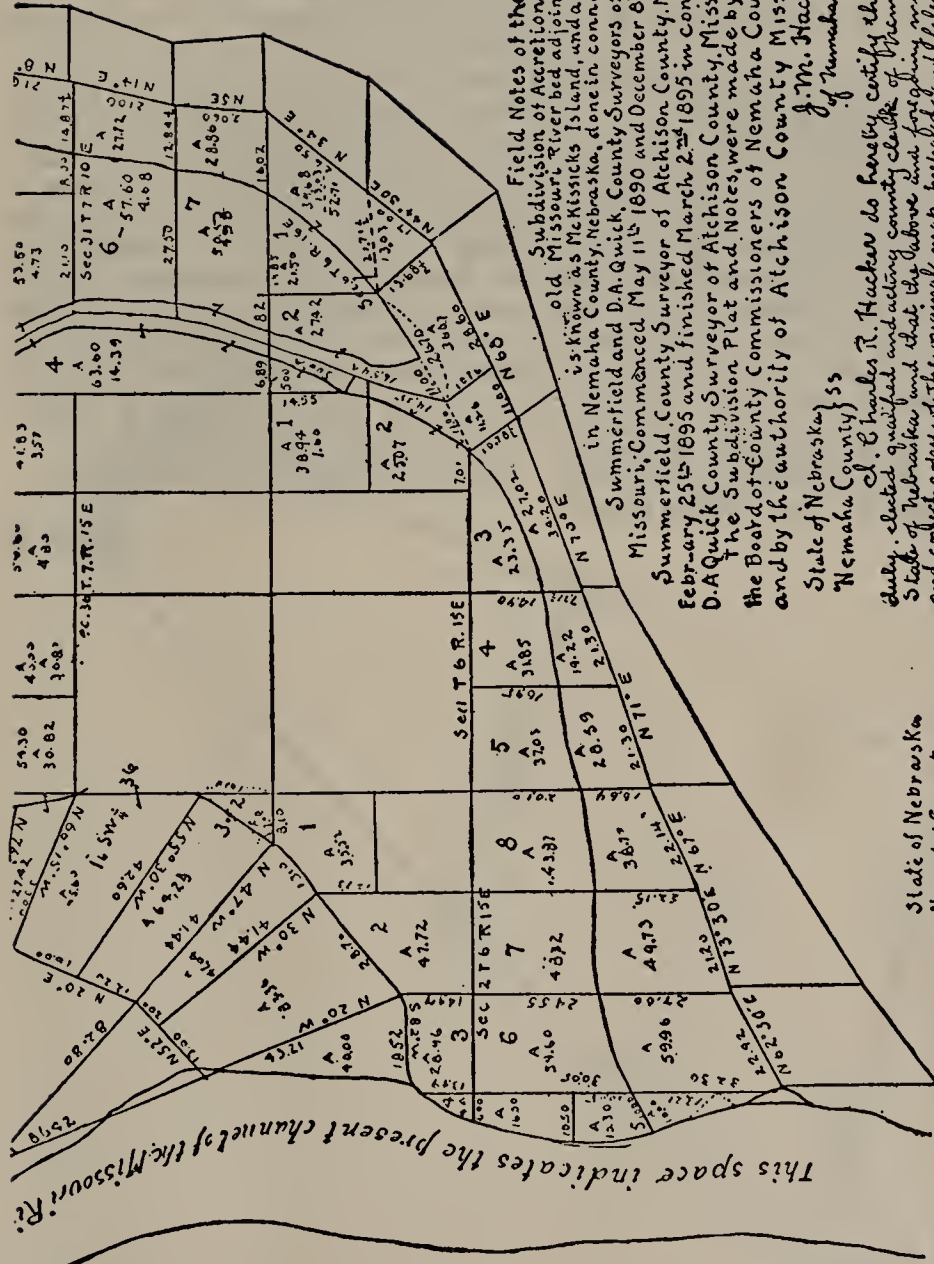
torney ge. ral of the state of Missouri, coun- sel for said complainant, that a decree be entered in this cause in accordance with said opinion and stipulation:

It is now here ordered, adjudged, and, de- creed by this court that the middle of the

channel of the Missouri river, according to its course as it was prior to the avulsion of July 5, 1867, is and shall be the true bound- ary line between Missouri and Nebraska, and that said boundary line is indicated upon and shown by the following plat:

DEFENDANTS EXHIBIT D.





Field Notes of the division and a Subdivision of Acquisitions, formed in the old Missouri River bed adjoining to land, what is known as McKissicks Island, and as Island Precinct in Nemaha County, Nebraska, done in connection with B.F. Summerville and D.A. Quick, County Surveyors of Atchison County, Missouri, commenced May 11th 1890 and December 8th 1891 with B.F. Summerville, County Surveyor of Atchison County, Missouri, on February 25th 1895 and finished March 2nd 1895 in connection with D.A. Quick, County Surveyor of Atchison County, Missouri. The Subdivision Plat and Notes, were made by the authority of the Board of County Commissioners of Nemaha County, Nebraska and by the authority of Atchison County, Missouri.

J.M. Hacker, County Surveyor of Nemaha County, Nebraska

I, Charles R. Hacker do hereby certify that I am the duly elected qualified and acting county clerk of Nemaha County, State of Nebraska and that the above and foregoing map is a full, true and correct copy of the original map prepared and filed by the County Surveyor of Nemaha County, Nebraska, in the office of the County Clerk of said County and State, as the same now appears among the files and records of my office and that I am as such County Clerk under the laws of the State of Nebraska by proper endorsement and oath sworn under my hand and the seal and county this 7 day of October A.D. 1902 at Auburn Nebraska

State of Nebraska
Nemaha County
Filed 10th day of April 1895
J.M. Hacker
County Clerk

[580] *And that said boundary line is more particularly shown and described by the following eleven sectional survey maps, with the field notes descriptive of each of said sectional maps and surveys:

Defendant's Exhibit "E."

FIELD NOTES.

No. of Survey Date February 25th to March 29th 1895

Survey for Nemaha county Nebraska

At request of the Board of County Commissioners

Chainmen sworn W. T. Hacker and H. D. Hacker

Point established divis. of Accretions to Sec. 35, Twp. 7 N, Rng. 15 E, 6th P. M.

Commencing at the meander corner, on the Nebraska bank of the Old Missouri River bed where the Township line between Townships 6 and 7 North of Range 15 East of the 6th Principal Meridian in Nebraska intersects with the Old Missouri River bed and at a point 9.10 chaines West of the South East corner of Section 35 and South West corner of Section 36 in Township 7 North, of Range 15 East of the 6th Principal Meridian in Nebraska, and run thence N 47° W at 40.00 chaines set a random stake for half way and at 82.88 chaines came to a meander corner on the Missouri bank of

884

the Old Missouri river bed. This line run in connection with D. A. Quick Surveyor of Atchison county Missouri. Correcting back we corrected the random stake set at 40.00 chaines to 41.44 chaines for the half way or dividing line between Missouri and Nebraska and set a Limestone 7x12x25 inches square. Marker M. and N. Whole distance across 82.88 chaines. Half the distance across 41.44 chaines.

And Commencing at the quarter section corner on the West line of Section 36 and East line of Section 35 in Township 7 North, of Range 15 East of the 6th Principal Meridian in Nebraska, it being on the Nebraska bank of the Old Missouri *River bed and [581] run thence N 67° W and at 32.52 chaines set a random stake for half way and at 66.00 chaines came out 88 links South of the corner on the Missouri bank of the Old Missouri River bed. This line was run in connection with D. A. Quick County Surveyor of Atchison county Missouri. Adjusting our bearing to N 66° 15' W we corrected back and corrected the random stake set at 32.52 chaines to 33.00 chaines 48 links west and 44 links North of the random stake and on a direct line, and we set a Limestone 8x11x44 inches square for the dividing line between Missouri and Nebraska marked M and N

Whole distance across 66.00 chaines.

Half the distance across 33.00 chaines.

197 U. S.

[582]

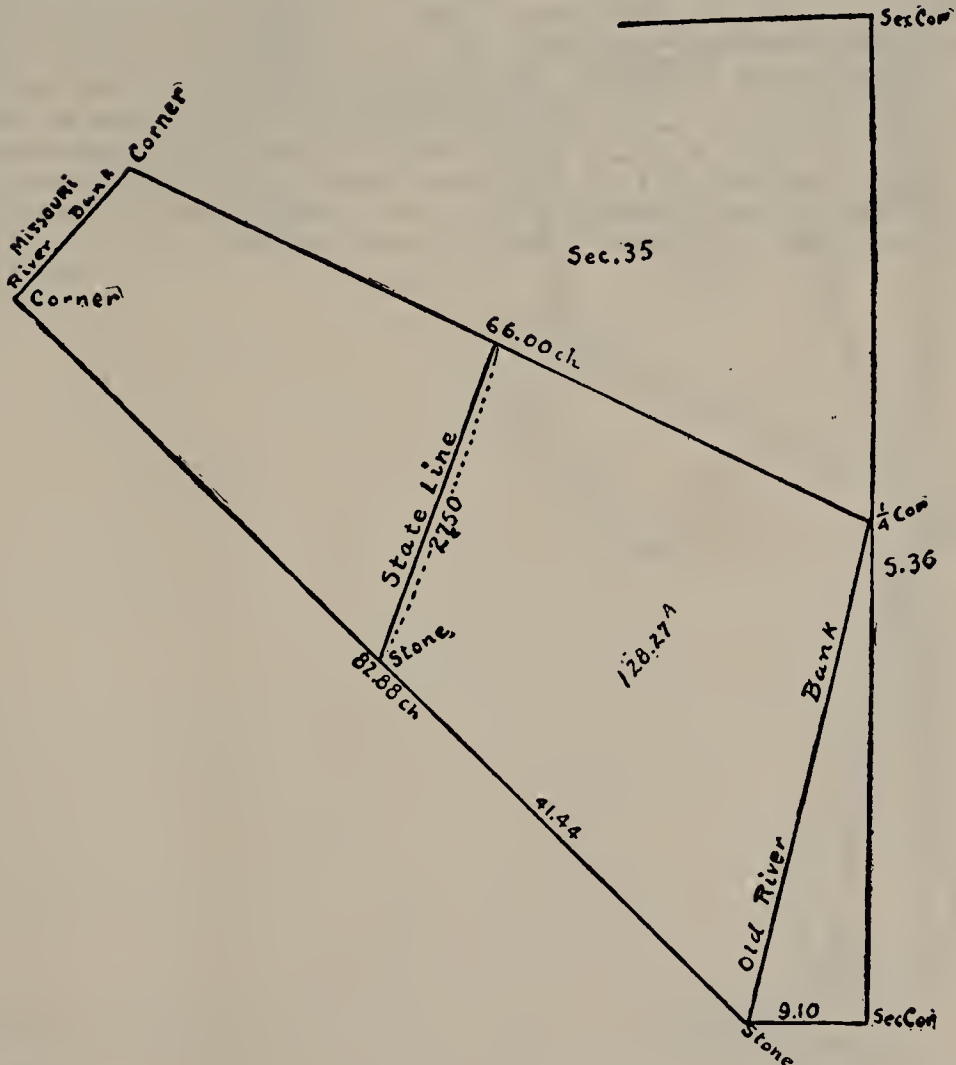
SURVEYOR'S RECORD

224

N^o 1

PLAT

Section 35 in. Township 7 North, Range 15 East. 6 th. P. M. Nebr.



J. M. Hacker.
County Surveyor.

[583]

*SURVEYOR'S RECORD.

FIELD NOTES.

No. of Survey Date May 15th to 20th 1890

Survey for J. B. Shields

At request of J. B. Shields

Chainmen sworn Marton Lamb and W. Barrenger

Point established corners to Lots 1 & 2 & Sec. 35, Twp. 7, Rng. 15 E 6th P. M.

Commenced at the North East corner of section 35 T 7 N of R 15 E and run thence South and at 6.58 chaines came to North Bank of old River Shute the SE. cor. of Lot 1 in Sec. 35, and at 4.20 chaines on South bank of Old River Shoot at the NE cor. of Lot 2 in Sec. 35 and at 40.00 chaines set a stone 6x6x12 inches square for the quarter Sec. corner on the East line of Sec. 35, the SE. cor. of Lot 2 in Sec. 35. And at 80.00 chaines set a stone 6x10x16 inches square for South East corner of Sec. 35, T 7 R 15 E Nemaha County Nebraska. Then commencing at the North East corner of Sec 35, T 7, R 15 E. and running thence West 6.12 chaines to the East bank of old River Shute, the NW. cor. of Lot 1, in Sec. 35. Thence West 3.10 chaines to the West bank of old River Shute the NE. corner of Lot 2 in Sec. 35, thence West 8.00 chaines to the old bank of the Missouri River Set a Stone 6x8x10

886

inches square for the NW. cor. of Lot 2 in Sec. 35, and for the bank of the Old Missouri River in Nebraska.

Survey of the Accretion to Lot 2 in Sec. 35, T 7, R 15 E in Nebraska.

Commencing at a stone 6x8x10 inches square, set for the NW. cor. of Lot 2 in Sec. 35, T 7, R 15 E. the Nebraska bank of the old Missouri River bed, and running thence S 78° 30' W 42.00 chaines to the opposite bank of the old Missouri River bed in Missouri as designated by B. F. Rummerfield County *Surveyor of Atchison County,[584] Missouri. Then correcting and setting a stake 3 inches square at the half way point and for the NW. cor. of the Accretion to Lot 2 in Sec. 35, T 7, R 15 E in Nemaha Co. Neb. Said stake witnessed by a Cottonwood tree 9 inches in diameter beares N 49° 30' W 24 links distant. And by a Cottonwood tree 11 inches in diameter beares N 19 E 32 links distant.

Then commencing at quarter section corner stone on the bank of the old Missouri River bead in Nebraska. Running thence N 67° W 65.05 chaines to the opposite bank of the old Missouri River bed on the Missouri State side of the old River bed. Then correcting and setting a stake & stone at 32.52½ chaines for the half way line and the South West corner of the Accretions to Lot 2 in Sec. 35 town. 7 Range 15 East in Nemaha County Nebraska.

197 U. S.

[586]

*SURVEYOR'S RECORD.

FIELD NOTES.

No. of Survey Date May 13th to 20th 1890

Survey for D. P. Holley and J. C. Roberts.

At request of D. P. Holley and J. C. Roberts. Chainmen sworn Marton Lamb and W. Bärrenger

Point established Lots 1, 2 & 3 &c. in Sec. 26, Twp. 7, Rng. 15 E, 6th P. M.

Commencing at the SE. cor. of Sec. 26 T 7 R 15 E in Nemaha Co. Neb. and running thence North, at 20.00 chaines set a stake for East line of Lot 2 in Sec. 26, at 40.00 chaines found quartersection corner post at SE. cor. Lot 1 & NE cor of Lot 2 set by the Government, at 60.00 chaines set stake for East line of Lot 1 and at 73.90 chaines set stake for NE. cor. of Lot 1 and at bank of Missouri River in Nebraska. And from this line as a base we run lines West to find the old Missouri River bank on the Nebraska side, By First Commencing at the stake set at the 60.00 chaines North of SE. cor. of Sec. 26, Running thence West 16.50 chaines for bank of river setting a stake 3 inches square. Then commencing at the quarter section corner on the East line of Sec 26. and running thence West 21.45 chaines setting stake 3 inches square for SW. cor. of Lot 1 in Sec 26 and NW cor to Lot 2 in Sec 26, which contains by Government Survey 52.70 Acres.

Then commencing at the stake 20.00 chaines North of the SE. cor. of Sec. 26. and on the East line of Lot 2 in Sec 26, and running thence West at 7.24 chaines, came to East bank of the River Shute the West line of Lot 2, Sec. 26, then at 11.34 chaines came to the West bank of the River Shute the East line of Lot 3 in Sec 26. Thence at 26.84 chaines set a stake for River bank and for the West line of Lot 3 in Sec 26.

Then commencing at the SE. corner of Sec 26 T 7 R 15 E in Nebraska, Running thence [587] West and at 6.12 ch. came to *the East bank of the River Shute and the SW. cor. of Lot 2 in Sec. 26, Lot 2 contains 42.00 Acres and at 9.22 chaines came to West bank of the River Shute and the SE. corner of Lot 3 in Sec. 26, and at 17.22 chaines set a stone 6x8x10 in. sqr. for SW. cor. of Lot 3 on Old River line in Sec. 26, T 7 R 15 E. Lot 3 contains 30.80 Acres per Government survey. Survey of Accretions in Sec. 26 T 4 R 15 E in old River bed dividing the Accretions between Lots 1, 2 and 3 in Sec 26, T 7 R 15 E and Dividing between Nebraska and Missouri, and between the parties above named. Then commencing at a stone 6x8x10 inches square set

for meander line and at SE cor. of Accretions to Lot 3 in Sec 26 And running thence S 78° 30' West 42.00 chaines to the opposite Meander bank of Missouri River in Missouri as designated by B. F. Rummerfield County Surveyor of Atchison County Missouri. Then correcting back at 21.00 ch. set stake 3 inches sqr. for Division line and at the SW. cor. of Accretions to Lot 3 in Sec 26. The Stake Witnessed by a Cottonwood tree 9 inches in diameter beares N 49° 30' W 24 lks distant and by a Cottonwood 11 inches in diameter beares N 19° E 32 lks. distant.

Then commencing at the stake for the West line of Lot 3 in Sec 26, for the old River bank Running thence S 84° W 24.40 chaines to the opposite bank of the old Missouri River in Missouri as designated by B. F. Rummerfield County Surveyor of Atchison Co. Mo. Then at 12.24½ chaines set stake for division line on the West line of Lot 3 Sec 26, T 7 R 15 E between Mo. & Neb.

Then commencing at stake 3 inches square set for NW. cor. of Lot 2 and SW cor. of Lot 1 in Sec 26, and running thence N 87° W. 27.70 chaines to opposite Meander line of the Missouri River, in Missouri. Then at 13.85 chaines half way set a stone 6x6x12 inches square for SW. cor. Accretions to Lot 1 and NW. cor. of Accretions to Lot 2 in Sec 26, T. 7, R 15 E in Nebraska

Then commencing at a stake 3 inches square set for the meander line of the old Missouri River on the West line of *lot 1 in [588] Sec 26. T 7. R 15 E. in Nebraska. Running thence N 81° W 28.34 chaines to the meander line on the Missouri side of the old Missouri River bead. Then setting a stake at 14.17 chaines for half way dividing line between Nebraska and Missouri.

Then commencing at a stake at the NE. corner of Lot 1 in Sec 26 T 7 R 15 E and at the intersection of the East line of Sec. 26 with the Missouri River in Nemaha County Nebraska. And running thence N 40° W 80.30 chaines to the meander line on the Atchison county Missouri side of the old Missouri River.

Then correcting and setting at 40.15 chaines the half way dividing point between Missouri and Nebraska a Limestone 3x12x18 inches square, for the NW. cor. of the Accretions in Missouri River belong g to Lot 1 in Sec 26 Nemaha Co. Neb. Witnessed by a cottonwood tree 5 inches in diameter beares East 6½ lks. distant. And by a White Willow tree 5 inches in diameter beares West 5° S 9½ links distant

This survey made in connection with B. F. Rummerfield County Surveyor of Atchison county Missouri

Magnetic V 9° 30' east.

[590]

*SURVEYOR'S RECORD.

FIELD NOTES.

No. of Survey Date May 16th to 20th 1890

Survey for D. P. Holley and J. Henderson
At request of D. P. Holley and J. Henderson
Chainmen sworn Marton Lamb and W. Barrenger

Point established Accretions to Lots 3 & 4
Sec. 25, Twp. 7, Rng. 15 E, 6th P. M.

Commenced the survey of the Accretions to Lots 3 and 4 of Sec 25 Town 7 North of Range 15 East, by Commencing at the Meander corner, at intersection of the half section line, running North and South threw section Twenty-five Town seven Range Fifteen East, with the Missouri River and at the Northeast corner of Lot No 3, marked by a Bur Oak stake 4x4x36 inches square and by a peace of an iron bar drove in by the side of the stake.

Running thence North 102.88 chaines to the meander line on the opposite bank of the Missouri River as designated by B. F. Rummerfield County Surveyor of Atchison County Mo.

Then correcting back making corner on dividing line between Nebraska and Missouri at 51.44 chains at a stone set by the Atchison County Missouri Surveyor and Chainmen. And at 12.70 chaines north of the meander corner at the Northeast corner of Lot No 3 in Sec 25 set a stone for the NE. cor. of Twenty-eight acres off of the South end of the Acretians to Lot No. 3, of Sec 25. Then commencing at the NW. cor. of Lot 3, Sec.

890

25, running thence N 20° W 89.43 chaines to meander line on opposite bank of the Missouri River in Atchison County Mo. as designated by the County Surveyor of Atchison County Missouri B. F. Rummerfield. Then correcting back and setting a limestone 8x9x14 inches square at 44.71½ ch for the NW. cor. of Acreations to Lot No. 3 *in Sec. [591] 25. T 7, R 15 East in Nebraska and on the dividing line between Nebraska and Missouri Said stone is Witnessed by a Willow tree 9 inches in diameter bears N 63° 30' W 54 lks distant. And setting a stone 12.70 ch. North of NW. cor. Lot 3, S 25, for NW. cor. of 28.00 acres off of South end of Acreations in Missouri River to Lot No. 3, Sec. 25, T 7 R 15 E.

Then commencing at the intersection of the West line of Section 25 Town 7 North of Range 15 E, with the Missouri River. in Nebraska, at the meander corner at the North West corner of Lot No 4 in Sec 25, running thence N 40° W 80.30 chaines to the meander line of the opposite bank of the Missouri River in Missouri as designated by the County Surveyor of Atchison County Missouri B. F. Rummerfield. Then correcting back and at 40.15 chaines, the half way point, set a Limestone 3x12x18 inches square. Witnesses by a Cottonwood tree 5 inches in diameter, Beares East 6½ links distent. And also by a White Willow tree 5 inches in diameter Beares W 5° South 9½ links distent. This stone marks the North West corner of the Acretion in the Missouri River to Lot Number Four 4 in Section 25 Town 7 North of Range 15 East, in Nebraska, Nemaha County.

197 U. S.

[593]

*SURVEYOR'S RECORD.

FIELD NOTES.

No. of Survey Date December 8th to 23r 1891

Survey for The Lombard Investment Co.

At request of J. H. Stewart 512 Exchange B'd'g. Kansas City Mo.

Chainmen sworn Henry C. Taylor and Robert Taylor

Point established Accretions to Lots 1 & 2 Sec. 25, Twp. 7, Rng. 15 E. 6th P. M.

Began the survey by commencing at the quartersection corner on the East line of section 25 Town 7 Range 15 East where we found the old government stake standing and for the purpose of preserving the corner we set a Limestone 4x9x16 inches square marked $\frac{1}{4}$, in the ground by the side of the old stake—Running from thence North to find the Meander corner at the NE. cor of Lot No 1 in Sec. 25 and at 20.00 chains found a stone heretofore set at the SE. cor. of Lot 1, and at 32.00 chaines set a random stake for the Meander corner on the Bank of the old Missouri River at the NE. cor. of Lot No 1

Then commencing at a stone set for the center of Sec. 25, T 7 R 15 E, and at 20.00 cha. found a stake heretofore set and at 40.00 chaines found an iron bar heretofore set the NW. cor. of 40. acres off of the South end of Lot 2, in Sec. 25, and set a limestone 6x12x15 inches square in by the side of the Iron bar, and at 43.40 chaines found an oak post heretofore set for the meander Corner at the NE. cor. of Lot 3 in Sec 25-7-15 and by the side of the oak post we set a limestone 3x9x18 inches square for the NW. Meander cor. of Lot 2 in Sec. 25-7-15 E.—Witnessed by a Sycamore tree 12 inches in diameter beares S. 75° 30' W. 44 links distant. And by a Sycamore tree ten inches in diameter. Beares S 35° E. 53 lks. distant. And also Witnessed by a Cottonwood tree 20 inches in diameter Beares N 31° 30' W. 69 lks distant

[594] Then commencing at a stone *heretofore set for the NE. cor, of 40 acres off of the South end of Lot 2 in S 25, and run thence North 7.50 chains and set a random stake for the NE. Meander cor. to lots 1 & 2 in Sec 25. Then after testing the Meander random stake set at the NE. corners of Lots 1 & 2 of Sec. 25-7-15 E. At the NE. Meander cor of Lot 1 we set a Blue Limestone 1½x12x12 inches square—Witnesses by a cottonwood tree 13

892

inches in diameter Beares N 63° W 16 lks distant, And by a Sycamore tree 9 inches in diameter, Beares N 61° 30' E. 53 lks distant. And at the NE. Meander cor. of Lot 2 & NW. cor of Lot 1 we set a Blue Limestone 3x15x18 inches sqr. Witnessed by a cluster of Willows Beares S 57° 30' W. 33 lks. distant. Then commencing at the NW. cor. of Lot 2 in Sec. 25-7-15 E. and run thence North at 52.00 ch. set a random stake for half way point across the old Missouri river bead, at 104.55 chains came to the North bank of the old Missouri river bed 2.57 ch. West of a Meander stake at the intersection of a Sec. line with the river, set by Rummerfield, making a jog of 2.57 ch. between $\frac{1}{2}$ Sec & Sec lines in the diferent states, Then correcting back and at 27½ lks. North of the random stake set at 52.00 chains. Setting a Limestone 5x11x20 inches square for the NW. cor. of the accretions in the old Missouri river bed to Lot 2 in Sec 25 T 7 R 15 E.

Then commencing at the NE. cor of Lot 2 & the NW. cor. of Lot 1 in Sec 25, running thence N 10° 30' E. at 50.00 chaines set a random stake for $\frac{1}{2}$ way and at 98.62 chains came to a stone at Meander corner on the North bank of the Mo. River set by Rummerfield for North bank of river Then correcting back at 49.31 chains the half way point from NE. cor. of Lot 2 in Sec. 25-7-15 E. on the South bank of old Missouri river, to the meander corner on the opposite bank of the old Missouri river to a stone by Rummerfield for Meander corner on old Mo. river bank in the state of Mo. Setting a limestone 7x10x12 inches sqr. at the NE. corner of accretion to Lot 2 in Sec. 25-7-15 in Nebraska. And NW. cor. of Lot 1 in Sec. 25.

Then commencing at the NE. cor. of Lot 1 in Sec. 25-7-15 E. *Neb. running thence N[595] 23° 47' E. at 40.00 chaines set a random stake and at 78.56 chaines came to meander corner set by Rummerfield for north bank of old Missouri river. Then correcting back and correcting random stake set at 40.00 chaines by setting a limestone 3x9x13 inches square at 39.28 chaines the half way point. Being the NE. cor. of the accretion to Lot 1 in Sec 25 T 7 R 15 E. on the State line. The stone Witnessed by a cottonwood tree 6 inches in diameter. Beares N. 37° E 70 links distant

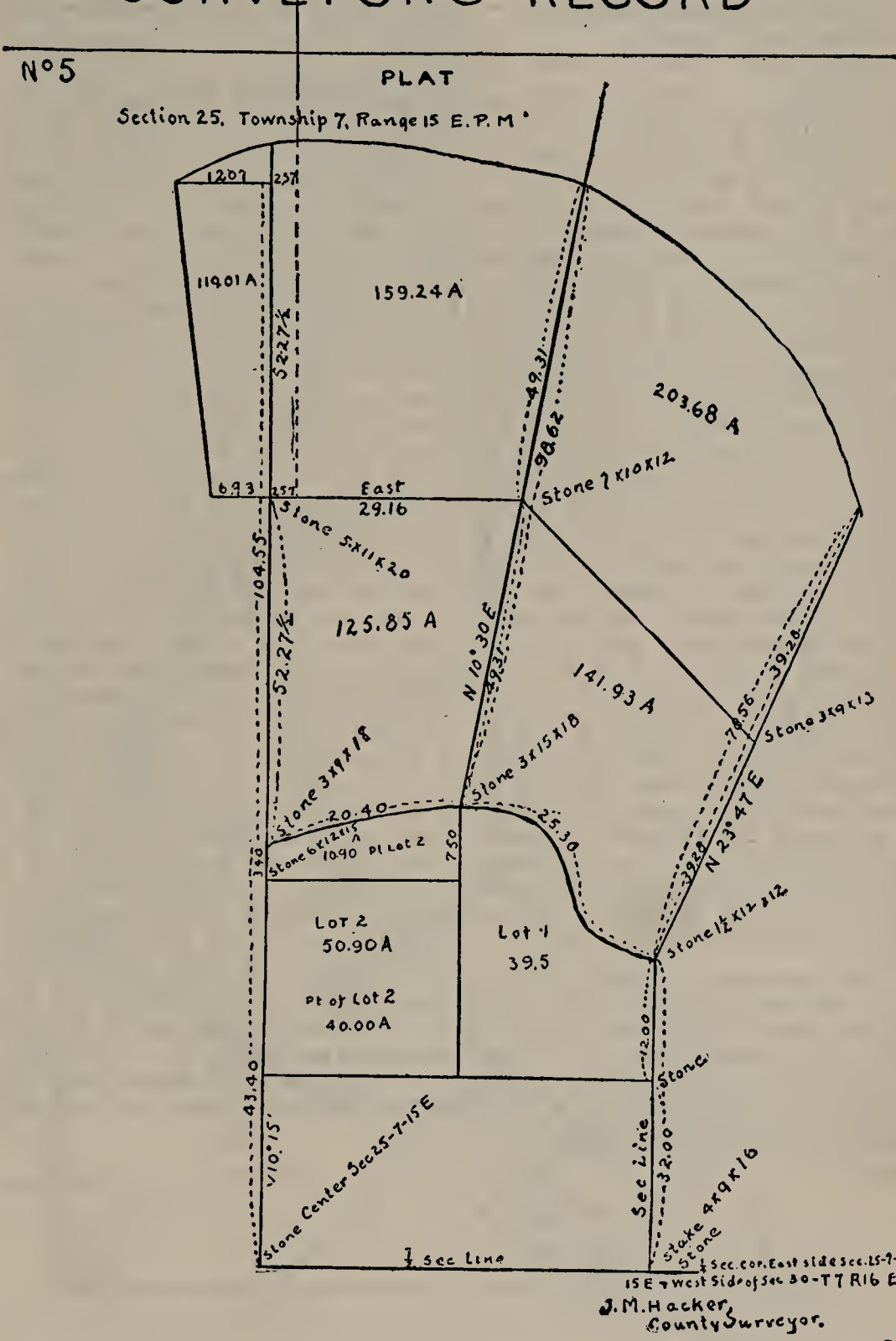
This survey made in connection with B. F. Rummerfield County Surveyor of Atchison county Missouri

197 U. S.

[596]

SURVEYOR'S RECORD

156



[597]

*FIELD NOTES.

No. of Survey Date December 8th to 23d 1891

Survey for The Lombard Investment Co.

At request of J. H. Stewart.

Chainmen sworn Henry C. Taylor and Robert Taylor.

Point established Accretion to Lot 1 Sec. 30, Twp. 7. Rng. 16 E, 6th P. M.

Commencing at quartersection corner on the West line of Sec. 30, Town 7, North of Range 16 East. (By the side of the stake set by the Government Surveyors I set a limestone 4x9x16 to preserve and perpetuate the qr. sec. corner on the West line of Sec 30 T 7 R 16 E.) And run thence East on the half section line at 20.00 chaines set a stake, at 40.00 chaines set a random stake and at 47.60 chaines set random stake for the meander corner on the bank of the Old Missouri river bed and the SE. cor. of Lot 1 in S 30 T 7 R 16 E. At the SE. cor. of Lot 1 in Sec. 30 T 7 R 16 E set a limestone 2x11x17 inches square for Meander cor. on the Old Missouri river bed. Then correcting back on half section line and at 20.00 chaines set a limestone 4x8x16 inches square. Witnessed by a White elm tree 21 inches in diameter. Beares N $49\frac{1}{2}^{\circ}$ E. $17\frac{1}{2}$ lks. distent. Then commencing at the Meander corner stone set at the NE. corner of Lot 1 in S 25 T 7 R 15 E. and also the NW. corner of Lot 1 in Sec 30 T 7 R 16 E. (see page 156 for sise of stone & Witness tree) running thence S $59^{\circ} 30'$ E. 23.10 chaines for Meander corner set a limestone 2x12x14 inches square for meander corner on river bank. Witnessed by a cottonwood tree 14 inches in diameter Beares S $54^{\circ} 30'$ E-1.47 chaines distant. Then run S. 55° E- 24.33 chaines for meander corner on bank of old Missouri river bed, and set a limestone 4x9x19 for meander corner.

Then commencing at the Meander corner at the NW. cor. of Lot 1 Sec. 30 T 7 R 16 E and run thence N $23^{\circ} 47'$ E for the meander corner on the opposite side of the old Missouri river *for the purpose of dividing the accretions and obtaining the amount belonging to Lot 1 Sec. 30 T 7 R 16 E. at 40.00 chaines set a random stake for half way, at

78.56 chaines came to the meander corner stone set by Rummerfield on Meander river line Then correcting back at halfway random stake corrected and at 39.29 chaines half way set a Limestone 3x9x13 inches square. Witnessed by a cottonwood tree 6 inches in diameter N 37° E. 70 links distant. Then commencing at meander corner stone No 4 and run N $54^{\circ} 30'$ E at 12.00 chaines set a random stake at 27.49 chaines came to random corner set by Rummerfield at SE. cor Lot 1 Se 9 T 66 R 42 W in Missouri, Then correcting back at half way at 13.75 chaines set a stone 3x10x13 inches square Witnessed by a cottonwood tree 6 inches in diameter. Beares S $14^{\circ} 30'$ E 67 links distent.

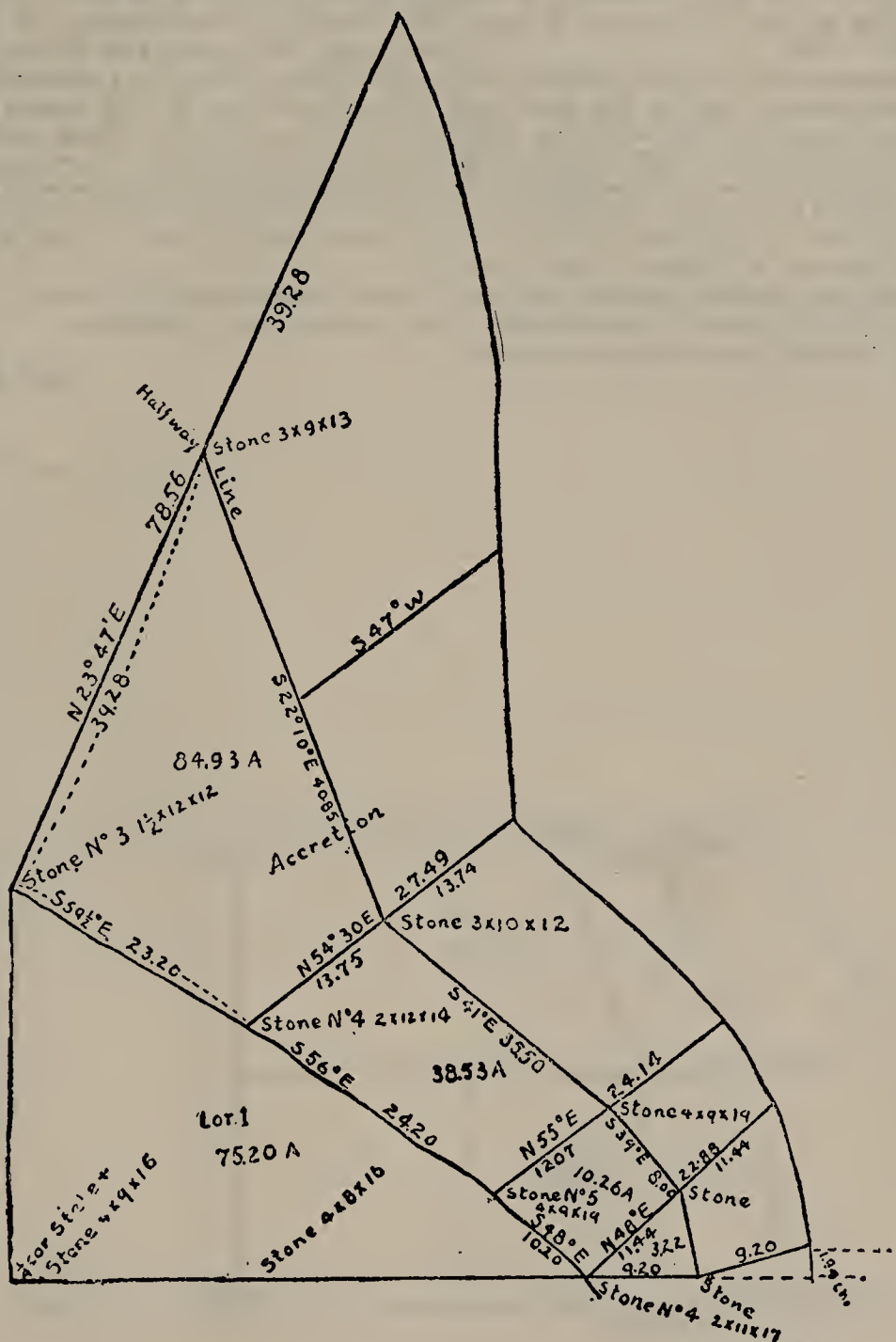
Then commencing at meander corner stone No. 5 and run N 55° E at 10.00 chaines set a random stake for half way at 24.14 chaines came to random corner set by Rummerfield. Then correcting back at 12.07 chaines set a stone for the NE. corner of a part of accretions to Lot 1 in Sec 30-7-16 E 12.07 chaines N 55° E from a limestone 4x9x19 inches square on meander bank of the old Missouri river on North line of lot 1 S 30-7-16 E Then commencing at a stone 2x11x17 inches square set at SE meander corner of Lot No 1 Sec 30-7-16 E. and run N 48° E at 10.00 chaines set a random stake for half way across the old river bed and at 22.88 chaines found it to be the distance across the river. Then correcting back moved random stake set at 10.00 ch by setting a stone at 11.44 chaines for the NE. cor of accretions to Lot 1, Sec 30-7-16 E. Then from the 2x11x17 inches square set for the SE. cor. of Lot 1 S 30-7-16 E. run east at 9.20 chaines set a stone for half way across the old bed of the Missouri river, and at 14.28 chaines set a random stake on the East bank of the Nishineyboteny river which river is in the old Missouri river bed, 4.12 chaines West of the East bank of the old Missouri River bed. At which point the half section line running East & West threw *Sec. 30 T 7 R [599] 16 E in Nebraska Jogs South 1.94 chaines of an 80 rod line running E & W threw the Section opposite and in Missouri state and 80 rods North of the South line of said sec. in Mo.

SURVEYOR'S RECORD

N^o 6

PLAT.

Section 30 Township 7 Range 16 East of 6th P.M. Neb

J. M. Hackey
County Surveyor.

[601] *The division of the accretions from the North East corner of lot 2 and the SE. corner of Lot 1 in Section 30 Town 7 North, of Range 16 East of the 6th P. M. in Nebraska. Was made in connection with B. F. Rummerfield, Surveyor of Atchison county Missouri

in December 1891. Run East and at 9.20 chaines set a stone for the dividing line and was 1.94 chaines South of Rummerfield's line

Whole distance across 18.40 chaines. Half the distance across 9.20 chaines. V 9° 30' E

FIELD NOTES.

No. of Survey Date From February 25th to March 29th 1895

Survey for Nemaha County Nebraska

At request of the Board of County Commissioners

Chainmen sworn W. T. Hacker and H. D. Hacker

Point established Divis. Accretions in Old River Sec. 30, Twp. 7 N, Rng. 16 E. 6th P. M. Neb

Commencing at the meander corner on the Nebraska bank of the Old Mo. River bed at the intersection of the South line of S. 30, T 7, N. R 16 E. 6th P. M. in Nebr. with the Old Mo. River bed, it it being the S E. cor. of Lot 3 in S 30, and the N E. cor. of Lot 1 in S 31. And run East to meet D. A. Quick Surveyor of Atchison county Mo. Running from the Mo. side of the Old Mo. River bed on a division of Accretions therein and at 13.32½ ch. set a stake and came

out 1.53 ch. apart he N and me S. and at half the difference between us 76½ lks. we set a Limestone 5x14x25' in. sqr. for the dividing line between Mo. and Neb. Whole distance across 26.65 chains. Half the distance across 13.32½ chaines. And Commencing at the meander corner of the Nebr. bank of the Old Mo. River bed, at the S E. cor. of Lot 2 and the N East cor. of Lot 3 in S 30 T 7 N R 16 E 6th P. M. in Nebr. And run East to meet D. A. Quick Surveyor of Atchison county Mo. running from the Mo. side of the Old Mo. River bed on a division of Accretions therein *and at 11.35 chaines set a [602] stake and came out 2.00 chaines apart he North and me South, and at half the difference between us, 1.00 chain, we set a Limestone 6x11x20 inches square for the dividing line between Mo. and Nebr. Marked M. and N.

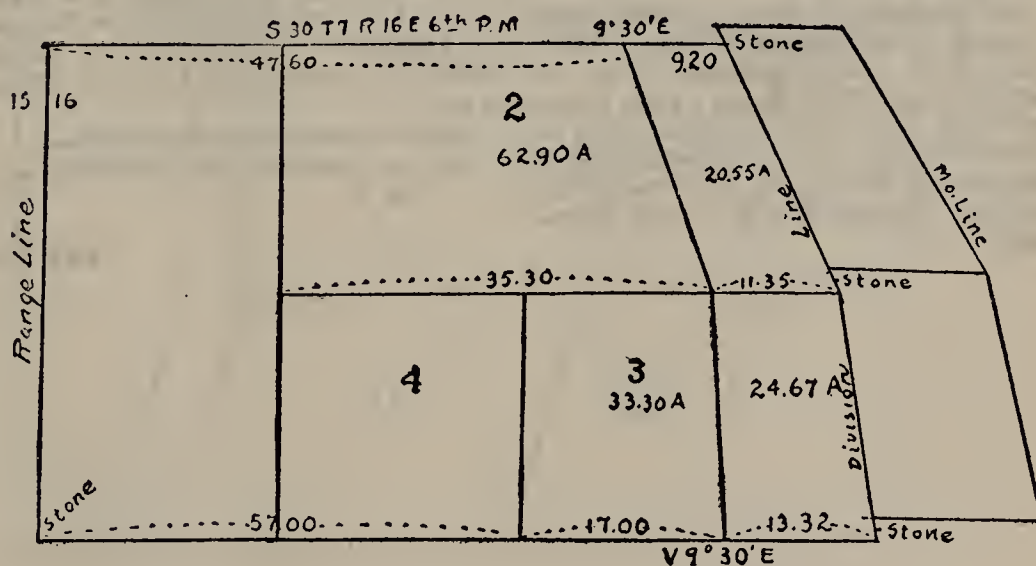
Whole distance across 22.70 chains. Half the distance across 11.35 chaines.

SURVEYOR'S RECORD 220

Nº 7

PLAT.

Section 30, Township 7N Range 16E 6th P.M. Nebr.



J. M. Hacker
County Surveyor.

[604]

*FIELD NOTES.

No. of Survey.....Date From February 25th to March 29th 1895

Survey for Nemaha County Nebraska

At request of the Board of County Commissioners of Nemaha County Nebr.

Chainman sworn W. T. Hacker and H. D. Hacker

Point established division of Accretions Sec 31, Twp 7 N, Rng. 16 E, 6th P. M.

Commencing at the meander corner on the Nebraska bank of the Old Missouri River bed at the intersection of the Township line between Townships 6 and 7 North of Range 16 East of the 6th P. M. in Nebr. with the Old Missouri River bed. Said meander corner being the S E. corner of Lot No 7 in Sec 31 Town 7 N of R 16 E of the 6th P. M in Nebraska.

And run thence East for the purpose of meeting D. A. Quick County Surveyor of Atchison county Missouri coming from the Missouri side of the Old Missouri River bed on a division of the Accretions formed in the Old Missouri River bed, and at 16.02 chaines set a stake for half way and came out 89 links apart he North and me South and at half the difference between us, $44\frac{1}{2}$ links, we set a Limestone $6 \times 15 \times 35$ inches square for the dividing line between Missouri and Nebr. marked M & N.

Whole distance across the Old River bed 32.04 chaines. Half the distance across 16.02 ch.

Commencing at the meander corner on the Nebr. bank of the Old Mo. River bed at the S. E. meander cor. of Lot 6 and the N E corner of Lot No. 7 in S 31, T 7 N of R 16 E. of 6th P. M in Nebr.

And run East to meet D. A. Quick County Surveyor of Atchison county Mo. running from the Mo. side on a division of the Accretions and at $12.84\frac{1}{2}$ ch. set a stake & came out 89 lks. apart, he N & me S and at $\frac{1}{2}$ the difference $44\frac{1}{2}$ lks we set a Limestone $6 \times 15 \times 36$ inches Sqr for the dividing line between *Mo. and Nebr. Marked M & N. Whole distance

[605]

898

across 25.69 ch. Half the distance across $12.84\frac{1}{2}$ chaines. And commencing at the meander corner on the Nebr. bank of the Old Mo. River bed at the S E. cor. of Lot 1. and the N E cor. of Lot 6 in S 31 T 7 N of R 16 E. of 6th P. M. in Nebr. and run East to meet D. A. Quick County Surveyor of Atchison Co. Mo. running from the Mo. side on a division of the Accretions and at $14.87\frac{1}{2}$ ch. set a stake & came out 1.00 ch. apart, he N and Me S at half the difference 50 lks set a Limestone $6 \times 15 \times 30$ inches Sqr. for the dividing line between Mo & Nebr. Marked M & N Whole dist. across 29.75 ch. Half the distance across $14.87\frac{1}{2}$ ch. And Commencing at the East meander line of Lot 1 on the Nebr. bank of the Old Mo. river bed about 20.00 ch. N. of the SE. cor. of Lot 1 in S 31 T 7 N. R. 16 E of 6th P. M. in Nebr. and run East to meet D. A. Quick Co. Surveyor Atchison Co. Mo. running from the Mo. side on a division of the Accretions & at 13.09 ch. set a stake & came out 1.15 ch. apart he N & me S. at half the difference $57\frac{1}{2}$ lks we set a Limestone $5 \times 14 \times 27$ in. Sqr. for the dividing line between Mo. & Nebr. Marked M & N. Whole distance across 26.18 chaines. Half the " " 13.09 chaines.

And Commencing at the meander corner on the Nebr. bank of the Old Mo. river bed at the intersection of the section line between S 30 & 31 in T 7, N. R 16 E of 6th P. M in Nebr. with the Old Mo River bed. It being the NE. cor. of Lot 1 in S 31 and the SE. cor. of Lot 3 in S 30, T 7, N. R 16 E and run East to meet D. A. Quick Surveyor of Atchison Co. Mo. Running from the Mo. side of the Old River bed on a division of the Accretions and at $13.32\frac{1}{2}$ ch. set a stake and came out 1.53 chaines apart he N and me S at half the difference between us $76\frac{1}{2}$ links set a Limestone $5 \times 14 \times 25$ inc. sqr. for the dividing line between Mo. and Nebr. Marked M and N.

Whole distance across 26.65 chaines.

Half the distance across $13.32\frac{1}{2}$ chaines.

V $9^{\circ} 30' E$

197 U. S.

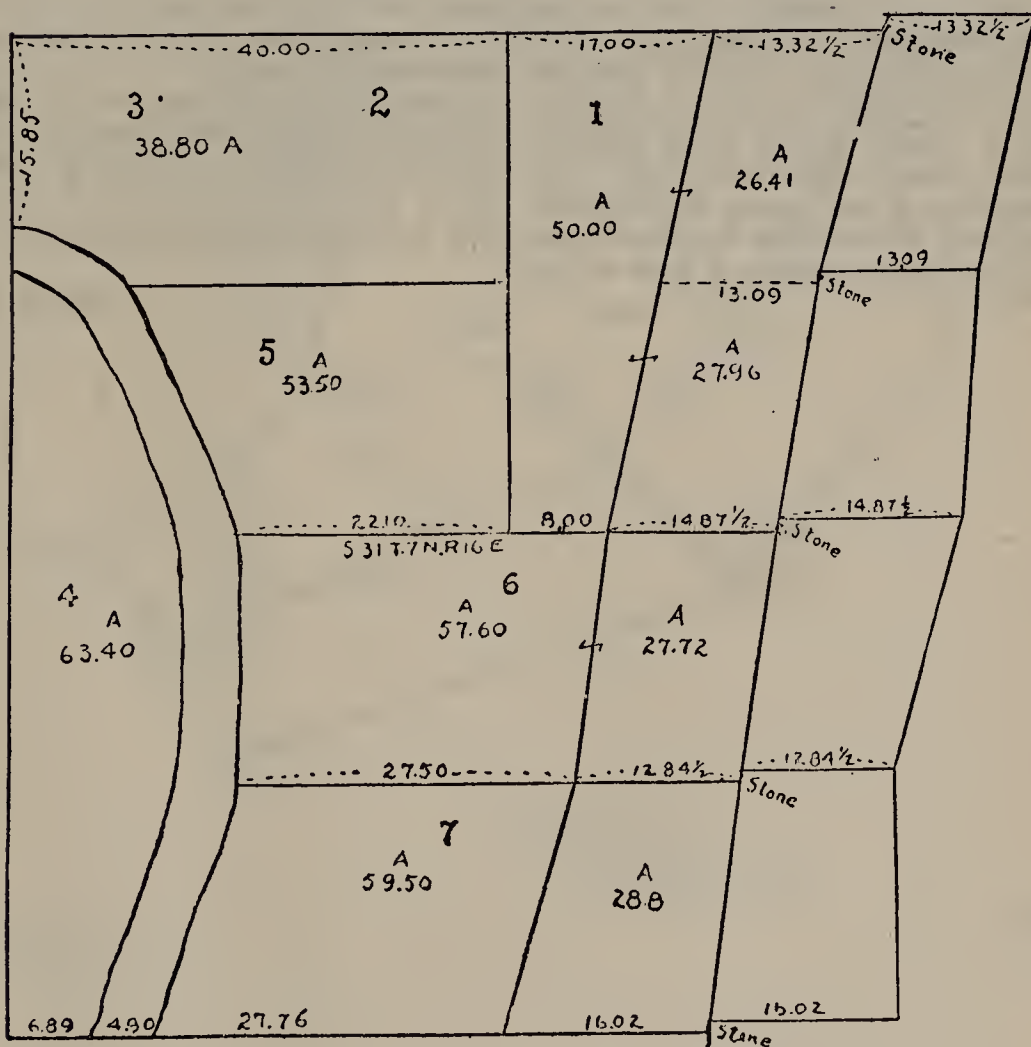
[606]

SURVEYOR'S RECORD

219

N° 8

PLAT.

Section 31, Township 7 N. Range 16 E of 6th P.M. Nebr.J. M. Hacker
County Surveyor.

[607]

*FIELD NOTES.

No. of Survey Date February 25th to March 29th 1895

Survey for Nemaha County Nebraska

At request of the Board of County Commissioners

Chainmen sworn W. T. Hacker and H. D. Hacker.

Point established Div. of Accretions to Sec. 6, Twp. 6 N, Rng. 16 E, 6th P. M.

Commencing at the meander corner of the Nebr. bank of the Old Mo. River bed at the intersection of the Township line between Towns. 6 and 7 N. of R. 16 E of the 6th P. M. in Nebr. with said river bed. Said corner being the N E. cor. of Lot 1 in S 6, T 6 N, R 16 E, and the S E. cor. of Lot 7 in S 31 T 7 N. R. 16 E. of 6th P. M in Nebr. And run East to meet D. A. Quick Surveyor of Atchison county Mo. running from the Mo. bank of the Old Mo. River bed on a division of Accretions in the Old Mo. river bed and at 16.02 ch. set a stake for half way and came out 89 links. apart he N and me S. at half the difference between us $44\frac{1}{2}$ lks we set a Limestone $6 \times 15 \times 35$ in. Sqr. for the dividing line between Mo. and Nebr. Marked M and N. Whole distance across 32.04 ch. Half the distance across 16.02 chaines. And commencing at the meander corner on the Nebr. bank of the Old Mo. River bed at the S. W cor. of Lot 1 and the S E cor of Lot

900

2 in Sec. 6, T 6, N. R 16 E of the 6th P. M. in Nebr. And run East for the purpose of meeting D. A. Quick Surveyor of Atchison co. Mo. running from the Mo. side of the Old Mo. River bed on a division of Accretions in the Old river bed and at $21.71\frac{1}{2}$ ch. set a stake and came out 3.48 ch. apart he N and me S. At half the difference between us 1.74 ch. we set a Limestone $6 \times 15 \times 40$ in. Sqr. for the dividing line between Mo. and Nebr. Marked M. and N.

Whole distance across 43.43 chaines. Half the distance across $21.71\frac{1}{2}$ chaines.

*Commencing at the meander corner at [608] the SW. cor. of Lot 1 and the SE. cor. of Lot 2 in S 6 T 6 N R 16 E of the 6th P. M. in Nebr. And run S 40° E to meet D. A. Quick Surveyor of Atchison Co. Mo. running from the Mo. side on a division of the Accretions, and at $15.68\frac{1}{2}$ ch. set a stake and came out 1.98 ch. apart he E and me W. at half the difference between us 99 lks. we set a Limestone $6 \times 13 \times 39$ in. Sqr. for the dividing line between Mo. and Nebr. Marked M & N. Whole distance across 31.37 ch. Half the distance across $15.68\frac{1}{2}$ ch.

Commencing at a stone set N 54° E 11.00 ch. from the SE. cor. of Lot 2 Sec 1 T 6 R 15 E and S 47° W 11.00 ch. from the SW. cor. of lot 2 in S 6 T 6. R 16 E 6th P. M. Nebr. and run S $33^\circ 30'$ E. 11.70 ch. more or less to the dividing line between Mo. and Nebr.

197 U. S.

[610]

*FIELD NOTES.

No. of Survey Date February 25th to March 29th 1895

Survey for Nemaha County Nebraska

At request of the Board of County Commissioners

Chainmen sworn W. T. Hacker and H. D. Hacker

Point established div. of Accretions to Sec. 1, Twp. 6 N, Rng. 15 E, 6th P. M.

Commencing at the meander corner on the Nebr. of the Old Mo. River bed at the SE. cor. of Lot 2 and the NE. cor. of Lot 3 in S 1 T 6 N. R 15 E of the 6th P. M. in Nebr. and run S $33^{\circ} 30'$ E and at 10.87 $\frac{1}{2}$ ch. met D. A. Quick Surveyor of Atchison Co. Mo. on a division of Accretions with a difference of 26 lk between us, we set a Limestone 6x15x41 in. Sqr. for the dividing line between Mo. and Nebr., Marked M and N.

Whole distance across 21.57 ch. Half the distance across 10.78 $\frac{1}{2}$ chaines.

Commencing on the Nebr. bank of the Old Mo. River bed at the SW. cor. of Lot 3, the SE. cor. of Lot 4 in S 1, T. 6, N R 15 E of 6th P. M. in Nebr. And run South and at 7.27 $\frac{1}{2}$ ch. & set a stake & met D. A. Quick Surveyor of Atchison Co. Mo. running from the Mo. bank of the old Mo. River bed, on a division of Accretions and came out with a

902

difference of 55 links he E and me W. at half the difference between us 27 $\frac{1}{2}$ lks. we set a Limestone 8x10x23 in. Sqr. for the dividing line between Mo. & Nebr. marked M. & N. Whole distance across 14.55 ch. Half the distance 7.27 $\frac{1}{2}$ ch.

Commencing on the Nebr. bank of the old Mo. River bed at the intersection of the section line between Sec 1 and 2 in T 6 N. R 15 E 6th P. M. in Nebr. with the Old Mo. River bed being the SW. cor. of Lot 5 in S 1 and the SE. cor. of Lot 8 in S 2 T 6 R 15 E in Neb. and run South and at 16.64 ch. set a stake and met D. A. Quick Surveyor of Atchison Co. Mo. running from the Mo. bank of the old Mo. River bed on a division *of Ac-^[611]cretions and came out 30 links apart he E and me West and at half the difference 15 lks. we set a Limestone 6x6x30 in. sqr. for the dividing line between Mo. and Nebr. Marked M and N. Whole distance across 33.28 chaines. Half the distance across 16.64 chaines.

Commencing on the Nebr. bank of the Old Mo. River bed at the SW. cor. of Lot 4 the SE. cor. of Lot 5 in S 1 T 6 N. R 15 E. 6th P. M. in Nebr. and run South 11.95 chaines more or less to the dividing line between Mo. and Nebr. and set a Limestone 10x12x16 inches sqr. Marked M and N.

197 U. S.

[612]

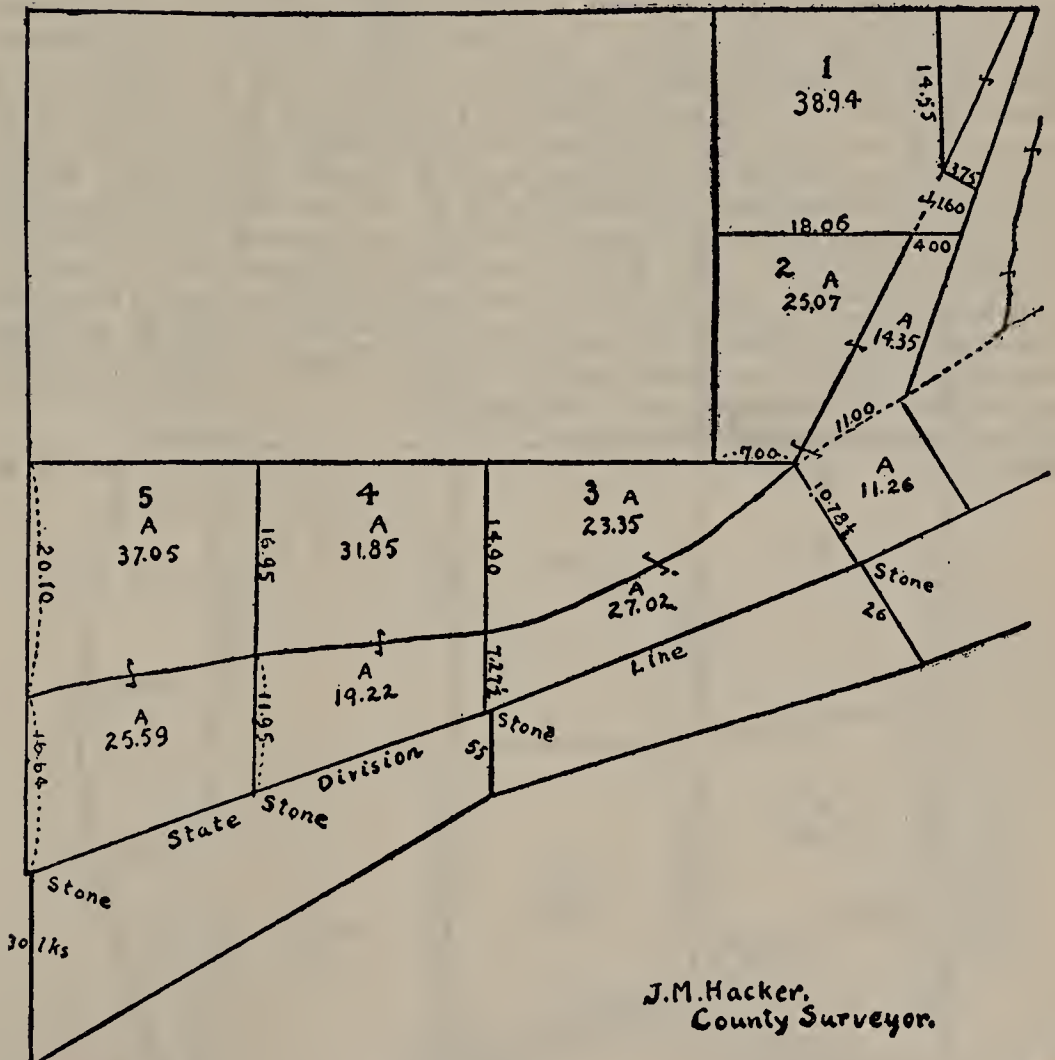
SURVEYOR'S RECORD

222.

Nº 10

PLAT.

Section 1. Township 6 N., Range 15 E. 6th P.M. Nebr.



[613]

*FIELD NOTES.

No. of Survey Date February 25th to March 29th 1895

Survey for Nemaha county Nebraska

At request of the Board of County Commissioners

Chainmen sworn W. T. Hacker and H. D. Hacker

Point established Div. of Accretions to Sec. 2, Twp. 6 N. Rng. 15 E, 6th P. M.

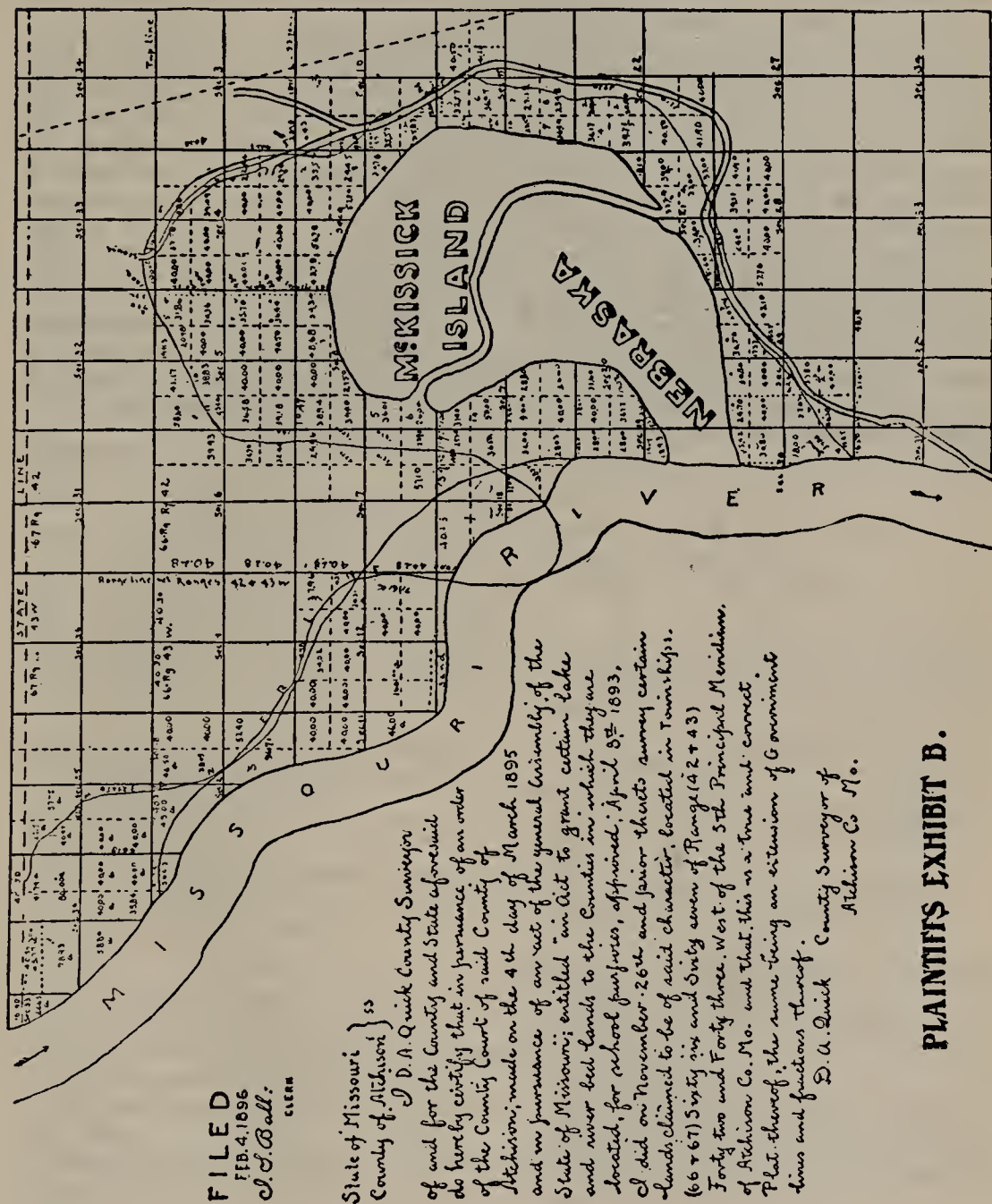
Commencing on the Nebr. bank of the Old Mo. river bed at the SW. cor. of Lot 5 in S 1 and SE. cor. of Lot 8 in S 2 T 6 N. R. 15 E and run South to meet Surveyor Quick running from the Mo. bank of said River bed on a division of Accretions, at 16.64 ch. set a stake and came out thirty lks W. of Quick's line at half the difference 15 lks. we set a Limestone 6x6x30 in. Sqr. for the dividing line between Mo & Nebr. Marked M & N. Whole distance across 33.28 chs

Commencing on the Nebr. bank of the Old Mo. river bed at the SW. cor. of Lot 7, and the SE. cor. of Lot 6 in S 2 T 6. R 15 E, and run South to meet Surveyor Quick running on a division of Accretions at 27.60½ ch. set a stake and was 3.84 ch. West of Quick at half the difference 1.92 ch. we set a Limestone 7x8x20 in. Sqr. for the dividing line between Mo. & Nebr. Marked M & N. Whole distance across 55.21 ch. Commencing on the Nebr. bank of the Old Mo. river bed at the SW. cor. of Lot 6 and the SE. cor. of Lot 5 in S 2 T 6 R 15 E and run South to meet Surveyor Quick running North on a division of Accretions at 32.36 ch. set a stake and was 80 links West of Quick's line at half the difference 40 lks we set a Limestone 7x14x23 in. Sqr for the dividing line between Mo. & Nebr. Marked M & N. Whole distance across 64.72 chs. Commencing on the Nebr. bank of the Old Mo. River bed at a corner 9.10 chs. West

of the NE. cor. of S 2, T 6 N. R 15 E and run N 47° W at 40.00 ch set a random stake and at 82.88 chs. came to a cor. on the Mo. bank of the Old Mo. river bed, Run with Surveyor Quick,— Correcting back we corrected the *stake set at 40.00 chs., to 41.44 ch. and set [614] a Limestone 7x12x25 in. Sqr. for the dividing line between Mo. & Nebr. Marked M. & N. Whole distance across 82.88 chs. Commencing on the Nebr. bank of the Old Mo. river bed at the NW. cor. of Lot 2 and NE. cor. of Lot 3 in S 2 T 6 R 15 E and run N 20° W at 40.00 chs. set a stake and at 86.42 chs. came to a Cor. on the Mo. bank of the Old Mo. river bed. Run with Surveyor Quick. Correcting back we corrected the stake set at 40.00 chs. to 43.21 chs. and set a Limestone 8x15x25 in. Sqr. as a Witness Corner N 50° E 3.00 ch. the true corner being in a hole of watter on the sand bar. Marked M & N and on the dividing line between Mo. & Nebr. The distance from the SE. cor. of Lot 4 S 2 T 6 R 15 E, North to the Mo. river is 13.99 ch. And from the SE. cor. of said Lot 4. West is 6.00 chs. to the Mo. River. And the distance from the NE. cor. of Lot 5 in said S 2 to the Mo. River is 10.50 chs. And South from the NE. cor. of said Lot 5 is 10.05 ch. to the old Mo. River bed. Then Commencing on the Nebr. bank of the Old Mo. river bed at the SE cor. of Lot 7, the SW. cor. of Lot 8 in S 2, T 6 R 15 E and run S. 20.70 chs. to the dividing line between Mo & Nebr. and set a Limestone 7x13x27 in Sqr. Marked M. & N. Dividing Accretions between Lots 7 & 8 S 2. Commencing at the NW cor. of Lot 1, the NE. cor. of Lot 2, in said S 2, and run N 30° W 41.44 chs. and set a stake at the dividing line between Mo and Nebr. Run to find the amount of Accretions to Lots 1 and 2 in S 2 T 6 N R 15 E of 6th P. M. in Nebraska.

[617]

Fractional Townships 66 and 67 North of Ranges 42 and 43 West of the 5th Principal Meridian covering land of Old Missouri River Bed.
This line shows Meander of Mo. River when the Government surveyed this land.



PLAINTIFFS EXHIBIT B.

- [618] *And it is further ordered, adjudged and decreed by the court that the commissioners heretofore appointed, namely, Alfred Hazlett, Esq., and John W. Halliburton, Esq., be, and they are hereby, directed to establish, or cause to be established, under their direction, permanent monuments marking said boundary line between the state of Missouri and the state of Nebraska, as shown by said aforesaid surveys, and that said commissioners establish such permanent monuments upon said boundary line as may in their opinion be necessary for permanently marking and establishing the same, and that they make a report to this court of their acts and doings therein, and that said report contain a full and complete description of said boundary line and the monuments thereon established. And that in the execution of this decree said commissioners are hereby authorized to employ such surveyors and other assistants, and procure such material as may be necessary in the establishment of said permanent monuments marking said boundary line, in accordance with the decree of this court.
- And it is further ordered that said commissioners be paid for their services herein such compensation as may be agreed upon by the respective parties to this suit and said commissioners, and if the parties to this suit and said commissioners are unable to agree upon said compensation, such compensation shall be awarded to said commissioners as in the opinion of this court, upon the filing of the final report by said commissioners, may seem proper.
- It is further ordered that said commissioners make said final report of their acts and doings in the premises to this court on or before the 15th day of May, 1905.
- March 6, 1905.
- 197 U. S.
- 908

MEMORANDA

OF

CASES DISPOSED OF WITHOUT OPINIONS.

[619] *EDWARD D. JOHNSON *et al.*, Appellants, v. ELIZABETH THOMAS. [No. 312.]

Appeal from the Court of Appeals of the District of Columbia.

See same case below, 23 App. D. C. 141.

Mr. S. Herbert Giesy for appellants.

Messrs. D. W. Baker and *Wm. Robert Andrews* for appellee.

February 27, 1905. *Dismissed* for the want of jurisdiction. *McLish v. Roff*, 141 U. S. 661, 35 L. ed. 893, 12 Sup. Ct. Rep. 118; *Lubin v. Edison*, 195 U. S. 625, ante, 349, 25 Sup. Ct. Rep. 790; *Lodge v. Twell*, 135 U. S. 235, 34 L. ed. 154, 10 Sup. Ct. Rep. 745; *Hasentine v. Central Nat. Bank*, 183 U. S. 130, 46 L. ed. 117, 22 Sup. Ct. Rep. 49.

EX PARTE: IN THE MATTER OF PETER MILLER and THOMAS SHEPPERSON, *Petitioners*. [No. —, Original.]

Motion for Leave to File Petition for Writs of Habeas Corpus.

Messrs. Thomas M. Patterson, *Charles S. Thomas*, and *Milton Smith* for petitioners. March 20, 1905. *Denied*.

W. J. WARDER, *Plaintiff in Error*, v. MRS. LAURA LOOMIS *et al.* [No. 201.]

In Error to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 61 C. C. A. 682, 127 Fed. 1022.

Messrs. Thomas H. Clark, *A. Seymour Thurmond*, and *Jay Good* for plaintiff in error.

Messrs. Millard Patterson and *T. J. Beall* for defendants in error.

April 10, 1905. *Dismissed* for the want of jurisdiction. *Spencer v. Duplan Silk Co.* 191 U. S. 526, 48 L. ed. 287, 24 Sup. Ct. Rep. 174; *Arbuckle v. Blackburn*, 191 U. S. 405, 48 L. ed. 239, 24 Sup. Ct. Rep. 148; *Continental Nat. Bank v. Buford*, 191 U. S. 119, 48 L. ed. 119, 24 Sup. Ct. Rep. 54; *Blackburn v. Portland Gold Min. Co.* 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222; *Washer v. Bullitt County*, 110 U. S. 558, 28 L. ed. 249, 4 Sup. Ct. Rep. 249.

197 U. S.

*LUDINGTON NOVELTY COMPANY, *Petitioner*, [620] v. CHARLES H. LEONARD *et al.* [No. 458.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 62 C. C. A. 269, 127 Fed. 155.

Messrs. Fred. L. Chappell and *Geo. A. Prevost* for petitioner.

Messrs. Edward Taggart and *Arthur C. Denison* for respondents.

February 27, 1905. *Denied*.

MERCHANTS & MINERS TRANSPORTATION COMPANY, Owner, etc., *et al.*, *Petitioners*, v. STEAMSHIP THORNHILL, etc. [No. 495.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 134 Fed. 1023.

Messrs. Robert H. Smith and *Daniel H. Hayne* for petitioners.

Mr. J. Parker Kirlin for respondent.

February 27, 1905. *Denied*.

JAMES TALCOTT *et al.*, *Petitioners*, v. HENRY FRIEND *et al.* [No. 525.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 134 Fed. 778.

Mr. Horace Kent Tenney for petitioners.

Messrs. Jacob Newman, *Benjn. V. Becker*, and *Solomon O. Levinson* for respondents.

February 27, 1905. *Denied*.

MARCELLUS E. THORNTON *et al.*, *Petitioners*, v. BOARD OF MAYOR & ALDERMEN OF THE CITY OF NATCHEZ *et al.* [No. 527.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 63 C. C. A. 526, 129 Fed. 84.

Mr. Wade R. Young for petitioners.

Messrs. E. J. Bowers and *Marcellus Green* for respondents.

February 27, 1905. *Denied*.

REMBERT ROLLER COMPRESS COMPANY, *Petitioner*, v. AMERICAN COTTON COMPANY *et al.* [No. 521.]

[621] *Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 64 C. C. A. 25, 129 Fed. 355.

Mr. Walter Gresham for petitioner.

No appearance for respondents.

March 6, 1905. *Denied.*

GEORGE E. ZARTMAN, as Trustee, *Petitioner*, v. FIRST NATIONAL BANK OF WATERLOO, N. Y. [No. 543.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 134 Fed. 345.

Mr. Geo. E. Zartman for petitioner.

Mr. W. H. Sholes for respondent.

March 6, 1905. *Denied.*

UNITED STATES LIFE INSURANCE COMPANY OF NEW YORK, *Petitioner*, v. AGNES McMAHON *et al.* [No. 533.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 133 Fed. 1022.

Mr. George Clark for petitioner.

Mr. A. L. Beaty and *C. H. Smith* for respondents.

March 13, 1905. *Denied.*

JOHN T. MCGRAW *et al.*, *Petitioners*, v. SAMUEL B. WOODS *et al.* [No. 540.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 63 C. C. A. 556, 127 Fed. 914.

Messrs. Holmes Conrad, John W. Holt, and *Melville D. Post* for petitioners.

Mr. L. L. Lewis for respondents.

March 20, 1905. *Denied.*

TENNESSEE OIL, GAS, & MINERAL COMPANY, *Petitioner*, v. F. D. BROWN *et al.* [No. 551.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 65 C. C. A. 524, 131 Fed. 696.

Messrs. Harvey D. Goulder and *H. H. Ingersoll* for petitioner.

Messrs. Edward T. Sanford and *C. E. Lucky* for respondents.

April 3, 1905. *Denied.*

*CENTRAL COMMERCIAL COMPANY, *Petitioner*—[622] *er*, v. CHICAGO TITLE & TRUST COMPANY, Trustee, *et al.* [No. 557.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 133 Fed. 388.

Mr. Lewis W. Parker for petitioner.

No opposition.

April 3, 1905. *Denied.*

BOSTON WATER & LIGHT COMPANY *et al.*, *Petitioners*, v. FARMERS' LOAN & TRUST COMPANY, Trustee, *et al.* [No. 558.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Messrs. S. S. Gregory and *C. H. Poppenhusen* for petitioners.

Messrs. John S. Runnells and *William Burry* for respondents.

April 3, 1905. *Denied.*

NEW ENGLAND WATER WORKS COMPANY *et al.*, *Petitioners*, v. FARMERS' LOAN & TRUST COMPANY, Trustee, *et al.* [No. 559.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Mr. James Hamilton Lewis for petitioners.

Messrs. John S. Runnells and *William Burry* for respondents.

April 3, 1905. *Denied.*

IONIA TRANSPORTATION COMPANY, *Petitioner*, v. J. I. CASE THRESHING MACHINE COMPANY, Claimant, *etc.* [No. 567.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 135 Fed. 317.

Mr. John C. Rieberg for petitioner.

Mr. George D. Van Dyke for respondent.

April 3, 1905. *Denied.*

FIRST NATIONAL BANK OF BALTIMORE, *Petitioner*, v. WILLIAM H. STAAKE, Trustee, *etc.*, *et al.* [No. 583]; HENRY K. MCHARG *et al.*, Receivers, *etc.*, *et al.*, *Petitioners*, v. WILLIAM H. STAAKE, Trustee, *etc.* [No. 584].

*Petitions for Writs of Certiorari to the [623] United States Circuit Court of Appeals for the Fourth Circuit.

Mr. S. Hamilton Graves for petitioners.

Mr. H. Gordon McCouch for respondents.

April 10, 1905. *Granted.*

KANSAS CITY SOUTHERN RAILWAY COMPANY, *Petitioner*, v. CLARK PRUNTY. [No. 547.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 133 Fed. 13.

Mr. Samuel W. Moore for petitioner.

No opposition.

April 10, 1905. *Denied*.

ALBERT C. GUNNISON *et al.*, *Petitioners*, v. CHICAGO, MILWAUKEE, & ST. PAUL RAILWAY COMPANY. [No. 577.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 64 C. C. A. 505, 130 Fed. 259.

Messrs. Wm. F. Vilas, Jno. C. Spooner, and J. R. Sanborn for petitioners.

Messrs. George R. Peck, Burton Hanson, and C. H. Van Alstine for respondent.

April 10, 1905. *Denied*.

MEMPHIS CONSOLIDATED GAS & ELECTRIC COMPANY, *Petitioner*, v. JANE LETSON. [No. 580.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 135 Fed. 969

Mr. T. B. Turley for petitioner.

No opposition.

April 10, 1905. *Denied*.

CHARLES E. MOORE *et al.*, *Petitioners*, v. ROBERT B. PETTY *et al.*, Executors, etc. [No. 585.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 135 Fed. 668.

Mr. Elbert H. Hubbard for petitioners.

No opposition.

April 10, 1905. *Denied*.

STRATTON'S INDEPENDENCE, Limited, *Petitioner*, v. TYSON S. DINES *et al.*, Executors, etc., *et al.* [No. 589.]

[624] Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 135 Fed. 449.

Messrs. Samuel Untermeyer and Louis Marshall for petitioner.

Mr. L. M. Goddard for respondents.

April 10, 1905. *Denied*.

197 U. S.

WESTERN ELECTRIC COMPANY, *Petitioner*, v. JOHN F. HANSELMANN, JR. [No. 593.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 136 Fed. 564.

Mr. John Notman for petitioner.

Mr. John F. Hanselmann, Jr., p. p.

April 10, 1905. *Denied*.

GREAT NORTHERN RAILWAY COMPANY, *Petitioner*, v. WILLIAM C. FOWLER. [No. 594.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 136 Fed. 118.

Messrs. Luthene C. Gilman and James B. Howe for petitioner.

No opposition.

April 10, 1905. *Denied*.

UNITED ENGINEERING & CONTRACTING COMPANY, *Petitioner*, v. FRANCIS BROADNAX. [No. 595.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 136 Fed. 351.

Messrs. L. Laflin Kellogg, Alfred C. Pette, and Franklin Nevins for petitioner.

Messrs. Andrew Wilson and Noel W. Barksdale for respondent.

April 10, 1905. *Denied*.

HENRY F. MCCLURE *et al.*, *Plaintiffs in Error*, v. UNITED STATES MORTGAGE & TRUST COMPANY. [No. 437.]

In Error to the Supreme Court of the State of Oregon.

See same case below, 42 Or. 190, 70 Pac. 543.

Mr. John H. Mitchell for plaintiffs in error.

Mr. John H. Hale for defendant in error.

March 3, 1905. *Dismissed, with costs, on [625] motion of Mr. John H. Mitchell for the plaintiffs in error.

RUSSELL SAGE, as Assignee, etc., *Plaintiff in Error*, v. THEODORE A. MAXWELL *et al.* [No. 270]; RUSSELL SAGE, as Assignee, etc., *Plaintiff in Error*, v. HENRY MUNSTERMAN *et al.* [No. 271.]

In Error to the Supreme Court of the State of Minnesota.

Messrs. A. B. Browne, Alex. Britton, and Owen Morris for plaintiff in error.

Mr. E. T. Young for defendants in error.

March 20, 1905. *Dismissed*, per stipulation, on motion of Mr. A. B. Browne for the plaintiff in error.

DISTRICT OF COLUMBIA, *Appellant, v. COLUMBUS J. ESLIN, Administrator, et al.* [No. 265]; COLUMBUS J. ESLIN, Administrator, etc., *Appellant, v. DISTRICT OF COLUMBIA* [No. 266]; SAMUEL J. RITCHIE, *Appellant, v. DISTRICT OF COLUMBIA* [No. 293]; WILLIAM A. GORDON *et al.*, Executors, etc., *Appellants, v. DISTRICT OF COLUMBIA* [No. 296].

Appeals from the Court of Claims.

See same case below, 39 Ct. Cl. 557.

The Attorney General and Solicitor General Hoyt for District of Columbia.

Mr. Wm. B. King for Eslin, Administrator.

Mr. John J. Hemphill for Ritchie.

Mr. J. W. Douglass for Gordon *et al.*, Executors.

April 3, 1905. *Dismissed*, per stipulation, on motion of *Mr. Solicitor General Hoyt*.

ENOCH HUNSAKER, *Plaintiff in Error, v. TOLTEC RANCH COMPANY.* [No. 207.]

In Error to the Circuit Court of the United States for the District of Utah.

Mr. B. Howell Jones for plaintiff in error.

No appearance for defendant in error.

April 5, 1905. *Dismissed*, with costs, pursuant to the Tenth Rule.

*AMERICAN SURETY COMPANY, *Appellant, v.* [626] WILLIS G. BOWLAND *et al.* [No. 348]; FIDELITY & CASUALTY COMPANY, *Appellant, v. WILLIS G. BOWLAND et al.* [No. 349]; AMERICAN BONDING & TRUST COMPANY, *Appellant, v. WILLIS G. BOWLAND et al.* [No. 350].

Appeals from the Circuit Court of the United States for the Southern District of Ohio.

Mr. Hartwell Cabell for appellants.

Mr. Augustus T. Scymour for appellees.

April 3, 1905. *Dismissed*, per stipulation.

LOUIS AUGUSTE MARANDE *et al.*, *Plaintiffs in Error, v. TEXAS & PACIFIC RAILWAY COMPANY.* [No. 402.]

In Error to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 59 C. C. A. 567, 124 Fed. 42.

Mr. Treadwell Cleveland for plaintiffs in error.

Mr. Rush Taggart for defendant in error.

April 10, 1905. *Dismissed*, per stipulation.

CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

AT

OCTOBER TERM, 1904.

Vol. 198.

REFERENCE TABLE

OF SUCH CASES

DECIDED IN U. S. SUPREME COURT,

OCTOBER TERM, 1904,

AND REPORTED HEREIN,

VOLUME 198,

AS ALSO APPEAR IN

OFFICIAL REPORTER'S EDITION.

Off. Rep. 198 U. S.	Title.	Here in.	Off. Rep. 198 U. S.	Title.	Here in.
1-2	Benson v. Henkel	919	95	Remington v. Central Pac. R. Co.	959
2	" "	920			
8-9	" "	921	96-98	" "	962
9-12	" "	922	98-100	" "	963
12-14	" "	923	100	{ Covington v. First Nat. Bank	
14-17	" "	924		{ First Nat. Bank v. Covington	963
17	" "	925	101-102	" "	964
17	Pabst Brewing Co. v. Crenshaw	925	102-104	" "	965
21-23	" "	927	107-109	" "	967
23-25	" "	928	109-111	" "	968
25-28	" "	929	111-113	" "	969
28-30	" "	930	113-115	" "	970
30-33	" "	931	115	Bonin v. Gulf Co.	970
33-35	" "	932	116-117	" "	971
35-37	" "	933	117-118	" "	972
37-40	" "	934	118-119	Howe Scale Co. v. Wyckoff, Seamans, & Benedict	972
40-42	" "	935			
42-45	" "	936	119-121	" "	973
45-47	Lochner v. New York	937	121-124	" "	974
52	" "	939	134-136	" "	984
52-55	" "	940	136-139	" "	985
55-57	" "	941	139-140	" "	986
57-60	" "	942	141	Steigleder v. McQuesten	986
60-62	" "	943	141-143	" "	987
62-64	" "	944	143	" "	988
64-67	" "	945	144	Jaster v. Currie	988
67-69	" "	946	146-148	" "	989
69-71	" "	947	148-149	" "	990
71-74	" "	948	149-150	Allen v. Arguinban	990
74-76	" "	949	150-152	" "	991
77-79	{ Beavers v. Haubert		152	" "	992
	{ Beavers v. United States	950	154-156	" "	993
79	" "	951	156	Rodriguez v. United States	994
84-85	" "	953	157-159	" "	995
85-88	" "	954	159	" "	996
88-90	" "	955	161-163	" "	996
90-91	" "	956	163-165	" "	997
91	Humphrey v. Tatman	956	166-168	Dunbar v. Green	998
92	" "	957	168-170	" "	999
92-95	" "	958	171-173	Glaser, Re	1000
95	" "	959	173	Schlosser v. Hemphill	1000

REFERENCE TABLE.

Off. Rep. 198 U. S.	Title.	Here in.	Off. Rep. 198 U. S.	Title.	Here in.
173-174	Schlosser v. Hemphill	1001	292-293	Empire State-Idaho Min. & D.	
174-175	" "	1002		Co. v. Hanley	1056
175-176	" "	1003	293-294	" "	1057
177	W. L. Wells Co. v. Gastonia		296-298	" "	1058
	Cotton Mfg. Co.	1003	298	" "	1059
177-179	" "	1005	299-300	Old Dominion S. S. Co. v. Vir-	
182	" "	1005		ginia	1059
182-185	" "	1006	300-302	" "	1060
185-187	" "	1007	302	" "	1061
187-188	" "	1008	305-307	" "	1062
188-189	Riverdale Cotton Mills v. Ala-		307-310	" "	1063
	bama & G. Mfg. Co.	1008	310	Thompson v. Darden	1064
189-191	" "	1009	313-315	" "	1065
192	" "	1013	315-317	" "	1066
192-194	" "	1014	317	Harding v. Harding	1066
194-197	" "	1015	324-326	" "	1070
197-199	" "	1016	326-328	" "	1071
199-202	" "	1017	328-331	" "	1072
202	" "	1018	331-333	" "	1073
202-203	Holden v. Stratton	1018	333-336	" "	1074
204-205	" "	1019	336-338	" "	1075
207	" "	1019	338-341	" "	1076
207-209	" "	1020	341-343	Delaware, L. & W. R. Co. v.	
209-212	" "	1021		Pennsylvania	1077
212-214	" "	1022	343-346	" "	1078
214-215	" "	1023	346-348	" "	1079
215-216	Harris v. Balk	1023	348-349	" "	1080
216-217	" "	1024	352-353	" "	1081
221-223	" "	1026	353-355	" "	1082
223-225	" "	1027	355-358	" "	1083
225-228	" "	1028	358-360	" "	1084
228	" "	1029	360-361	" "	1085
229	Harley v. United States	1029	361-362	Clark v. Nash	1085
229-231	" "	1030	362-365	" "	1086
234	" "	1030	365	" "	1087
234-236	" "	1031	367-368	" "	1087
236	{ Chicago Board of Trade v.		368-370	" "	1088
	Christie Grain & Stock Co.		370	" "	1089
	{ L. A. Kinsey Co. v. Chicago		371	United States v. Winans	1089
	Board of Trade	1031	377-379	" "	1091
245-247	" "	1037	379-381	" "	1092
247-249	" "	1038	381-384	" "	1093
249-252	" "	1039	384	" "	1094
252-253	" "	1040	385-386	Chicago, M. & St. P. R. Co. v.	
253	United States v. Ju Toy	1040		United States	1094
258-259	" "	1042	386-389	" "	1095
259-262	" "	1043	389	" "	1096
262-264	" "	1044	390	{ Birrell v. New York & H.	
264-267	" "	1045		R. Co.	
267-269	" "	1046		{ Kierns v. New York & H. R.	
269-271	" "	1047		Co.	1096
271-274	" "	1048	390-392	" "	1097
274-276	" "	1049	392	Savannah, T. & I. of H. R. Co.	
276-279	" "	1050		v. Savannah	1097
279-280	" "	1051	396-397	" "	1099
280-281	First Nat. Bank v. Chicago		397-399	" "	1100
	Title & Trust Co.	1051	399	Cimiotti Unhairing Co. v.	
281-284	" "	1052		American Fur Ref. Co.	1100
284-285	" "	1053	399-402	" "	1101
288-289	" "	1054	403	" "	1102
289-291	" "	1055	403-406	" "	1103
291-292	" "	1056	406-408	" "	1104

REFERENCE TABLE

Off. Rep. 198 U. S.	Title.	Here in.	Off. Rep. 198 U. S.	Title.	Here in.
408-411	Cimiotti Unhairing Co. v. American Fur Ref. Co.	1105	485-487	Louisville & N. R. Co. v. West Coast Naval Stores Co.	1137
411-413	" "	1106	492-495	" "	1139
413-415	" "	1107	495-497	" "	1140
415-416	" "	1108	497-499	" "	1141
416-417	Leonard v. Vicksburg, S. & P. R. Co.	1108	499-500	" "	1142
417-419	" "	1109	500	Ah Sin v. Wittman	1142
419-421	" "	1110	502-505	" "	1144
421-423	" "	1111	505-507	" "	1145
424	Chicago Board of Trade v. Hammond Elevator Co.	1111	507-508	" "	1146
424-425	" "	1112	508	Supreme Lodge Knights of Pythias v. Meyer	1146
432-433	" "	1115	515-516	" "	1148
433-435	" "	1116	516-519	" "	1149
435-438	" "	1117	519-520	" "	1150
438-440	" "	1118	521	Texas & P. R. Co. v. Dashiell	1150
440-442	" "	1119	523-524	" "	1151
443	Lavagnino v. Uhlig	1119	524-527	" "	1152
443-444	" "	1120	527-529	" "	1153
444-446	" "	1121	530	Union Trust Co. v. Wilson	1154
448-449	" "	1121	534-536	" "	1155
449-451	" "	1122	536-538	" "	1156
451-454	" "	1123	538-539	" "	1157
454-456	" "	1124	539-541	Whitney v. Wenman	1157
456-457	" "	1125	541-543	" "	1158
458	Cunnius v. Reading School Dist.	1125	548-550	" "	1159
458-459	" "	1127	550-552	" "	1160
459-461	" "	1128	552-553	" "	1161
461-462	" "	1129	554	Van Reed v. People's Nat. Bank	1161
467-468	" "	1129	554-555	" "	1162
468-471	" "	1130	557-559	" "	1162
471-473	" "	1131	559-560	" "	1163
473-476	" "	1132	561	Great Western Min. & Mfg. Co. v. Harris	1163
476-477	" "	1133	561-564	" "	1164
477-478	Kendall v. American Auto- matic Loom Co.	1133	564-566	" "	1165
478-480	" "	1134	566-568	" "	1166
482-483	" "	1135	573-574	" "	1167
483	Louisville & N. R. Co. v. West Coast Naval Stores Co.	1135	574-576	" "	1168
483-485	" "	1136	576-578	" "	1169
198 U. S.			579-589	Memorandum Cases	1171-1175

THE DECISIONS
OF THE
Supreme Court of the United States

AT
OCTOBER TERM, 1904.

[1] *JOHN A. BENSON, Appt.,

v.

WILLIAM HENKEL, United States Marshal.

(See S. C. Reporter's ed. 1-17.)

Criminal law—removal to another Federal district for trial—sufficiency of indictment—removal to District of Columbia—jurisdiction of offense begun in one Federal district and completed in another.

1. Objections to an indictment charging a violation of U. S. Rev. Stat. § 5451 (U. S. Comp. Stat. 1901, p. 3680), in bribing two Federal officers to reveal the contents of certain reports pertaining to an investigation then pending in the Land Department with respect to certain frauds used in obtaining public lands, are not available in proceedings before a United States commissioner for the removal of the accused to another Federal district for trial, where such objections raise the questions whether the statute applied to reports which had not yet been filed and might never be filed, or whether the words of the statute, "which may at any time be pending, or which may by law be brought before him in his official capacity," apply to the pendency of the investigation or to the pendency of an obligation not to reveal the contents of a paper then in the officer's possession, or whether the revealing of the contents of such reports was forbidden by any lawful authority, there being no statute imposing such obligation; but such questions should be determined by the court in which the indictment was found.
2. The District of Columbia is a district of the United States within the meaning of U. S. Rev. Stat. § 1014 (U. S. Comp. Stat. 1901, p. 716), authorizing the removal for trial of a person charged with an offense against the United States to the Federal district where

the trial is to be had, although this section was taken from the judiciary act of 1789, when the District of Columbia was not in existence.

3. The supreme court of the District of Columbia must be deemed a "court of the United States" within the meaning of U. S. Rev. Stat. § 1014, authorizing the removal of a person charged with an offense against the United States cognizable by a court of the United States to the Federal district where the trial is to be had, in view of the act of June 22, 1874 (18 Stat. at L. 193, chap. 396), making applicable to the courts of the District the sections of the original judiciary act from which § 1014 was taken, and of the powers given to that court as a court of the United States by D. C. Code, § 61, and of the provision of § 1 of that Code (31 Stat. at L. 1189, chap. 854), making applicable to the District all general acts of Congress "not locally inapplicable."
4. The crime of bribing a public officer in violation of U. S. Rev. Stat. § 5451, when begun by mailing a letter containing the money in one Federal district, and completed by the receipt of the letter in another district, is triable in the latter district.

[No. 308.]

Argued February 20, 21, 1905. Decided
April 17, 1905.

APPEAL from the Circuit Court of the United States for the Southern District of New York to review an order dismissing a writ of habeas corpus to inquire into a detention to await a warrant for the removal of a person charged with an offense against the United States to the Federal district where the trial was to be had. *Affirmed.*

See same case below, 130 Fed. 486.

Statement by Mr. Justice **Brown**:

*This was an appeal from an order dismissing a writ of habeas corpus, and remanding appellant to the custody of the

NOTE.—On the removal to another Federal district for trial of a person there charged with an offense against the United States—see note to *Greene v. Henkel*, 46 L. ed. U. S. 177.

marshal to await the action of the district judge.

On December 31, 1903, an indictment was found by the grand jury of the District of Columbia, charging appellant with a violation of Rev. Stat. § 5451 (U. S. Comp. Stat. 1901, p. 3680), in bribing an officer of the United States to do an act in violation of his official duty. Appellant was arrested in the southern district of New York, upon a warrant issued by a United States commissioner, which warrant was issued upon the complaint of a special agent of the Interior Department, to which a copy of the indictment was annexed. Appellant demanded an examination before the commissioner, in the course of which witnesses were examined on behalf of the government, and a certified copy of the indictment was admitted as evidence. No material testimony was offered on behalf of the defendant. The commissioner found there was probable cause, and remanded defendant to the custody of the marshal to await a warrant for his removal. Immediately thereafter appellant applied for a writ of habeas corpus and certiorari. At the close of the hearing he was remanded to the custody of the marshal. 130 Fed. 486.

Mr. Frank H. Platt argued the cause and filed a brief for appellant:

The sufficiency of the charge of a crime is jurisdictional. It has always been held that the writ of habeas corpus is a proper instrument to secure the release of a prisoner held under order or sentence of a tribunal which acted without jurisdiction and whose process was consequently void.

Re Nielsen, 131 U. S. 176, 33 L. ed. 118, 9 Sup. Ct. Rep. 672; *Re Coy*, 127 U. S. 731, 32 L. ed. 274, 8 Sup. Ct. Rep. 1263; *Re Snow*, 120 U. S. 274, 30 L. ed. 658, 7 Sup. Ct. Rep. 556; *Re Sawyer*, 124 U. S. 200, 31 L. ed. 402, 8 Sup. Ct. Rep. 482; *Ex parte Bain*, 121 U. S. 1, 30 L. ed. 849, 7 Sup. Ct. Rep. 781; *Re Ayers*, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164; *Ex parte Siebold*, 100 U. S. 371, 25 L. ed. 717; *Ohio v. Thomas*, 173 U. S. 276, 43 L. ed. 699, 19 Sup. Ct. Rep. 453.

It has been the practice in all Federal jurisdictions in removal proceedings to determine whether the indictment sufficiently charges a crime, and to discharge the prisoner if it does not.

Stewart v. United States, 55 C. C. A. 641, 119 Fed. 89; *Re Buell*, 3 Dill. 116, Fed. Cas. No. 2,102; *Re Terrell*, 51 Fed. 213; *Re Corning*, 51 Fed. 205; *Re Dana*, 68 Fed. 886; *United States v. Lee*, 84 Fed. 626; *Re Greene*, 52 Fed. 104; *Re Belknap*, 96 Fed. 614; *Re Huntington*, 68 Fed. 881; *United States v. Conners*, 111 Fed. 734; *Re Doig*,

4 Fed. 193; *Re Palliser* (*Palliser v. United States*) 136 U. S. 257, 34 L. ed. 514, 10 Sup. Ct. Rep. 1034.

The District of Columbia did not exist at the time of the enactment of § 33 of the judiciary act of 1789, and was not, therefore, within its contemplation. It has never been constituted or included within one of the Federal judicial districts, and is not, therefore, within the provisions of U. S. Rev. Stat. § 1014, U. S. Comp. Stat. 1901, p. 716.

Re Dana, 68 Fed. 886; *United States v. Burr*, Fed. Cas. No. 14,694, a.

Territorial courts created under the power of Congress to legislate for the territories of the United States are not courts of the United States.

McAllister v. United States, 141 U. S. 174, 35 L. ed. 693, 11 Sup. Ct. Rep. 949; *Wingard v. United States*, 141 U. S. 201, 35 L. ed. 719, 11 Sup. Ct. Rep. 959; *The Coquitlam v. United States*, 163 U. S. 346, 41 L. ed. 184, 16 Sup. Ct. Rep. 1117; *Thiede v. Utah*, 159 U. S. 510, 40 L. ed. 237, 16 Sup. Ct. Rep. 62; *United States v. McMillan*, 165 U. S. 510, 41 L. ed. 807, 17 Sup. Ct. Rep. 395; *Corbus v. Leonhardt*, 51 C. C. A. 636, 114 Fed. 12; *Jackson v. United States*, 42 C. C. A. 452, 102 Fed. 473.

The courts created for the District of Columbia are created under a legislative power in effect identical with that under which territorial courts are constituted.

The fact that the judges of the District of Columbia are appointed to hold office during good behavior does not alter the situation.

McAllister v. United States, 141 U. S. 185, 186, 35 L. ed. 696, 11 Sup. Ct. Rep. 949.

If any crime was committed by the appellant in the present case, it was a complete crime in the state of California, and he is entitled to a trial in that jurisdiction, and that jurisdiction alone.

United States v. Worrall, 2 Dall. 384, 388, 1 L. ed. 426, 427, Fed. Cas. No. 16,766; *United States v. Plympton*, 4 Cranch, C. C. 309, Fed. Cas. No. 16,057; *United States v. Bickford*, 4 Blatchf. 337, Fed. Cas. No. 14,591; *United States v. Fowkes*, 3 C. C. A. 394, 3 U. S. App. 247, 53 Fed. 13; *Landa v. State*, 26 Tex. App. 580, 10 S. W. 218; *Com. v. Dorrance*, 14 Phila. 671; *United States v. Guiteau*, 1 Mackey, 564, appx.

Mr. J. C. Campbell also argued the cause for appellant.

Mr. James Russell Soley filed a brief for appellant in opposition to a motion to advance.

Mr. Francis J. Heney argued the cause,
198 U. S.

and, with *Solicitor General Hoyt* and *Mr. Arthur B. Pugh*, filed a brief for appellee:

Technical objections to an indictment are to be determined by the court in which it was found, and are not matters of inquiry in removal proceedings.

Greene v. Henkel, 183 U. S. 249, 261, 262, 46 L. ed. 177, 189, 190, 22 Sup. Ct. Rep. 218; *Beavers v. Henkel*, 194 U. S. 73, 87, 48 L. ed. 882, 887, 24 Sup. Ct. Rep. 605.

The writ of habeas corpus cannot be used as a writ of error to review the action of a commissioner or other officer under U. S. Rev. Stat. § 1014, U. S. Comp. Stat. 1901, p. 716, either upon questions of evidence or upon questions of law relating to the sufficiency of the indictment.

Greene v. Henkel, 183 U. S. 261, 46 L. ed. 189, 22 Sup. Ct. Rep. 218; *Horner v. United States*, 143 U. S. 570, 577, 578, 36 L. ed. 266, 269, 12 Sup. Ct. Rep. 522; *Ex parte Rickelt*, 61 Fed. 203; *Ex parte Parks*, 93 U. S. 18, 23, 23 L. ed. 787, 788; *Ex parte Yarbrough*, 110 U. S. 651, 653, 28 L. ed. 274, 4 Sup. Ct. Rep. 152; *Stevens v. Fuller*, 136 U. S. 468, 477, 34 L. ed. 461, 10 Sup. Ct. Rep. 911.

Courts of general jurisdiction in the District of Columbia have always been regarded as courts of the United States, even prior to the enactment of the new Code.

See *Moss v. United States*, 23 App. D. C. 475; *Embry v. Palmer*, 107 U. S. 3, 9, 10, 27 L. ed. 346, 349, 2 Sup. Ct. Rep. 25; *Phillips v. Negley*, 117 U. S. 665, 674, 675, 29 L. ed. 1013, 1015, 6 Sup. Ct. Rep. 901.

In *United States v. Haskins*, 3 Sawy. 262, Fed. Cas. No. 15,322, the United States district court of California held that for a Federal offense committed in the territory of Utah the offender may be arrested in any district of the United States and removed to the territory for trial if the territorial courts have cognizance of the offense, and that the territorial courts are "courts of the United States," as that designation is applied in § 33 of the judiciary act.

In *Burton v. United States*, 196 U. S. 293, ante, 482, 25 Sup. Ct. Rep. 243, it seems to have been taken for granted by this court that the term "district," used in article 6 of the Amendments to the Constitution, providing for trial of a person charged with crime by a jury of the state and district in which the crime was committed, and in U. S. Rev. Stat. § 731, U. S. Comp. Stat. 1901, p. 585, providing that offenses begun in one "judicial circuit" (meaning judicial district, *Horner v. United States*, 143 U. S. 570, 36 L. ed. 266, 12 Sup. Ct. Rep. 522) and completed in another may be tried and punished in either district, was intended to embrace the District of Columbia as well as other districts of the United States; or, at
198 U. S.

least, that in matters of venue in criminal cases the term "district" is applicable interchangeably to the District of Columbia and other districts of the United States.

All laws must be construed, if possible, to prevent absurd or mischievous results.

Lau Ow Bew v. United States, 144 U. S. 47, 59, 36 L. ed. 340, 344, 12 Sup. Ct. Rep. 517.

Mr. Justice **Brown** delivered the opinion of the court:

But three questions are raised by the arguments and briefs of counsel in this case:

1. That the indictment charges no crime against the United States.

2. That the District of Columbia is not a district of the United States within the meaning of Rev. Stat. § 1014 (U. S. Comp. Stat. 1901, p. 716), authorizing the removal of accused persons from one district to another.

3. That the crime was committed in California, and is only triable there.

*The indictment is founded upon Rev.[9] Stat. § 5451, which enacts that "every person who promises, offers, or gives . . . any money or other thing of value . . . to any officer of the United States, or to any person acting for or on behalf of the United States in any official function, under or by authority of any department or office of the government thereof, . . . with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, . . . or with intent . . . to induce him to do, or omit to do, any act in violation of his lawful duty, shall be punished as prescribed," etc.

The first three counts of the indictment charge, in substance, that the defendant was engaged with one Hyde, at San Francisco, California, in the business of unlawfully obtaining the public lands of the United States; that an investigation by special agents of the Land Department of the unlawful transactions so charged was ordered by the Secretary of the Interior; and it became the duty of such agents to make reports to the Secretary, the contents of which should not be revealed to any unofficial person; that at this time a department clerk was acting as chief of the special service division of the General Land Office, whose duty it was to act upon all reports of such special agents, and to preserve and keep for the exclusive use of the Land Department all such reports; and that pending such investigation the defendant unlawfully gave to such officer, in the District of Columbia, certain sums of money, with the intent to induce him to do an act in violation of his

lawful duty,—that is to say, to reveal to defendant the contents of the reports of such special agents relating to said investigation. These counts are representative of all the others, one of which is based upon the payment of money to another officer of the United States, with like intent.

(1) Objection is made to the indictment upon the ground that at the time of payments to these officers the special agents' report had not come into their possession or
10] knowledge, *and there is no allegation to prove that it ever would; that they had no duty concerning it; that it was not shown that they ever would have such duty; and that a charge of bribery cannot be based upon payment to an officer to induce him to perform an act, as to which he has no duty, and may never have any duty. (2) That neither of these officers was forbidden by any lawful duty to reveal to Benson the contents of any report, even if they ever should come into a position to do so. Upon these grounds it is insisted that the indictment charges no offense against the United States under § 5451.

1. The extent to which a commissioner in extradition may inquire into the validity of an indictment put in evidence before him, as proof of probable cause of guilt, has never been definitely settled, although we have had frequent occasion to hold generally that technical objections should not be considered, and that the legal sufficiency of the indictment is only to be determined by the court in which it is found. *Ex parte Reggel*, 114 U. S. 642, 650, 29 L. ed. 250, 252, 5 Sup. Ct. Rep. 1148; *Roberts v. Reilly*, 116 U. S. 80, 96, 29 L. ed. 544, 6 Sup. Ct. Rep. 291; *Horner v. United States*, 143 U. S. 570, 577, 36 L. ed. 266, 269, 12 Sup. Ct. Rep. 522; *Greene v. Henkel*, 183 U. S. 249, 260, 46 L. ed. 177, 22 Sup. Ct. Rep. 218; *Beavers v. Henkel*, 194 U. S. 73, 87, 48 L. ed. 882, 887, 24 Sup. Ct. Rep. 605.

Indeed, it is scarcely seemly for a committing magistrate to examine closely into the validity of an indictment found in a Federal court of another district, and subject to be passed upon by such court on demurrer or otherwise. Of course, this rule has its limitations. If the indictment were a mere information, or obviously, upon inspection, set forth no crime against the United States, or a wholly different crime from that alleged as the basis for proceedings; or if such crime be charged to have been committed in another district from that to which the extradition is sought,—the commissioner could not properly consider it as ground for removal. In such cases resort must be had to other evidence of probable cause.

While the principle laid down in some of

the earlier cases in this court, that an indictment upon a statute is ordinarily sufficient if framed in the language of the statutes, has been somewhat qualified in later cases, the rule still holds good that, *where^[11] the statute contains every element of the offense, and an indictment is offered in evidence before the extradition commissioner as proof of probable cause, it is sufficient if framed in the language of the statute with the ordinary averments of time and place, and with such a description of the fraud, if that be the basis of the indictment, as will apprise an intelligent man of the nature of the accusation, notwithstanding that such indictment may be open to motion to quash or motion in arrest of judgment in the court in which it was originally found. An extradition commissioner is not presumed to be acquainted with the niceties of criminal pleading. His functions are practically the same as those of an examining magistrate in an ordinary criminal case, and, if the complaint upon which he acts, or the indictment offered in support thereof, contains the necessary elements of the offense, it is sufficient, although a more critical examination may show that the statute does not completely cover the case. *Pearce v. Texas*, 155 U. S. 311, 39 L. ed. 164, 15 Sup. Ct. Rep. 116; *Davis's Case*, 122 Mass. 324; *State ex rel. O'Malley v. O'Connor*, 38 Minn. 243, 36 N. W. 462; *Re Voorhees*, 32 N. J. L. 141; *Re Greenough*, 31 Vt. 279, 288.

Applying these considerations to the present case, it appears plainly from the indictment that the accused was charged with the crime of bribery in paying to two officers certain sums of money to reveal to the petitioner the contents of certain reports, pertaining to an investigation then pending with respect to certain frauds used in obtaining public lands. The commissioner was not required to determine for himself whether the statute applied to reports which had not yet been filed, and which might never be filed, or whether the words of the statute, "which may at any time be pending, or which may by law be brought before him in his official capacity," apply to the pendency of the investigation, or to the pendency of an obligation not to reveal the contents of a paper then in his possession. This was peculiarly a subject for examination by the court in which the indictment was found.

Like comment may be made with respect to the second *objection, that neither of these^[12] clerks was forbidden by any lawful authority to reveal the contents of such reports, upon the ground that there was no statute imposing such obligation. But it is clearly for the court to say whether every duty to be performed by an official must be desig-

nated by statute, or whether it may not be within the power of the head of a department to prescribe regulations for the conduct of the business of his office and the custody of its papers, a breach of which may be treated as an act in violation of the lawful duty of an official or clerk. *United States v. Macdaniel*, 7 Pet. 1, 14, 8 L. ed. 587, 592.

While we have no desire to minimize what we have already said with regard to the indictment setting out the substance of the offense in language sufficient to apprise the accused of the nature of the charge against him, still it must be borne in mind that the indictment is merely offered as proof of the charge originally contained in the complaint, and not as a complaint in itself or foundation of the charge, which may be supported by oral testimony as well as by the indictment. When the accused is arraigned in the trial court he may take advantage of every insufficiency in the indictment, since it is there the very foundation of the charge; but to hold it to be the duty of the commissioner to determine the validity of every indictment as a pleading, when offered only as evidence, is to put in his hands a dangerous power, which might be subject to serious abuse. If, for instance, he were moved by personal considerations, popular clamor, or insufficient knowledge of the law to discharge the accused by reason of the insufficiency of the indictment, it might turn out that the indictment was perfectly valid, and that the accused should have been held. But the evil once done is, or may be, irremediable, and the commissioner, in setting himself up as a court of last resort to determine the validity of the indictment, is liable to do a gross injustice.

2. It is further urged in support of this appeal that Rev. Stat. § 1014, does not authorize a removal to the District of Columbia, as it is not a district of the United States within *the meaning of the law; and the supreme court of the District is not a court of the United States, as the words are used in that section. The pertinent words in the section are that "for any crime or offense *against the United States*, the offender may," by certain officers therein designated, "be arrested and imprisoned or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense; . . . and, where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty . . . of the marshal to execute a warrant for his removal to the district where the trial is to be had." It is true that this section was taken from the judiciary act of 1789, and at that time the District of Co-
198 U. S.

lumbia was not in existence. But the same remark may be made of the dozens of different districts which have been formed since this act was passed. The fact that the District of Columbia was not created out of territory theretofore unorganized, but was simply carved out of the district of Maryland, is of no more importance than would be the creation of a new district, rendered necessary by an increase of population or business, of which almost every Congress produces an example. Even if this were not so, the re-enactment of this section of the judiciary act in 1873 as § 1014 of the Revised Statutes, clearly extended the word "district" to the District of Columbia as well as to all other districts created since the judiciary act. *United States v. Bowen*, 100 U. S. 508, 25 L. ed. 631; *Arthur v. Dodge*, 101 U. S. 36, 25 L. ed. 949; *Cambria Iron Co. v. Ashburn*, 118 U. S. 57, 30 L. ed. 61, 6 Sup. Ct. Rep. 929.

The anomaly in Rev. Stat. § 1014, as applied to this District, consists in its limitations to offenses "against the United States," since the courts of the District of Columbia have a local as well as a Federal jurisdiction, and may punish for offenses, which, if committed within the limits of any other district of the United States, would be relegated to the state courts. Offenders against state laws escaping from the state where the crime is committed and found in another state are surrendered upon the demand of the governor, by proceedings *taken under a different statute. Rev. [14] Stat. §§ 5278, 5279, U. S. Comp. Stat. 1901, p. 3597. Certain cases are to be found, which hold that persons accused of crimes committed within the District of Columbia, against its local laws, cannot be removed to this district for trial under § 1014. If this objection might have been a sound one under § 33 of the judiciary act [1 Stat. at L. 91, chap. 20, U. S. Comp. Stat. 1901, p. 716], since the Revised Statutes local offenses have also been treated as offenses against the United States. The question, however, does not arise in this case, since the indictment charges an offense against the United States in violation of § 5451 (U. S. Comp. Stat. 1901, p. 3680), respecting the bribery of public officers.

It is unnecessary to decide whether the power to remove offenders found in other districts to this district is affected by the act of February 21, 1871 (16 Stat. at L. 426, chap. 62), providing that "the Constitution and all the laws of the United States, which are not locally inapplicable, shall have the same force and effect within the said District of Columbia as elsewhere within the United States," since by § 2 of the act of June 22, 1874 (18 Stat. at L. 193, chap.

396) the provisions of the 33d section of the judiciary act of 1789, from which Rev. Stat. § 1014, is taken, "shall apply to courts created by act of Congress in the District of Columbia." Criticism is made of this act in that it only authorizes a removal from the District of Columbia to other districts, but that it does not authorize the removal of persons arrested in some other judicial district to the District of Columbia. But we think that, if there were any doubt upon the subject still remaining, it was removed by the new Code of the District of Columbia (31 Stat. at L. 1189, chap. 854), taking effect January 1, 1902, wherein it is declared by § 61 that the supreme court of the District "shall possess the same powers, and exercise the same jurisdiction, as the circuit and district courts of the United States, and shall be deemed a court of the United States;" and by § one (1) of the same Code, that "all general acts of Congress not locally inapplicable in the District of Columbia, and all acts of Congress by their terms applicable to the District of Columbia and to other places under [15] the *jurisdiction of the United States, in force at the date of the passage of this act, shall remain in force, except in so far as the same are inconsistent with, or are replaced by, some provision of this Code."

In conclusion of this branch of the case, it may be said that any construction of the law which would preclude the extradition to the District of Columbia of offenders who are arrested elsewhere would be attended by such abhorrent consequences that nothing but the clearest language would authorize such construction. It certainly could never have been intended that persons guilty of offenses against the laws of the United States should escape punishment simply by crossing the Potomac river, nor, upon the other hand, that this District should become an Alsatia for the refuge of criminals from every part of the country.

3. Appellant makes further objection to a removal to the District of Columbia upon the ground that the offense, if any, was committed in California, and that under the Constitution he is entitled to a trial in that jurisdiction.

The objection does not appear upon the face of the indictment, which charges the offense to have been committed within this District, but from the testimony of one of those clerks it seems that the money was received by him in certain letters mailed to him from San Francisco and received in Washington. Without intimating whether the question of jurisdiction can be raised in this way, the case clearly falls within that of *Re Palliser* (*Palliser v. United States*) 136 U. S. 257, 34 L. ed. 514, 10 Sup. Ct. Rep.

1034, in which it was held that, where an offense is begun by the mailing of a letter in one district, and completed by the receipt of a letter in another district, the offender may be punished in the latter district, although it may be that he could also be punished in the former. A large number of authorities are collated by Mr. Justice Gray in the opinion, and the case is treated as covered by § 731 (U. S. Comp. Stat. 1901, 585), providing that, when an offense is begun in one district and completed in another it shall be deemed to have been committed in either, and be tried in either, as though it had been *wholly committed there-[16] in. In addition to this, however, it is conceded that some of the offenses charged in the various counts were committed in Washington.

There was no error in the action of the court below, and its judgment is affirmed.

Mr. Justice **Day**, concurring:

Mr. Justice **White**, Mr. Justice **Peckham**, Mr. Justice **McKenna**, and the writer agree in the conclusion just announced, and, in the main, with the reasoning of the opinion. But we are unable to concur in the view that, where the commissioner may be of opinion that the indictment charges no offense against the laws of the United States, and there is no other proof of probable cause before him, the order of arrest may be made, remitting to the court where the indictment was found all questions of the sufficiency of the indictment. We agree that, upon the hearing before the commissioner, the indictment is prima facie to be taken as good, and that no technical objection should prevail against it; its ultimate sufficiency being matter for determination of the court wherein it was returned against the accused, subject to review in the appellate courts. *Greene v. Henkel*, 183 U. S. 249, 46 L. ed. 179, 22 Sup. Ct. Rep. 218. But the order of removal involves judicial, rather than mere ministerial, action, and must be issued by the judge of the district when the case made warrants it. § 1014, Rev. Stat.; *Beavers v. Henkel*, 194 U. S. 73-83, 48 L. ed. 882-886, 24 Sup. Ct. Rep. 605. And, whether found in the indictment, or as the result of other testimony, the order to remove the accused can only be issued upon a showing of probable cause. *Greene v. Henkel*, 183 U. S. 249, 46 L. ed. 179, 22 Sup. Ct. Rep. 218.

In this case the argument chiefly relied upon against the right to issue the order of arrest, and subsequently of removal, rested upon the alleged insufficiency of the indictment to charge any offense within the terms of the statute, because the *reports which it [17] was alleged the accused had been bribed to

reveal were not then on file, and might never be filed in the department. It is said that the commissioner was not required to determine for himself whether the statute applied to such reports, but such objections must be remitted for determination to the court in which the indictment was found. In other words, the order of arrest and commitment may be made, although the commissioner be of opinion that the indictment, in a particular vital to the prosecution of the offense, and which cannot be supplied by other proof, is fatally defective, and the accused is charged with no offense against the laws of the United States. In our opinion, the commissioner, when the case is thus presented, must pass upon the sufficiency of the indictment. It is his duty to decide whether an offense is charged with a view to making or withholding the order of arrest, which, when made, becomes the basis of an order of removal of a citizen to the place of trial, which may be many miles distant from his home. Such order is proper only in cases wherein probable cause has been shown to believe the accused guilty of an offense cognizable by the laws of the United States in the proceeding pending against him, and for which he is to answer at the place of indictment.

PABST BREWING COMPANY, *Appt.*,

v.

G. Y. CRENSHAW *et al.*

(Sec S. C. Reporter's ed. 17-45.)

Commerce in intoxicating liquors—validity of state inspection law—interstate commerce.

1. A state statute imposing an inspection fee upon beer or other malt liquors shipped from other states into that state, and held there for sale and consumption therein, must, although producing a revenue, and not providing for an adequate inspection, be deemed enacted by the state "in the exercise of its police powers," within the meaning of the Wilson act of August 8, 1890 (26 Stat. at L. 313, chap. 728, U. S. Comp. Stat. 1901, p. 3177), subjecting to laws so enacted all intoxicating liquors arriving in the state, where the highest state court has upheld as a valid police regulation so much of the statute as imposes the same fee on beer of domestic manufacture over the objection that it is a revenue measure, and not an inspection law.
2. An inspection law enacted by a state "in the exercise of its police powers," within the meaning of the Wilson act of August 8, 1890, subjecting to laws so enacted all intoxicating

liquors arriving in the state, is not void as an interference with interstate commerce because it operates to deter shipments into the state.

3. Interstate commerce in intoxicating liquors is not unlawfully burdened by an inspection law enacted by a state "in the exercise of its police powers," within the meaning of the Wilson act of August 8, 1890, subjecting to laws so enacted intoxicating liquors arriving in the state, because the statute does not provide for an adequate inspection, and imposes a burden beyond the cost of inspection.

[No. 85.]

Argued December 8, 1904. Decided April 17, 1905.

A PPEAL from the Circuit Court of the United States for the Western District of Missouri to review a decree dismissing a bill to enjoin the collection of an inspection fee upon beer shipped from another state into Missouri and held there for sale and consumption therein. *Affirmed.*

See same case below, 120 Fed. 144.

The facts are stated in the opinion.

Mr. Clifford Histed argued the cause, and, with *Messrs. James H. Harkless, Charles S. Cryslar, and Francis C. Downey*, filed a brief for appellant:

The business of the complainant in Missouri is that of interstate commerce.

Schollenberger v. Pennsylvania, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; *United States v. Swift*, 122 Fed. 529.

Intoxicating liquors and liquids, where authorized as legitimate articles of commerce by the public policy of the state, are upon exactly the same plane as any other legitimate article of commerce, in their relation to the commerce clause of the Constitution.

License Cases, 5 How. 504, 12 L. ed. 256; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 488, 31 L. ed. 700, 708, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *Leisy v. Hardin*, 135 U. S. 100, 110, 34 L. ed. 128, 132, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Scott v. Donald*, 165 U. S. 58, 91, 41 L. ed. 632, 640, 17 Sup. Ct. Rep. 265.

Intoxicating liquors, then being subjects of lawful commerce in the state of Missouri, the state, in imposing an inspection fee under its reserved power, is bound by the rule that the charge for such inspection must bear a just and reasonable relation to the cost of making the same.

Hopkins v. United States, 171 U. S. 578, 597, 43 L. ed. 290, 298, 19 Sup. Ct. Rep. 40; *Adams Exp. Co. v. Ohio State Auditor*, 166 U. S. 185, 218, 41 L. ed. 965, 976, 17 Sup. Ct. Rep. 604; *Western U. Teleg. Co. v. New Hope*, 187 U. S. 419, 47 L. ed. 240, 23 Sup. Ct. Rep. 204; *Atlantic & P. Teleg. Co. v.*

NOTE.—*On commerce in intoxicating liquors*—see notes to *State v. Creeden*, 7 L. R. A. 296; *State ex rel. Cochran v. Winters*, 10 L. R. A. 616; and *Rhodes v. Iowa*, 42 L. ed. U. S. 1089.

198 U. S. U. S., Book 49.

Philadelphia, 190 U. S. 160, 47 L. ed. 995, 23 Sup. Ct. Rep. 817; *Postal Teleg. Cable Co. v. New Hope*, 192 U. S. 55, 48 L. ed. 338, 24 Sup. Ct. Rep. 204; *Postal Teleg. Cable Co. v. Taylor*, 192 U. S. 64, 48 L. ed. 342, 24 Sup. Ct. Rep. 208.

This act wholly fails to meet the requirements of an inspection measure.

Vance v. W. A. Vandercook Co. 170 U. S. 438, 456, 42 L. ed. 1100, 1107, 18 Sup. Ct. Rep. 674; *Mugler v. Kansas*, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; *Scott v. Donald*, 165 U. S. 93, 41 L. ed. 642, 17 Sup. Ct. Rep. 265; *Reid v. Colorado*, 187 U. S. 150, 151, 47 L. ed. 115, 116, 23 Sup. Ct. Rep. 92.

The absence of unfair discrimination against nonresident dealers is immaterial.

Minnesota v. Barber, 136 U. S. 326, 34 L. ed. 460, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Robbins v. Taxing District*, 120 U. S. 489, 497, 30 L. ed. 694, 697, 1 Inters. Com. Rep. 45; 7 Sup. Ct. Rep. 592; *State Freight Tax Case*, 15 Wall. 232, 21 L. ed. 146.

This court is not bound by the declaration of the supreme court of Missouri that the act is an inspection measure passed pursuant to the police power of the state.

Brennan v. Titusville, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; *Scott v. Donald*, 165 U. S. 100, 41 L. ed. 645, 17 Sup. Ct. Rep. 265; *Postal Teleg. Cable Co. v. Taylor*, 192 U. S. 64, 48 L. ed. 342, 24 Sup. Ct. Rep. 208; *New York v. Compagnie Generale Transatlantique*, 107 U. S. 59, 63, 27 L. ed. 383, 385, 2 Sup. Ct. Rep. 87; *Minnesota v. Barber*, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Stockard v. Morgan*, 185 U. S. 36, 46 L. ed. 794, 22 Sup. Ct. Rep. 576.

The supreme court of Missouri itself has recognized that a tax is not to be denied its legal significance because denominated something else in the law enacting it.

St. Louis v. Spiegel, 75 Mo. 145.

The Wilson bill does not authorize a statute like the one in question.

Rhodes v. Iowa, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; *Vance v. W. A. Vandercook*, 170 U. S. 446, 42 L. ed. 1103, 18 Sup. Ct. Rep. 674; *Scott v. Donald*, 165 U. S. 91, 41 L. ed. 640, 17 Sup. Ct. Rep. 265; *Reymann Brewing Co. v. Brister*, 179 U. S. 445, 455, 45 L. ed. 269, 274, 21 Sup. Ct. Rep. 201; *Pabst Brewing Co. v. Terre Haute*, 98 Fed. 330; *Ex parte Jervey*, 66 Fed. 957; *Re Bergen*, 115 Fed. 339; *Minneapolis Brewing Co. v. McGillivray*, 104 Fed. 258.

Messrs. Edward C. Crow and William M. Williams argued the cause and filed a brief for appellees:

The supreme court of the state of Missouri has held the law to be constitutional, and it is not open to appellant to question its validity upon the ground of any supposed conflict with the state Constitution.

State v. Bixman, 162 Mo. 1, 62 S. W. 828.

The only question for determination here is whether the act violates the Constitution of the United States; and in determining that question, the Federal courts will adopt the construction given to the statute by the supreme court of the state.

W. W. Cargill Co. v. Minnesota, 180 U. S. 452, 45 L. ed. 619, 21 Sup. Ct. Rep. 423.

The "Wilson bill" puts intoxicating liquors shipped into a state within the police power of such state immediately upon their arrival. Such liquors do not stand upon the same footing as other articles of interstate commerce, and authorities touching the latter are inapplicable, since the passage of said bill, to the former. The state may prescribe the terms and conditions upon which such liquors may be sold, even in the original packages, and, in the absence of discrimination against the products of other states, such regulations are valid.

Vance v. W. A. Vandercook Co. 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674; *Reymann Brewing Co. v. Brister*, 179 U. S. 445, 45 L. ed. 269, 21 Sup. Ct. Rep. 201.

It by no means follows that, because a large revenue is derived from a statute regulating the traffic in intoxicating liquors, such statute cannot be deemed a police measure.

11 Am. & Eng. Enc. Law, p. 592; Black, *Intoxicating Liquors*, § 55; *Kurth v. State*, 86 Tenn. 134, 5 S. W. 593; *McGahcy v. Virginia*, 135 U. S. 662, 34 L. ed. 304, 10 Sup. Ct. Rep. 972; *State v. Bixman*, 162 Mo. 19, 62 S. W. 828.

It will not do to say that this is not a tax upon the privilege or business, on the ground that the right to engage in the business is given by another statute. It was still within the power of the legislature to impose additional conditions and burdens upon the privilege of carrying on the business. It is not necessary that all the regulations of the liquor traffic should be contained in one statute.

State ex rel. Henshall v. Ludington, 33 Wis. 107; *Kurth v. State*, 86 Tenn. 134, 5 S. W. 593.

The state has plenary police power to regulate the manufacture and sale of intoxicating liquors within its borders. It may entirely prohibit the same, or permit it upon such terms as the legislature imposes. It may require the inspection of beer and

other malt liquors, or may demand other evidence of their purity, and may fix the charges that must be paid before such liquors can be sold in said state. Having the right to absolutely prohibit, it may authorize the manufacture and sale upon condition that the charges which it makes for its official inspection shall be paid into the state treasury. As it may prohibit entirely, the legislature may license conditionally. It may burden the licensee with such restraints, conditions, and responsibilities as it chooses to require. The right to manufacture and sell intoxicating liquors is not a natural right.

State ex rel. Henshall v. Ludington, 33 Wis. 107; *Black, Intoxicating Liquors*, § 39; *Austin v. State*, 10 Mo. 591; *State v. Bixman*, 162 Mo. 1, 62 S. W. 828; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Danville v. Hatcher*, 101 Va. 523, 44 S. E. 723; *Trageser v. Gray*, 73 Md. 250, 9 L. R. A. 780, 25 Am. St. Rep. 587, 20 Atl. 905; *Ex parte Sikes*, 102 Ala. 173, 24 L. R. A. 774, 15 So. 522; *Cooley, Taxn.* 2d ed. 587.

If appellant's contention that, under the guise of an inspection law, the state statute simply imposes a specific tax upon beer for general revenue purposes, was correct, still there is nothing in the interstate commerce clause of the Federal Constitution to prevent such tax.

Hinson v. Lott, 8 Wall. 148, 19 L. ed. 387.

The interstate commerce clause does not prohibit the levy of a tax upon goods brought from another state, after they have arrived at their destination.

American Steel & Wire Co. v. Speed, 192 U. S. 500, 48 L. ed. 538, 24 Sup. Ct. Rep. 365; *Carstairs v. Cochran*, 193 U. S. 10, 48 L. ed. 596, 24 Sup. Ct. Rep. 318.

Mr. Justice **White** delivered the opinion of the court:

The Pabst Brewing Company, a Wisconsin corporation, filed its bill in the court below to enjoin the beer inspector of the state of Missouri and his assistant from collecting, or attempting to collect, an inspection charge, fee, license, or burden, which it was alleged the law of Missouri imposed upon beer or other malt liquors when shipped from other states into Missouri, after its delivery within that state to the consignee, and when held for sale for consumption in Missouri or for shipment to other states. The general ground upon

[22] which the law was *assailed was that the exactions complained of were regulations of commerce repugnant to the Constitution of the United States. It was, in addition, specially averred that, so far as the law im-

posed a charge on beer shipped from Wisconsin into Missouri, and held there by the consignee for sale and shipment for consumption in other states, the Missouri law was repugnant to the commerce clause, because in this particular it discriminated in favor of beer manufactured in Missouri and held for sale or shipment for consumption in other states.

The bill was amended and demurred to. Whilst the court considered the law not to be in conflict with the commerce clause on the general grounds alleged, it nevertheless concluded, because of the averment concerning discrimination as to beer shipped into Missouri for reshipment to other states, that the demurrer could not be sustained. 120 Fed. 144. An answer was thereupon filed, as also a replication, and subsequently the cause was submitted upon the pleadings and an agreed statement of facts.

The supreme court of Missouri having decided that the law in question did not provide for any charge or burden upon beer or other malt liquors shipped into Missouri and held there for reshipment to points outside of the state, the court below, adhering to its previous opinion as to the general averments of the bill, and applying the construction given by the supreme court of the state to the statute, held that it did not discriminate, and dismissed the suit.

The law of Missouri in question is entitled "An Act Creating the Office of Inspector of Beer and Malt Liquors of the State, and Providing for the Inspection of Beer and Malt Liquors Manufactured and Sold in This State." The provisions of the act essential to be considered may be summarized as follows:

It creates the office of beer inspector, to be appointed by the governor, who shall be an expert beer brewer, and who is required to furnish a bond, and is given power to appoint the necessary deputies to execute the provisions of the act. The act forbids every person or corporation engaged in brewing *within the state from using any material [23] or chemical in the manufacture of beer or other malt liquors other than pure hops or pure extract of hops, or barley, malt, or wholesome yeast or rice. It is provided that the inspector or his deputies shall keep a record of those engaged in the manufacture, brewing, and sale of malt liquors within the state, and of the quantity manufactured or sold, and shall make a full report to the governor concerning the same, and imposes upon the officials named the duty of inspecting all beer or other malt liquors manufactured or sold within the state, to see that they conform to the standard of purity which the law requires. The act further imposes an inspection fee.

charge, or license, accompanied with provisions for a label or stamp to be affixed upon the packages containing the beer or other malt liquor so manufactured or offered for sale within the state.

Concerning beer or other malt liquors manufactured outside of the state of Missouri and shipped into that state for sale and consumption within the state, after delivery and receipt under the shipment, the act provides as follows:

"Sec. 5. Every person, persons, or corporation, who shall receive for sale, or offer for sale, any beer or other malt liquors other than those manufactured in this state, shall, upon receipt of same, and before offering for sale, notify the inspector, who shall be furnished with a sworn affidavit, subscribed by an officer authorized to administer oaths, from the manufacturer thereof, or other reputable person having actual knowledge of the composition of said beer or other malt liquors, that no material other than pure hops, or the extracts of hops, or pure barley, malt, or wholesome yeast, or rice, was used in the manufacture of same; upon the receipt of said affidavit the inspector shall inspect and label the packages containing said beer or malt liquors, for which services he shall receive like fees as those imposed upon the manufacturers of beer and malt liquors in this state."

In the printed and oral argument at bar all the contentions concerning discrimination [24] are waived, and the sole ground *relied upon is the assertion that the statute constitutes a regulation of commerce, and is, hence, repugnant to the commerce clause of the Constitution of the United States.

Brevity and clearness in the consideration of the propositions relied upon to sustain the contentions made will be subserved by fixing at the outset exactly what the statute does, and by stating the legal principles which are controlling.

The subject with which the statute deals is beer and other malt liquors. Plainly, it operates upon such liquors only when manufactured in the state, or, if shipped from other states, after their arrival in the state, and when they are held there for sale and consumption therein.

It is provided by the act of Congress, commonly styled the Wilson act (26 Stat. at L. 313, chap. 728, U. S. Comp. Stat. 1901, p. 3177), as follows:

"That all fermented, distilled, or other intoxicating liquors or liquids transported into any state or territory, or remaining therein, for use, consumption, sale, or storage therein, shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police

powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

The scope of this act and the power of Congress to adopt it was passed upon in *Re Rahrer* (*Wilkerson v. Rahrer*) 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865. The scope of the act was thus stated (p. 560, L. ed. p. 576, Sup. Ct. Rep. p. 868):

"Congress has now spoken and declared that imported liquors or liquids shall, upon arrival in a state, fall within the category of domestic articles of a similar nature."

It was decided that, although the act had the effect thus stated, it was not repugnant to the Constitution of the United States, the court saying (p. 562, L. ed. p. 576, Sup. Ct. Rep. p. 869):

"No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at *an earlier period of time than [25] would otherwise be the case, it is not within its competency to do so."

In *Rhodes v. Iowa*, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664, the purport of the act was again passed upon. Reiterating the ruling made in the *Rahrer Case*, it was decided that, whilst the Wilson act caused liquors shipped into Iowa from another state to be divested of their character as articles of interstate commerce after their delivery in Iowa to the person to whom consigned, nevertheless the act did not authorize the laws of Iowa to be applied to such merchandise whilst in transit from another state and before delivery in Iowa.

In *Vance v. W. A. Vandercook Co.* 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674, the operation of a liquor law of South Carolina was considered. By the act in question the state of South Carolina took exclusive charge of the sale of liquor within the state, appointed its agents to sell the same, and empowered them to purchase the liquor, which was to be brought into the state for sale. The fact was that by the act in question the state of South Carolina, instead of forbidding the traffic in liquor, authorized it, and engaged in the liquor business for its own account, using it as a source of revenue. The act, in addition, affixed prerequisite conditions to the shipment into South Carolina from other states of liquor to a consumer who had purchased it for his own use, and not for sale. Considering the Wilson act and the previous decisions applying it, it was decided that

the South Carolina law, in so far as it took charge in behalf of the state of the sale of liquor within the state, and made such sale a source of revenue, was not an interference with interstate commerce. In so far, however, as the state law imposed burdens on the right to ship liquor from another state to a resident of South Carolina intended for his own use, and not for sale within the state, the law was held to be repugnant to the Constitution, because the Wilson act, whilst it delegated to the state plenary power to regulate the sale of liquors in South Carolina shipped into the state from other states, did not recognize the right of [26] a state to prevent an individual *from ordering liquors from outside of the state of his residence for his own consumption, and not for sale.

Quite recently, at this term, in *American Exp. Co. v. Iowa*, 196 U. S. 133, *ante*, 417, 25 Sup. Ct. Rep. 182, and *Adams Exp. Co. v. Iowa*, 196 U. S. 147, *ante*, 424, 25 Sup. Ct. Rep. 185, the construction affixed to the Wilson act in the previous cases was applied, and the power of the state of Iowa to control the sale of liquors shipped from another state into that state, after their delivery to the consignee, was upheld.

Applying the Wilson act and the decisions thereunder to the statute here assailed, we think it clear that the contention that it is repugnant to the commerce clause of the Constitution is without merit, unless the reasons urged to show that the present case is not within the scope of the Wilson act be well founded. We proceed to consider the contentions relied on to establish that proposition.

1st. The Wilson act, it is argued, subjects liquors shipped from one state into another, after their arrival at their destination, only to the "laws of such state or territory enacted in the exercise of its police powers. . . ." As, it is said, the law of Missouri was not enacted in the exercise of the police power, hence malt liquor received from another state, and held in Missouri for sale, retained its character as an article of interstate commerce until sold in the original package.

But the proposition rests upon the mere assumption that the law of Missouri was not enacted in the exercise of the police power of that state. Certainly the regulation of the sale of liquor is essentially a police power. Surely, also, provision made in a state law tending to determine the purity of malt liquors offered for sale and consumption within a state is likewise an exertion of the same power. Conceding that the law in question may be inadequate to accomplish the purpose designed, and produces a large revenue to the state over and

above the cost of inspection, this affords no Federal ground upon which to hold that the police power of the state was not brought into play in making the enactment where the law does not operate upon a subject within Federal control. This *becomes [27] evident when it is borne in mind that, whether the statute be regarded as a prohibition, as a regulation, as a license, or as an inspection law, if it encroached upon the Federal authority it would be void, and, on the contrary, in all or any of these aspects, the law would be valid, so far as the Federal Constitution is concerned, if it did not so encroach. The purpose of the Wilson act was to make liquor after its arrival a domestic product, and to confer power upon the states to deal with it accordingly. The police power is, hence, to be measured by the right of a state to control or regulate domestic products, a state, and not a Federal, question as respects the commerce clause of the Constitution. So far as the state aspect is concerned, the matter is foreclosed by a decision of the supreme court of Missouri passing upon the validity, under the state Constitution, of the law now under consideration. *State v. Bixman*, 162 Mo. 1, 62 S. W. 828. In that case a person was proceeded against for selling malt liquor made within the state of Missouri without complying with the statute. The validity of the statute was assailed, among others, on the ground that it was a revenue law and repugnant to the uniformity clause of the state Constitution; that it was not an inspection law because it did not provide for an adequate inspection, and because the burden which it imposed was obviously out of all proportion to the cost of inspection, since the charge which was exacted copiously enriched the state treasury. The state court, after an elaborate review of its previous decisions, held that the mere fact that a revenue was produced by the execution of the statute did not cause the statute to be merely a revenue measure, and that, although the inspection which the law provided might be inadequate, nevertheless the statute did not violate the state Constitution. These views were sustained upon the ground that the statute dealt with a subject which was peculiarly within the police power of the state. Summing up its conclusions as to the validity of the statute, the court declared:

"In our opinion it [the law] is a police regulation imposing *conditions upon the [28] business of manufacturing and selling beer and malt liquors in this state, which business the state may absolutely suppress, or permit upon such terms as the legislature may prescribe. We construe the act, in view of all its parts and in connection with

other license laws of this state, and hold that the fee exacted is the price which the state demands for the privilege of doing the business of brewing and selling beer and malt liquors in this state, and it is immaterial by what name it is called."

As, then, the supreme court of Missouri has determined that the statute does not conflict with the state Constitution, and is valid because it is a police regulation imposing conditions upon the business of manufacturing and selling beer in Missouri, a traffic which it is conceded the state had the power to prohibit entirely, it follows that we are without power, from a consideration of the state Constitution, to treat the law as invalid because of the revenue provisions of the state Constitution or other limitations imposed by that Constitution upon the state government. It necessarily results from this that the assailed law comes directly within the express terms of the Wilson act. The determination of this question by the supreme court of Missouri, as to liquor manufactured in Missouri, in the absence of discrimination, is necessarily conclusive, also, as to the character of the law when applied to a similar article shipped from other states into Missouri after arrival at its destination, and when held for sale and consumption in that state. This must be the case, since, as we have seen, the Wilson act, to use the words of *Re Rahrer*, places liquor coming from another state after its arrival "within the category of domestic articles of a similar nature."

To decide that an exertion by a state of its power to regulate the sale of malt liquors manufactured within the state was an exercise of its police authority, and yet to say that the same, when applied to liquor shipped into the state from other states, after delivery, was not an exertion of the police power, would be to destroy the [29] Wilson act, and frustrate the very *object which it was intended to accomplish, and, besides, would overrule the previous decisions of this court upholding and enforcing that statute.

We need not, however, further consider the subject, since the proposition relied upon is not open to discussion, as a similar contention was expressly ruled upon in *Vance v. W. A. Vandercook Co.* 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674. In that case, as has already been said, the state of South Carolina had, by law, taken charge of the sale of liquors in the various counties of the state, no liquor being allowed to be sold except through the state agencies. The law by which this system was put in force had been upheld by the state courts as a lawful exertion of the police power. The

validity of the act was assailed in the circuit court of the United States on the ground of its repugnancy to the commerce clause of the Constitution, and the lower court sustained the contention. Among the grounds relied upon in this court was that the law in question was not within the Wilson act, because it was not an exertion of the police power of the state, since it did not forbid the sale of liquor, but, on the contrary, fostered and encouraged it and made it a source of revenue. In holding this proposition to be untenable the court said (p. 447, L. ed. p. 1104, Sup. Ct. Rep. p. 677):

"The confusion of thought which is involved in the proposition to which we have just referred is embodied in the principle upon which the court below mainly rested its conclusion. That is, 'if all alcoholic liquors, by whomsoever held, are declared contraband, they cease to belong to commerce, and are within the jurisdiction of the police power; but so long as their manufacture, purchase, or sale, and their use as a beverage in any form, or by any person, are recognized, they belong to commerce, and are without the domain of the police power.' But this restricts the police power to the mere right to forbid, and denies any and all authority to regulate or restrict. The manifest purpose of the act of Congress was to subject original packages to the regulations and restraints imposed by the state law. If the purpose of the act had been to allow the *state law to govern [30] the sale of the original package only where the sales of all liquor were forbidden, this object could have found ready expression, whilst, on the contrary, the entire context of the act manifests the purpose of Congress to give to the respective states full legislative authority, both for the purpose of prohibition, as well as for that of regulation and restriction with reference to the sale in original packages of intoxicating liquors brought in from other states."

2d. Conceding, it is argued, that the Missouri statute attached to the liquor after delivery at its destination in Missouri, nevertheless, as the burdens which the statute imposed were of such a character as to affect traffic in the article, and hence operated to deter shipments into Missouri, therefore the statute must be treated as if it bore upon the liquor while still in transit as a subject of interstate commerce. This proposition simply amounts to contending that the Wilson act should be disregarded, since to enforce it would give the states power to regulate interstate traffic in liquor. If, when a state has but exerted the power lawfully conferred upon it by the act of Congress, its action becomes void as an

interference with interstate commerce because of the reflex or indirect influence arising from the exercise of the lawful authority, the result would be that a state might exert its power to control or regulate liquor; yet if it did so its action would amount to a regulation of commerce and be void. And this would be but to say at one and the same time that the power could and could not be exercised. But the proposition would have a much more serious result, since to uphold it would overthrow the distinction between direct and indirect burdens upon interstate commerce, by means of which the harmonious workings of our constitutional system has been made possible.

3d. It is further insisted that, as the Missouri law is denominated in its text as an inspection law, and does not provide an adequate inspection, and, besides, imposes a burden beyond the cost of inspection, the law is repugnant to the Constitution of the [31] United States when tested by previous *decisions of this court determining when particular inspection laws amounted to a regulation of commerce, citing *Atlantic & P. Teleg. Co. v. Philadelphia*, 190 U. S. 160, 47 L. ed. 995, 23 Sup. Ct. Rep. 817, and *Postal Teleg. Cable Co. v. New Hope*, 192 U. S. 55, 48 L. ed. 338, 24 Sup. Ct. Rep. 204. These cases, however, simply considered state laws which operated upon interstate commerce. To apply them to the Missouri law necessarily involves deciding that the malt liquors to which that law applied had not ceased to be articles of interstate commerce; and, therefore, again, merely disregards the Wilson act and the decisions of this court concerning it. Indeed, the whole argument upon which the entire case of the appellant proceeds rests upon this fallacious assumption, since it admits on the one hand the validity of the Wilson law, and yet seeks to take this case out of the reach of its provisions by distinctions which have no foundation in reason, unless it be that that law is to be disregarded or held to be unconstitutional.

Decree affirmed.

Mr. Justice **Brown**, dissenting:

The opinion of the court is put upon the ground that the Wilson act subjects liquors shipped from one state into another, after their arrival at their destination, to the laws of the state or territory enacted in the exercise of its police powers; and that, as an inspection law is a law enacted in the exercise of its police powers, the law in question is within the act; and we are consequently precluded from inquiring whether such law is a legitimate exercise of the police powers or a mere revenue law
198 U. S.

to which the name of an inspection law is given for the purpose of obviating the difficulty, under the state Constitution, of upholding it as a revenue measure. It may be conceded at once that, if the law in question be a legitimate inspection law, it necessarily follows that, as it was enacted in the exercise of the police power of the state, it applies to foreign liquors "to the same extent and in the same manner *as though [32] such liquors or liquids had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced in original packages or otherwise." The opinion practically concedes that the act must, if constitutional, be supported as an inspection law, passed under the police power of the state; and such was the position taken by the supreme court of Missouri. It was admitted in that case, both by the majority and minority judges, that the act could not be supported as a revenue measure, because in conflict with the Constitution of the state.

To determine the question whether it can be supported as an inspection law it is necessary to consider at some length the nature of its provisions.

The agreed statement of facts shows that the plaintiff manufactures in the state of Wisconsin ten different kinds or grades of beer and malt liquors, each kind being separately manufactured and requiring special treatment; that it ships into the state of Missouri annually not less than 15,000 barrels of malt liquors, of 31 gallons each, of the aggregate value of \$100,000; that there are a large number of domestic manufacturers of malt liquor in the state of Missouri, whose annual productions amount to over 2,250,000 barrels of beer of the aggregate value of \$12,250,000, of which 1,275,000 are sold within the state; that there are other manufacturers outside of the state standing in the same position as the plaintiff, who annually ship into the state not less than 165,000 barrels of the aggregate value of \$10,725,000, beside that imported from abroad; that plaintiff is licensed to carry on business in Missouri; that such business consists of shipping into the state, for the purposes of selling therein or reshipping therefrom, the product of its manufacture in Wisconsin; that in the usual course of its business it is compelled to maintain large warehouses in the state, as well as an office, as a necessary adjunct to the conduct of its business; that it maintains no manufactory in Missouri, and that it disposes of its beer in the original packages in which it is shipped.

*There are insuperable difficulties in the [33] way of the maintenance of this act as an inspection measure.

To inspect, as defined by Webster, is to examine, to view closely and critically, especially in order to ascertain quality and condition, to detect errors, etc.

The object of the act is declared by § 4 to be to exclude the use of any substance, material, or chemical, in the manufacture of malt liquors, other than pure hops, or pure extract of hops, or pure barley, malt, or wholesome yeast or rice. So far as beer manufactured within the state is concerned, the inspection is made, or at least may be made (*State v. Bixman*, 162 Mo. 1, 34, 62 S. W. 828), of the ingredients of the beer in the mash tub and before the beer is actually brewed. The inspector goes to the brewery and makes his test by taking a sample of the mash of the beer there fermenting, and, although thousands of gallons may be made from one mash, a single inspection is sufficient. With respect to beer manufactured outside of the state, § 5 requires that the consignee of the beer shall notify the inspector, who shall be furnished with a sworn affidavit, subscribed by an officer authorized to administer oaths, from the manufacturer thereof or other reputable person having actual knowledge of the composition of said beer or malt liquors, that no material other than pure hops, or the extract of hops, or pure barley, malt, or wholesome yeast or rice, was used in the manufacture of the same. "Upon the receipt of said affidavit the inspector shall inspect and label the packages containing said beer or malt liquors, for which services he shall receive like fees as those imposed upon the manufacturers of beers and malt liquors in this state."

It is true this section seems to require that upon receipt of such affidavit the inspector shall inspect and label the packages. But similar words used in § 7 with regard to domestic beer were interpreted by the supreme court in *State v. Bixman*, 162 Mo. 1, 62 S. W. 828, as requiring only an inspection of the mash at the brewery, since [34] the actual inspection of the beer *would require the opening of each package, or at least a sample package, which would practically ruin the contents. As it is impossible to suppose that the legislature should have contemplated that the inspectors should visit breweries outside of the state and inspect the mash, or that they should open the packages after their receipt in the state, and thus spoil the beer, it would seem that the inspectors have no alternative but to accept the affidavit as a basis of their inspection. This is said to be the manner in which the law is practically administered. Indeed, the agreed facts show that the beer involved in this case was inspected while still in the hands of the plaintiff, that the

packages were never opened, but the affidavit was accepted as a sufficient compliance with the act.

While this may be the only inspection practicable, it is really no inspection at all, since it is dependent entirely upon the veracity of the person making the affidavit. There is no power given to these inspectors to investigate the truth of the statements contained in these affidavits, except, possibly, by tasting or analyzing the beer. There is no penalty provided for making a false affidavit, nor can the state proceed against the manufacturer who is beyond the jurisdiction of the court. There is no assurance that the affidavit, which may be made in the state of manufacture as well as in Missouri, has any relation to the particular shipment to which it is sought to apply it, and there is no power given even to open the boxes in which bottled liquors purport to be inclosed, to examine their contents. The object of inspection laws is to require such examination of the thing inspected as will insure to the public a safe and wholesome article. Obviously to secure this the inspection must be made by officers appointed for that purpose; at least, it cannot be delegated, as it virtually is in this case, to the manufacturer. The requirement of an affidavit, and the acceptance of this in lieu of an actual inspection, make the affiant, who is the manufacturer or his agent, the sole judge of the fact whether the liquor contains only the ingredients allowed by law. We cannot treat this as a bona fide inspection. *To justify an inspection in law [35] there must be an inspection in fact.

We had occasion in *Vance v. W. A. Vandercook Co.* 170 U. S. 438-456, 42 L. ed. 1100-1107, 18 Sup. Ct. Rep. 674, to pass upon a law requiring a sample of alcoholic liquor proposed to be shipped, to be sent to the state officer in advance of the shipment, and as a prerequisite to making a subsequent shipment. We held that the inspection of a sample so sent in advance was not in the slightest degree an inspection of the goods subsequently sent in to the state. "The sample may be one thing and the merchandise which thereafter comes in another." This is a much stronger case for the application of the principle, as there is no inspection at all, but the acceptance of an affidavit made by an interested party in lieu thereof. Indeed, so perfunctory is this inspection that it appears to have awakened a suspicion in the court below "that the legislature was more concerned in collecting fees to swell the exchequer of the state, than in the protection of the people who might drink beer."

The obvious inefficacy of the inspection has an important bearing upon the more

serious objection to this act, in that the fees for inspection bear no just relation to the expense, and make it evident that the law was not passed in a bona fide exercise of the police powers of the state, but as a convenient method of increasing the public revenues. Section 8 provides for an inspection fee of one cent per gallon and two cents for labeling each package containing 8 gallons, making a total fee of one and a quarter cents per gallon. All of these fees are required to be paid into the state treasury, and pass to the general revenue fund of the state. The inspectors cannot even deduct their salaries from the fees, but are paid by a distinct appropriation for that purpose.

It is conceded in the stipulation of facts that the entire expenditure authorized on account of actual inspection amounts to \$12,500, and that the inspection fees annually collected amount to \$350,000, or \$337,500 in excess of the costs for inspection, and that the fees chargeable under said act upon [36]the *malt liquors manufactured out of and brought into the state from other states and from foreign countries, for sale in Missouri, exceed the total authorized cost for inspection, approximately, \$60,000 a year.

In this connection it is pertinent to notice that the bill in question, when first introduced in the house was entitled "An Act Creating the Office of Inspector of Beer and Malt Liquors, and Providing for the Creation of a Fund for the Construction of Roads and Highways;" and as originally introduced into the senate contained the words "providing for the increase of the general revenue fund." In the bill as passed these words were stricken out, and the words "providing for the inspection of beers and malt liquors manufactured and sold in this state" inserted in their place. Notwithstanding these changes in the title of the bill as finally passed, it is evident that the main object was to increase the general fund of the state by the amount of the inspection fees, less the expenses of the inspection, and that the inspection was really an incident to, or an excuse for, the revenue to be derived from the act. These facts are a cogent argument in favor of applying to this case the rule established in a number of recent cases, that fees cannot be imposed for the purpose of inspection upon companies doing an interstate business which are so far in excess of the expenses of such inspection as to make it plain that they were adopted, not as a means of paying such expenses, but as a means of raising revenue.

The latest of these is that of the *Postal Teleg. Cable Co. v. Taylor*, 192 U. S. 64, 48 L. ed. 342, 24 Sup. Ct. Rep. 208, wherein a license fee was imposed upon the telegraph company which largely exceeded the entire

cost to the company of maintaining its line, including repairs, reconstruction, costs of labor and of material, and traveling expenses of employees, and all expenses incurred by it in a careful inspection of its poles and wires. The ordinance was defended as a police regulation. It was argued that the question of revenue was not its object, but that the defendant had the right to constantly inspect the poles and wires to protect *the lives of its citizens.[37] The court found the borough to have been sparsely settled; that it had done nothing in the way of inspection, and had incurred no liability therefor; that the fee was twenty times as large as was necessary to make the most careful and efficient inspection that could have been made. The ordinance was adjudged to be invalid, the court saying: "To uphold it in such a case as this is to say that it may be passed for one purpose and used for another; passed as a police inspection measure, and used for the purpose of raising revenue; that the enactment as a police measure may be used as a mere subterfuge for the purpose of raising revenue, and yet, because it is said to be an inspection measure, the court must take it as such and hold it valid, although resulting in a rate of taxation which, if carried out throughout the country, would bankrupt the company, were it added to the other taxes properly assessed for revenue, and paid by the company."

In previous cases arising under a similar state of facts the ordinances had been upheld as within the police power of the municipality (*St. Louis v. Western U. Teleg. Co.* 148 U. S. 92, 37 L. ed. 380, 13 Sup. Ct. Rep. 485, 149 U. S. 465, 37 L. ed. 810, 13 Sup. Ct. Rep. 990; *Western U. Teleg. Co. v. New Hope*, 187 U. S. 419, 47 L. ed. 240, 23 Sup. Ct. Rep. 204), in which the ordinances were sustained upon the ground that the fees were not so excessive as to justify the inference that they were not imposed as a bona fide exercise of the police powers, and in *Atlantic & P. Teleg. Co. v. Philadelphia*, 190 U. S. 160, 47 L. ed. 995, 23 Sup. Ct. Rep. 817, in which the question of reasonableness was held to have been properly submitted to the jury, and *Postal Teleg. Cable Co. v. New Hope*, 192 U. S. 55, 48 L. ed. 338, 24 Sup. Ct. Rep. 204, in which the verdict of a jury for a less amount than that fixed by the ordinance was held to be a verdict that the charge was unreasonable, and should have been followed by a judgment for the telegraph company.

The facts of this case show that the inspection, as applied to malt liquors manufactured out of the state, was purely perfunctory, and accomplished nothing for the protection of its citizens, but that the fee

derivable therefrom was thirty times the actual cost of such inspection, even when [38] applied *to liquors manufactured within the state. A disproportion so gross can only be accounted for upon the theory that the act was intended for the purposes of revenue, and not for inspection.

It is insisted, however, that, as the supreme court of the state has in the case of *State v. Bieman*, 162 Mo. 1, 62 S. W. 828, by a majority vote, upheld the constitutionality of the act as an inspection law, applied to beer of domestic manufacture, and not as an act for raising revenue, we are bound by this definition, and are precluded from considering it in any other light than that of an inspection fee or license tax. But a question of constitutional law cannot be answered by a definition. While, as we have frequently said, we adopt the interpretation of the statute of a state affixed to it by the court of last resort thereof, we still feel at liberty, in accepting such interpretation, to determine for ourselves whether the act is a bona fide exercise of the police power of the state, and not intended merely as an excuse for the taxation of interstate commerce.

As was said by this court in *Mugler v. Kansas*, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273, 297: "If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

In *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527, the validity of the act of the state of Missouri, which prohibited the introduction into the state of any Texas or Mexican cattle between the months of March and November of each year, was considered. It was insisted that the law was valid as a quarantine or inspection law, as its purpose was to prevent the introduction of cattle afflicted with contagious diseases. But the court pointed out that no provision was made for the actual inspection of the cattle, so as to secure the rejection of those that were diseased, but that all importation of cattle, whether sound or diseased, was forbidden for long periods; [39] and it was *held that the statute was void as a plain intrusion upon the exclusive domain of Congress.

And in *Reid v. Colorado*, 187 U. S. 137, 150, 47 L. ed. 108, 115, 23 Sup. Ct. Rep. 92, 97, this court said:

"Certain principles are well settled by the former decisions of this court. One is that the purpose of a statute, in whatever

language it may be framed, must be determined by its natural and reasonable effect. *Henderson v. New York*. (*Henderson v. Wickham*) 92 U. S. 259, 268, 23 L. ed. 543, 548. Another is that a state may not, by its police regulations, whatever their object, unnecessarily burden foreign or interstate commerce. *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 472, 24 L. ed. 527, 530. Again, the acknowledged police powers of a state cannot legitimately be exerted so as to defeat or impair a right secured by the national Constitution, any more than to defeat or impair a statute passed by Congress in pursuance of the powers granted to it. *Gibbons v. Ogden*, 9 Wheat. 1, 210, 6 L. ed. 23, 73; *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 625, 626, 42 L. ed. 878, 882, 18 Sup. Ct. Rep. 488, and authorities cited."

The reasonableness of the law as compared with the cost of inspection is made the test of the validity of the law in *Pattapasco Guano Co. v. North Carolina Bd. of Agri.* 171 U. S. 345, 43 L. ed. 191, 18 Sup. Ct. Rep. 862; *Willis v. Standard Oil Co.* 50 Minn. 290, 52 N. W. 652.

But, treating it as an inspection law, the question remains whether, as applied to beer manufactured in other states, it is a bona fide exercise of the police powers of the state to protect the health of its citizens, and, for the reasons already given, we are of opinion it is not. The fact that the law may have been valid as applied to liquors manufactured within the state does not remove the difficulty, as the Wilson act only applies to the police powers of the state to the same extent and in the same manner as though the liquors had been produced within the state. If foreign liquors were subjected to the same inspection as domestic liquors there would be much force in the contention that the inspection was covered by the terms of the Wilson act; but as in this case domestic liquors were actually inspected, and foreign liquors were not inspected at all, the *act does not apply. The [40] object of the act is merely to place foreign and domestic liquors on the same footing as respects the police powers of the state. The inference is drawn in the opinion of the court that, upon the arrival of foreign liquors at their destination, the state may deal with such liquors as it pleases; in other words, that they have passed wholly beyond the Federal control as subjects of interstate commerce.

The Wilson act was passed in consequence of our decision in *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681, to the effect that a state statute prohibiting the sale of liquors was unconstitutional, as applied to a sale by the importer from another state in origi-

nal packages. That case was put upon the ground that liquors had always been recognized by the commercial world as subjects of exchange, barter, and traffic, and that the state could not prohibit their importation from abroad or their sale by the importer. To meet this exigency, and to enlarge the powers of the state with respect to intoxicating liquors, the Wilson act was passed, declaring that upon their arrival in the state they should be subject to the police powers of the state to the same extent and in the same manner as though such liquors had been produced within such state. The constitutionality of this act was sustained in *Rahrer's Case*, 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865, although in the subsequent case of *Rhodes v. Iowa*, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664, it was held that the Wilson act did not operate to attach to liquors the prohibitory legislation of the state at the moment they reached the state line, or before the completion of the act of transportation by their arrival at their point of destination and delivery to the consignee.

The primary, if not the sole, object of the Wilson act was to attach the prohibitory laws of the state as a police measure to liquors the moment they were delivered to the consignee, although they might still be in their original packages. The state was then at liberty to forbid their sale.

The act does not affect the right of inspection, since that right was one which [41] existed wholly independent of the act, *and had been applied and recognized ever since the case of *New York v. Miln*, 11 Pet. 102, 9 L. ed. 648, as one of the ordinary police powers of the state, which it was at liberty to exercise quite irrespective of any Federal statute for the protection of the health of its citizens. The Wilson act neither creates, adds to, takes from, nor affects, the police powers of the state with respect to inspection in any particular. The power of the state to enact inspection laws, provided that such laws are intended in good faith for the protection of the people, and not as a covert means for raising revenue by exorbitant charges, remains precisely as it was before the act was passed. In the *Miln Case* an act of the state of New York, requiring the masters of vessels arriving from foreign ports to report to the city authorities the names, etc., of his passengers, was upheld as a proper exercise of the police power; though subsequently, in the *Passenger Cases (Smith v. Turner)* 7 How. 283, 12 L. ed. 702, a similar law, requiring the masters of vessels to pay a certain sum on account of every passenger brought from a foreign country into the state, was held to be inoperative, although passed under the 198 U. S.

general denomination of a health law. It was said that, although the amount of the tax was small, it might have been increased so as to become prohibitory at the discretion of the legislature; and the fact that the tax was applied to the maintenance of a marine hospital, and to the reformation of juvenile delinquents, showed that it could not be sustained as an exercise of the police power.

While we may concede that the liquors in this case had arrived at their destination, it does not follow that they were subject to any law which the state chose to pass in an assumed exercise of the police power. The state has an undoubted right to inspect all goods arriving therein, but it does not follow that it has the right to subject them to an inspection which is no inspection at all, and charge them with a fee out of all proportion to the costs of even a proper inspection, and call it an exercise of the police power. Though these liquors had arrived at their destination, the state provided, by § 5 *of the act, that they should [42] be inspected before offering them for sale and before they had been commingled with the general mass of property. The fact that they had been delivered to the consignee was of no materiality, since the act which the state required should be done was one which applied a condition precedent to their admission to the state for commercial purposes. Until this act was performed, they were protected against an unlawful interference. This inspection might have taken place at the state line, but, for the convenience of the state officers, as well as that of the brewers, it was postponed until the arrival at their destination, as is frequently the case in foreign countries, where imported goods are not examined at the frontier, but at Paris or London, upon their arrival there; but they are not legally entered until such examination takes place. To say that their character as interstate commerce existed at the state line, but had been lost upon their arrival at their place of destination before they had shown themselves entitled to enter the state, is to apply a test wholly irrelevant under the circumstances. Indeed, in the case of *Rhodes v. Iowa*, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664, we held expressly that the prohibitory liquor laws did not apply to liquors while in transit from their point of shipment to their delivery to the consignee. The vital question is whether the inspection was applied at a time prior to their legal importation into the state as a commercial article. If it were, and the inspection were a lawful one, it is a proper regulation of interstate commerce; but, if the inspection were not a bona fide exercise of the police

power, it was an unlawful interference with such commerce. Whether the inspection was made at the state line, or at the destination of the goods, is absolutely immaterial.

The case of *Vance v. W. A. Vandercook Co.* 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674, so strongly relied upon in the opinion of the court, seems to me to have little or no bearing on this feature of the case, and tends rather to support the theory that the Wilson act had nothing to do with the question of inspection. The case turned upon the power of the consignee of liquors [43] to receive *them for his own use within the state of South Carolina, as well as the power to sell them in the original unbroken packages as imported, to citizens of South Carolina. It was held, in substance, that the consignee had the constitutional right to receive them for his own use without regard to the state laws, but that under the Wilson act he could no longer assert a right to sell them in original packages in defiance of the state laws. It was said that, although the state law permitted the sale of liquors subject to particular restrictions and upon certain enumerated conditions, it did not follow that the law was not a manifestation of the police powers of the state. The case, as do all others in which the Wilson act has been construed, relates to the power to sell, and not to the power to inspect. I have no criticism to make upon the extract from that opinion, particularly when taken in connection with the following extract from *Scott v. Donald*, 165 U. S. 58, 41 L. ed. 632, 17 Sup. Ct. Rep. 265, also cited with apparent approval in the *Vandercook Case*: "The question whether a given state law is a lawful exercise of the police power is still open, and must remain open, to this court. Such a law may forbid entirely the manufacture and sale of intoxicating liquors and be valid. Or, it may provide equal regulations for the inspection and sale of all domestic and imported liquors and be valid. But the state cannot, under the congressional legislation referred to, establish a system which, in effect, discriminates between interstate and domestic commerce, in commodities to make and use which are admitted to be lawful."

But we are not without authority upon this point. In *Minnesota v. Barber*, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862, a law of Minnesota, as in this case, prohibited the sale of fresh meats except after an inspection, and was sought to be sustained as a law for the protection of the health of the inhabitants. The act required the inspection to take place within twenty-four hours before the animals were slaughtered, and was held to be void

as a law intended to be applied only to cattle slaughtered outside the state. While the question was not discussed, it was assumed *that the meats had arrived at their [44] destination within the state and been delivered to their consignee, and that the inspection, not being a bona fide one, was an unlawful discrimination against interstate commerce. So in the subsequent case of *Brimmer v. Rebman*, 138 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213, a law of Virginia provided that meat should not be sold from animals slaughtered 100 miles or more from the place where offered for sale, unless previously inspected by local inspectors. The act was held to be void as in restraint of commerce between the states, and as imposing a tax upon the products of other states. Both of these acts, as does the act of Missouri in question, provided against the sale of uninspected merchandise, and this court held, quite irrespective of other considerations, that the act was void. To the same effect is *Walling v. Michigan*, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454.

For the reasons already given, I think the act in this case is void as an inspection law, and an illegal interference with interstate commerce, since the assumed inspection preceded the arrival of the liquors within the state as a constituent part of its general property.

The consequences of this decision seem to me extremely serious. If the states may, in the assumed exercise of police powers, enact inspection laws, which are not such in fact, and thereby indirectly impose a revenue tax on liquors, it is difficult to see any limit to this power of taxation, or why it may not be applied to any other articles brought within the state, and the cases of *Minnesota v. Barber*, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862, and *Brimmer v. Rebman*, 138 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213, be practically overruled. The Wilson act does not give the legislature any greater authority with respect to the inspection of liquors than with respect to other imported articles, and, as already observed, it leaves the question of inspection exactly where it found it. If the Wilson act receive its natural application,—that is, of meeting the exigency created by our decision in *Leisy v. Hardin*, and enabling the states to enforce their prohibitory liquor laws upon the arrival of the liquor within the state, as we have *re-[45]peatedly held,—the law has a definite and distinct value, and is readily understood.

I am authorized to state that the CHIEF JUSTICE, Mr. Justice **Brewer**, and Mr. Justice **Day** concur in this dissent.

JOSEPH LOCHNER, *Plff. in Err.*,
v.
PEOPLE OF THE STATE OF NEW YORK.

(See S. C. Reporter's ed. 45-76.)

Master and servant—validity of state regulation of hours of labor—ten-hour law for bakers—freedom to contract.

The limitation of employment in bakeries to sixty hours a week and ten hours a day, attempted by N. Y. Laws 1897, chap. 415, art. 8, § 110, is an arbitrary interference with the freedom to contract guaranteed by U. S. Const. 14th Amend., which cannot be sustained as a valid exercise of the police power to protect the public health, safety, morals, or general welfare.

[No. 292.]

Argued February 23, 24, 1905. Decided April 17, 1905.

IN ERROR to the County Court of Oneida County, State of New York, to review a judgment entered pursuant to the mandate of the Court of Appeals of that state affirming the judgment of the Appellate Division of the Supreme Court, Fourth Department, which had itself affirmed a conviction in the Oneida County Court of a violation of the labor law of that state by permitting an employee in a bakery to work more than sixty hours in one week. Judgments of all the courts below *reversed*, and the cause remanded to the Oneida County Court for further proceedings.

See same case below in Appellate Division, 73 App. Div. 120, 76 N. Y. Supp. 396, and in Court of Appeals, 177 N. Y. 145, 101 Am. St. Rep. 773, 69 N. E. 373.

Statement by Mr. Justice **Peckham**:

This is a writ of error to the county court of Oneida county, in the state of New York (to which court the record had been remitted), to review the judgment of the court of appeals of that state, affirming the judgment of the supreme court, which itself affirmed the judgment of the county court, convicting the defendant of a misdemeanor on an indictment under a statute of that state, known, by its short title, as the labor [46] *law. The section of the statute under which the indictment was found is § 110, and is reproduced in the margin † (together with

the other sections of the labor law upon the subject of bakeries, being §§ 111 to 115, both inclusive).

The indictment averred that the defendant "wrongfully and unlawfully required and permitted an employee working for him in his biscuit, bread, and cake bakery and confectionery establishment, at the city of Utica, in this county, to work more than sixty hours in one week," after having been theretofore convicted of a violation of the same act; and therefore, as averred, he committed the crime of misdemeanor, second offense. The plaintiff in error demurred to the indictment on several grounds, one of which was that the facts stated did not *constitute a crime. The demurrer was over- [47] ruled, and, the plaintiff in error having refused to plead further, a plea of not guilty was entered by order of the court and the trial commenced, and he was convicted of misdemeanor, second offense, as indicted, and sentenced to pay a fine of \$50, and to stand committed until paid, not to exceed fifty days in the Oneida county jail. A certificate of reasonable doubt was granted by the county judge of Oneida county, whereon an appeal was taken to the appellate division of the supreme court, fourth department, where the judgment of conviction was affirmed. 73 App. Div. 120, 76 N. Y. Supp. 396. A further appeal was then taken to the court of appeals, where the judgment of conviction was again affirmed. 177 N. Y. 145, 101 Am. St. Rep. 773, 69 N. E. 373.

Messrs. Frank Harvey Field and Henry Weismann (by special leave) argued the cause and filed a brief for plaintiff in error:

The statute in question is not a reasonable exercise of the police power.

4 Bl. Com. 162; Bentham, Edinburgh ed. pt. ix. 157; 2 Kent's Com. 340; *Slaughter-House Cases*, 16 Wall. 36, 37, 21 L. ed. 394; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; Tiedeman, Pol. Powers, § 178; Freund, Pol. Power, p. 534, § 58; *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; *People v. Hawkins*, 157 N. Y. 1, 42 L. R. A. 490, 68 Am. St. Rep. 736, 51 N. E. 257; *People v. Beattie*, 96 App. Div. 383, 89 N. Y. Supp. 193.

Where the ostensible object of an enact-

NOTE.—As to validity of legislation regulating hours of labor—see note to *Atkin v. Kansas*, 48 L. ed. U. S. 148; and *People v. Orange County Road Constr. Co.* 65 L. R. A. 33.

†"§ 110. *Hours of labor in bakeries and confectionery establishments.*—No employee shall be required or permitted to work in a biscuit, bread, or cake bakery or confectionery estab-

lishment more than sixty hours in any one week, or more than ten hours in any one day, unless for the purpose of making a shorter work day on the last day of the week; nor more hours in any one week than will make an average of ten hours per day for the number of days during such week in which such employee shall work.

"§ 111. *Drainage and plumbing of buildings*

ment is to secure the public comfort, welfare, or safety, it must appear to be adapted to that end. It cannot invade the rights of persons and property under the guise of the police regulation, when it is not such in fact.

Eden v. People, 161 Ill. 296, 32 L. R. A. 659, 52 Am. St. Rep. 365, 43 N. E. 1108; *Ex parte Jentzsch*, 112 Cal. 468, 32 L. R. A. 664, 44 Pac. 803; *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; *Lake View v. Rose Hill Cemetery Co.* 70 Ill. 191, 22 Am. Rep. 71.

The following decisions of the New York court of appeals interpreting the "labor law" of that state are not directly in point, but are important expressions of the views of that court on some branches of the case at bar:

People ex rel. Rodgers v. Coler, 166 N. Y. 1, 52 L. R. A. 814, 82 Am. St. Rep. 605, 59 N. E. 716; *People v. Orange County Road Constr. Co.* 175 N. Y. 84, 63 L. R. A. 33, 67 N. E. 129; *Ryan v. New York*, 177 N. Y. 271, 69 N. E. 599; *People ex rel. Cossey v. Grout*, 179 N. Y. 417, 72 N. E. 464.

Innocuous trades cannot arbitrarily be regulated by the legislature.

Butcher's Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 757, 28 L. ed. 585, 591, 4 Sup. Ct. Rep.

652; *Calder v. Bull*, 3 Dall. 386, 388, 1 L. ed. 648, 649; *United States v. Martin*, 94 U. S. 400, 403, 24 L. ed. 128; *People v. Phyfe*, 136 N. Y. 554, 19 L. R. A. 141, 32 N. E. 978; *Henderson v. New York (Henderson v. Wickham)* 92 U. S. 259, 23 L. ed. 543; *Wynehamer v. People*, 13 N. Y. 378; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; *People v. Gillson*, 109 N. Y. 401, 4 Am. St. Rep. 465, 17 N. E. 343; *People v. Budd*, 117 N. Y. 15, 5 L. R. A. 559, 15 Am. St. Rep. 460, 22 N. E. 670; *Health Department v. Trinity Church*, 145 N. Y. 32, 27 L. R. A. 710, 45 Am. St. Rep. 579, 39 N. E. 833; *Colon v. Lisk*, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302; *People v. Hawkins*, 157 N. Y. 1, 42 L. R. A. 490, 68 Am. St. Rep. 736, 51 N. E. 257; *People ex rel. Tyroler v. City Prison*, 157 N. Y. 116, 43 L. R. A. 264, 68 Am. St. Rep. 763, 51 N. E. 1006; *People ex rel. Rodgers v. Coler*, 166 N. Y. 1, 52 L. R. A. 814, 82 Am. St. Rep. 605, 59 N. E. 716; *People v. Biesecker*, 169 N. Y. 53, 57 L. R. A. 178, 88 Am. St. Rep. 534, 61 N. E. 990; *People v. Orange County Road Constr. Co.* 175 N. Y. 84, 65 L. R. A. 33, 67 N. E. 129; *Ryan v. New York*, 177 N. Y. 271, 69 N. E. 599; *People ex rel. Cossey v. Grout*, 179 N. Y. 417, 72 N. E. 464; *Slaughter-House Cases*,

and rooms occupied by bakeries.—All buildings or rooms occupied as biscuit, bread, pie, or cake bakeries, shall be drained and plumbed in a manner conducive to the proper and healthful sanitary condition thereof, and shall be constructed with air shafts, windows, or ventilating pipes, sufficient to insure ventilation. The factory inspector may direct the proper drainage, plumbing, and ventilation of such rooms or buildings. No cellar or basement, not now used for a bakery, shall hereafter be so occupied or used, unless the proprietor shall comply with the sanitary provisions of this article.

"§ 112. Requirements as to rooms, furniture, utensils, and manufactured products.—Every room used for the manufacture of flour or meal food products shall be at least 8 feet in height and shall have, if deemed necessary by the factory inspector, an impermeable floor constructed of cement, or of tiles laid in cement, or an additional flooring of wood properly saturated with linseed oil. The side walls of such rooms shall be plastered or wainscoted. The factory inspector may require the side walls and ceiling to be whitewashed at least once in three months. He may also require the wood work of such walls to be painted. The furniture and utensils shall be so arranged as to be readily cleansed and not prevent the proper cleaning of any part of the room. The manufactured flour or meal food products shall be kept in dry and airy rooms, so arranged that the floors, shelves, and all other facilities for storing the same can be properly cleaned. No domestic animals, except cats, shall be allowed to remain in a room used as a biscuit, bread, pie, or cake bakery, or any room in such bakery where flour or meal products are stored.

"§ 113. Wash rooms and closets; sleeping places.—Every such bakery shall be provided with a proper wash room and water-closet, or water-closets, apart from the bake room, or rooms where the manufacture of such food product is conducted, and no water-closet, earth closet, privy, or ashpit shall be within, or connected directly with, the bake room of any bakery, hotel, or public restaurant.

"No person shall sleep in a room occupied as a bake room. Sleeping places for the persons employed in the bakery shall be separate from the rooms where flour or meal food products are manufactured or stored. If the sleeping places are on the same floor where such products are manufactured, stored, or sold, the factory inspector may inspect and order them put in a proper sanitary condition.

"§ 114. Inspection of bakeries.—The factory inspector shall cause all bakeries to be inspected. If it be found upon such inspection that the bakeries so inspected are constructed and conducted in compliance with the provisions of this chapter, the factory inspector shall issue a certificate to the person owning or conducting such bakeries.

"§ 115. Notice requiring alterations.—If, in the opinion of the factory inspector, alterations are required in or upon premises occupied and used as bakeries, in order to comply with the provisions of this article, a written notice shall be served by him upon the owner, agent, or lessee of such premises, either personally or by mail, requiring such alterations to be made within sixty days after such service, and such alterations shall be made accordingly." [N. Y. Laws 1897, chap 415.]

16 Wall. 36, 21 L. ed. 394; *Henderson v. New York* (*Henderson v. Wickham*) 92 U. S. 259, 23 L. ed. 543; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Missouri v. Lewis* (*Bowman v. Lewis*) 101 U. S. 22, 25 L. ed. 989; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Petit v. Minnesota*, 177 U. S. 164, 44 L. ed. 716, 20 Sup. Ct. Rep. 666; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; *Atkin v. Kansas*, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124; *Cook v. Marshall County*, 196 U. S. 261, ante, 471, 25 Sup. Ct. Rep. 233.

Legislation of the kind in issue has been almost uniformly declared invalid in the state courts.

Sawyer v. Davis, 136 Mass. 239, 49 Am. Rep. 27; *Eden v. People*, 161 Ill. 296, 32 L. R. A. 659, 52 Am. St. Rep. 365, 43 N. E. 1108; *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; *Ex parte Kuback*, 85 Cal. 274, 9 L. R. A. 482, 20 Am. St. Rep. 226, 24 Pac. 737; *Godcharles v. Wigeman*, 113 Pa. 431, 6 Atl. 354; *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 25 Am. St. Rep. 863, 10 S. E. 285; *Leep v. St. Louis, I. M. & S. R. Co.* 58 Ark. 407, 23 L. R. A. 264, 41 Am. St. Rep. 109, 25 S. W. 75; *Low v. Rees Printing Co.* 41 Neb. 127, 24 L. R. A. 702, 43 Am. St. Rep. 670, 59 N. W. 362; *Ex parte Westerfield*, 55 Cal. 550, 36 Am. Rep. 47.

The questions which present themselves in the examination of a safety or health measure are: Does a danger exist? Is it of sufficient magnitude? Does it concern the public? Does the proposed measure tend to remove it? Is the restraint or requirement in proportion to the danger? Is it possible to secure the object sought without impairing essential rights and principles? Does the choice of a particular measure show that some other interest than safety or health was the actual motive of legislation?

Freund, Pol. Power, § 143.

Mr. **Julius M. Mayer** argued the cause and filed a brief for defendant in error:

In different states we find different conditions, of which the state itself is the best judge, and to meet which its legislature frames and passes laws.

A state which contains within its borders many and large mining enterprises naturally gives to the subject of public health in connection with the working of mines a study which is not needed in a state where mines do not exist or are not worked.

Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383.

The power of the legislature to decide
198 U. S.

what laws are necessary to secure the public health, safety, or welfare is subject to the power of the court to decide whether an act purporting to promote the public health or safety has such a reasonable connection therewith as to appear upon inspection to be adapted to that end. And the court may order judicial notice of the fact of the common belief of the people upon that subject.

Viemcister v. White, 179 N. Y. 235, 72 N. E. 97.

The propriety of the exercise of the police power within constitutional limits is purely a matter of legislative discretion, with which courts cannot interfere.

People v. King, 110 N. Y. 418, 1 L. R. A. 293, 6 Am. St. Rep. 389, 18 N. E. 245.

If the act admits of two constructions as to its being a health measure or otherwise, the courts should give the construction which sustains the act and makes it applicable in furtherance of the public interests.

Bohmer v. Haffen, 161 N. Y. 390, 55 N. E. 1047.

Mr. Justice **Peckham**, after making the foregoing statement of the facts, delivered the opinion of the court:

The indictment, it will be seen, charges that the plaintiff in error violated the 110th section of article 8, chapter 415, of the Laws of 1897, known as the labor law of the state of New York, in that he wrongfully and unlawfully required and permitted an employee working for him to work more than sixty hours in one week. There is nothing in any of the opinions delivered in this case, either in the supreme court or the court of appeals of the state, which construes the section, in using the word "required," as referring to any physical force being used to obtain the labor of an employee. It is assumed that the word means nothing more than the requirement arising from voluntary contract for such labor in excess of the number of hours specified in the statute. There is no pretense in any of the opinions that the statute was intended to meet a case of involuntary labor in any form. All the opinions assume that there is no real distinction, so far as this question is concerned, between the words "required" and "permitted." The mandate of the statute, that "no employee shall be required or permitted to work," is the substantial equivalent of an enactment that "no employee shall contract or agree to work," more than ten hours per day; and, as there is no provision for special emergencies, the statute is mandatory in all cases. It is not an act merely fixing the number of hours which shall

constitute a legal day's work, but an absolute prohibition upon the employer permitting, under any circumstances, more than ten hours' work to be done in his establishment. The employee may desire to earn the extra money which would arise from his
[53] working more than the prescribed *time, but this statute forbids the employer from permitting the employee to earn it.

The statute necessarily interferes with the right of contract between the employer and employees, concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution. *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427. Under that provision no state can deprive any person of life, liberty, or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right. There are, however, certain powers, existing in the sovereignty of each state in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated, and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals, and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the state in the exercise of those powers, and with such conditions the 14th Amendment was not designed to interfere. *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Re Kemmler*, 136 U. S. 436, 34 L. ed. 519, 10 Sup. Ct. Rep. 930; *Crowley v. Christensen*, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13; *Re Converse*, 137 U. S. 624, 34 L. ed. 796, 11 Sup. Ct. Rep. 191.

The state, therefore, has power to prevent the individual from making certain kinds of contracts, and in regard to them the Federal Constitution offers no protection. If the contract be one which the state, in the legitimate exercise of its police power, has the right to prohibit, it is not prevented from prohibiting it by the 14th Amendment. Contracts in violation of a statute, either of the Federal or state government, or a contract to let one's property for immoral purposes, or to do any other unlawful act, could obtain no protection from the Federal Constitution, as coming under the liberty
[54] of *person or of free contract. Therefore, when the state, by its legislature, in the assumed exercise of its police powers, has

passed an act which seriously limits the right to labor or the right of contract in regard to their means of livelihood between persons who are *sui juris* (both employer and employee), it becomes of great importance to determine which shall prevail,—the right of the individual to labor for such time as he may choose, or the right of the state to prevent the individual from laboring, or from entering into any contract to labor, beyond a certain time prescribed by the state.

This court has recognized the existence and upheld the exercise of the police powers of the states in many cases which might fairly be considered as border ones, and it has, in the course of its determination of questions regarding the asserted invalidity of such statutes, on the ground of their violation of the rights secured by the Federal Constitution, been guided by rules of a very liberal nature, the application of which has resulted, in numerous instances, in upholding the validity of state statutes thus assailed. Among the later cases where the state law has been upheld by this court is that of *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383. A provision in the act of the legislature of Utah was there under consideration, the act limiting the employment of workmen in all underground mines or workings, to eight hours per day, "except in cases of emergency, where life or property is in imminent danger." It also limited the hours of labor in smelting and other institutions for the reduction or refining of ores or metals to eight hours per day, except in like cases of emergency. The act was held to be a valid exercise of the police powers of the state. A review of many of the cases on the subject, decided by this and other courts, is given in the opinion. It was held that the kind of employment, mining, smelting, etc., and the character of the employees in such kinds of labor, were such as to make it reasonable and proper for the state to interfere to prevent the employees from being constrained by the rules laid down by the proprietors in regard to labor. The following citation *from the [55] observations of the supreme court of Utah in that case was made by the judge writing the opinion of this court, and approved: "The law in question is confined to the protection of that class of people engaged in labor in underground mines, and in smelters and other works wherein ores are reduced and refined. This law applies only to the classes subjected by their employment to the peculiar conditions and effects attending underground mining and work in smelters, and other works for the reduction and refining of ores. Therefore it is not necessary

to discuss or decide whether the legislature can fix the hours of labor in other employments."

It will be observed that, even with regard to that class of labor, the Utah statute provided for cases of emergency wherein the provisions of the statute would not apply. The statute now before this court has no emergency clause in it, and, if the statute is valid, there are no circumstances and no emergencies under which the slightest violation of the provisions of the act would be innocent. There is nothing in *Holden v. Hardy* which covers the case now before us. Nor does *Atkin v. Kansas*, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124, touch the case at bar. The *Atkin Case* was decided upon the right of the state to control its municipal corporations, and to prescribe the conditions upon which it will permit work of a public character to be done for a municipality. *Knoxville Iron Co. v. Harbison*, 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1, is equally far from an authority for this legislation. The employees in that case were held to be at a disadvantage with the employer in matters of wages, they being miners and coal workers, and the act simply provided for the cashing of coal orders when presented by the miner to the employer.

The latest case decided by this court, involving the police power, is that of *Jacobson v. Massachusetts*, decided at this term and reported in 197 U. S. 11, ante, 643, 25 Sup. Ct. Rep. 358. It related to compulsory vaccination, and the law was held valid as a proper exercise of the police powers with reference to the public health. It was stated in the opinion that it was a case "of an adult who, for aught that appears, was himself in perfect health and a [56] fit *subject of vaccination, and yet, while remaining in the community, refused to obey the statute and the regulation, adopted in execution of its provisions, for the protection of the public health and the public safety, confessedly endangered by the presence of a dangerous disease." That case is also far from covering the one now before the court.

Petit v. Minnesota, 177 U. S. 164, 44 L. ed. 716, 20 Sup. Ct. Rep. 666, was upheld as a proper exercise of the police power relating to the observance of Sunday, and the case held that the legislature had the right to declare that, as matter of law, keeping barber shops open on Sunday was not a work of necessity or charity.

It must, of course, be conceded that there is a limit to the valid exercise of the police power by the state. There is no dispute concerning this general proposition. Otherwise the 14th Amendment would have no efficacy 198 U. S. U. S., Book 49.

and the legislatures of the states would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext,—become another and delusive name for the supreme sovereignty of the state to be exercised free from constitutional restraint. This is not contended for. In every case that comes before this court, therefore, where legislation of this character is concerned, and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty, or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Of course the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor.

This is not a question of substituting the judgment of the *court for that of the legis- [57] lature. If the act be within the power of the state it is valid, although the judgment of the court might be totally opposed to the enactment of such a law. But the question would still remain: Is it within the police power of the state? and that question must be answered by the court.

The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the state, interfering with their independence of judgment and of action. They are in no sense wards of the state. Viewed in the light of a purely labor law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals, nor the welfare, of the public, and that the interest of the public is not in the slightest degree affected by such an act. The law must be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation of a baker. It does not

affect any other portion of the public than those who are engaged in that occupation. Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week. The limitation of the hours of labor does not come within the police power on that ground.

It is a question of which of two powers or rights shall prevail,—the power of the state to legislate or the right of the individual to liberty of person and freedom of contract. The mere assertion that the subject relates, though but in a remote degree, to the public health, does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can [58] be held to be valid which interferes *with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.

This case has caused much diversity of opinion in the state courts. In the supreme court two of the five judges composing the court dissented from the judgment affirming the validity of the act. In the court of appeals three of the seven judges also dissented from the judgment upholding the statute. Although found in what is called a labor law of the state, the court of appeals has upheld the act as one relating to the public health,—in other words, as a health law. One of the judges of the court of appeals, in upholding the law, stated that, in his opinion, the regulation in question could not be sustained unless they were able to say, from common knowledge, that working in a bakery and candy factory was an unhealthy employment. The judge held that, while the evidence was not uniform, it still led him to the conclusion that the occupation of a baker or confectioner was unhealthy and tended to result in diseases of the respiratory organs. Three of the judges dissented from that view, and they thought the occupation of a baker was not to such an extent unhealthy as to warrant the interference of the legislature with the liberty of the individual.

We think the limit of the police power has been reached and passed in this case. There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health, or the health of the individuals who are following the trade of a baker. If this statute be valid, and if, therefore, a proper case is made out in which to deny the right of an individual, *sui juris*, as employer or employee, to make contracts for the labor of the latter under the protection of the provisions of

the Federal Constitution, there would seem to be no length to which legislation of this nature might not go. The case differs widely, as we have already stated, from the expressions of this court in regard to laws of this nature, as stated in *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383, and *Jacobson v. Massachusetts*, 197 U. S. 11, *ante*, 643, 25 Sup. Ct. Rep. 358.

*We think that there can be no fair doubt [59], that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract on the part of the individual, either as employer or employee. In looking through statistics regarding all trades and occupations, it may be true that the trade of a baker does not appear to be as healthy as some other trades, and is also vastly more healthy than still others. To the common understanding the trade of a baker has never been regarded as an unhealthy one. Very likely physicians would not recommend the exercise of that or of any other trade as a remedy for ill health. Some occupations are more healthy than others, but we think there are none which might not come under the power of the legislature to supervise and control the hours of working therein, if the mere fact that the occupation is not absolutely and perfectly healthy is to confer that right upon the legislative department of the government. It might be safely affirmed that almost all occupations more or less affect the health. There must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty. It is unfortunately true that labor, even in any department, may possibly carry with it the seeds of unhealthiness. But are we all, on that account, at the mercy of legislative majorities? A printer, a tinsmith, a locksmith, a carpenter, a cabinetmaker, a dry goods clerk, a bank's, a lawyer's, or a physician's clerk, or a clerk in almost any kind of business, would all come under the power of the legislature, on this assumption. No trade, no occupation, no mode of earning one's living, could escape this all-pervading power, and the acts of the legislature in limiting the hours of labor in all employments would be valid, although such limitation might seriously cripple the ability of the laborer to support himself and his family. In our large cities there are many buildings into which the sun penetrates for but a short time in each day, and these buildings are occupied by people carrying on the *business [60] of bankers, brokers, lawyers, real estate, and many other kinds of business, aided by

many clerks, messengers, and other employees. Upon the assumption of the validity of this act under review, it is not possible to say that an act, prohibiting lawyers' or bank clerks, or others, from contracting to labor for their employers more than eight hours a day would be invalid. It might be said that it is unhealthy to work more than that number of hours in an apartment lighted by artificial light during the working hours of the day; that the occupation of the bank clerk, the lawyer's clerk, the real-estate clerk, or the broker's clerk, in such offices is therefore unhealthy, and the legislature, in its paternal wisdom, must, therefore, have the right to legislate on the subject of, and to limit, the hours for such labor; and, if it exercises that power, and its validity be questioned, it is sufficient to say, it has reference to the public health; it has reference to the health of the employees condemned to labor day after day in buildings where the sun never shines; it is a health law, and therefore it is valid, and cannot be questioned by the courts.

It is also urged, pursuing the same line of argument, that it is to the interest of the state that its population should be strong and robust, and therefore any legislation which may be said to tend to make people healthy must be valid as health laws, enacted under the police power. If this be a valid argument and a justification for this kind of legislation, it follows that the protection of the Federal Constitution from undue interference with liberty of person and freedom of contract is visionary, wherever the law is sought to be justified as a valid exercise of the police power. Scarcely any law but might find shelter under such assumptions, and conduct, properly so called, as well as contract, would come under the restrictive sway of the legislature. Not only the hours of employees, but the hours of employers, could be regulated, and doctors, lawyers, scientists, all professional men, as well as athletes and artisans, could be forbidden to fatigue their brains and bodies by prolonged hours of exercise, lest [61] the fighting strength *of the state be impaired. We mention these extreme cases because the contention is extreme. We do not believe in the soundness of the views which uphold this law. On the contrary, we think that such a law as this, although passed in the assumed exercise of the police power, and as relating to the public health, or the health of the employees named, is not within that power, and is invalid. The act is not, within any fair meaning of the term, a health law, but is an illegal interference with the rights of individuals, both employers and employees, to make contracts regarding labor upon such terms as they

198 U. S.

may think best, or which they may agree upon with the other parties to such contracts. Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with, unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health, or to the health of the employees, if the hours of labor are not curtailed. If this be not clearly the case, the individuals whose rights are thus made the subject of legislative interference are under the protection of the Federal Constitution regarding their liberty of contract as well as of person; and the legislature of the state has no power to limit their right as proposed in this statute. All that it could properly do has been done by it with regard to the conduct of bakeries, as provided for in the other sections of the act, above set forth. These several sections provide for the inspection of the premises where the bakery is carried on, with regard to furnishing proper wash rooms and water-closets, apart from the bake room, also with regard to providing proper drainage, plumbing, and painting; the sections, in addition, provide for the height of the ceiling, the cementing or tiling of floors, where necessary in the opinion of the factory inspector, and for other things of *that nature; altera- [62] tions are also provided for, and are to be made where necessary in the opinion of the inspector, in order to comply with the provisions of the statute. These various sections may be wise and valid regulations, and they certainly go to the full extent of providing for the cleanliness and the healthiness, so far as possible, of the quarters in which bakeries are to be conducted. Adding to all these requirements a prohibition to enter into any contract of labor in a bakery for more than a certain number of hours a week is, in our judgment, so wholly beside the matter of a proper, reasonable, and fair provision as to run counter to that liberty of person and of free contract provided for in the Federal Constitution.

It was further urged on the argument that restricting the hours of labor in the case of bakers was valid because it tended to cleanliness on the part of the workers, as a man was more apt to be cleanly when not overworked, and if cleanly then his "output" was also more likely to be so. What has already been said applies with equal

force to this contention. We do not admit the reasoning to be sufficient to justify the claimed right of such interference. The state in that case would assume the position of a supervisor, or *pater familias*, over every act of the individual, and its right of governmental interference with his hours of labor, his hours of exercise, the character thereof, and the extent to which it shall be carried would be recognized and upheld. In our judgment it is not possible in fact to discover the connection between the number of hours a baker may work in the bakery and the healthful quality of the bread made by the workman. The connection, if any exist, is too shadowy and thin to build any argument for the interference of the legislature. If the man works ten hours a day it is all right, but if ten and a half or eleven his health is in danger and his bread may be unhealthy, and, therefore, he shall not be permitted to do it. This, we think, is unreasonable and entirely arbitrary. When assertions such as we have adverted to become necessary in order to give, if possible, a plausible foundation for the contention [63] that the law is a "health law," *it gives rise to at least a suspicion that there was some other motive dominating the legislature than the purpose to subserve the public health or welfare.

This interference on the part of the legislatures of the several states with the ordinary trades and occupations of the people seems to be on the increase. In the supreme court of New York, in the case of *People v. Beattie*, appellate division, first department, decided in 1904 (93 App. Div. 383, 89 N. Y. Supp. 193), a statute regulating the trade of horseshoeing, and requiring the person practising such trade to be examined, and to obtain a certificate from a board of examiners and file the same with the clerk of the county wherein the person proposes to practise such trade, was held invalid, as an arbitrary interference with personal liberty and private property without due process of law. The attempt was made, unsuccessfully, to justify it as a health law.

The same kind of a statute was held invalid (*Re Aubry*) by the supreme court of Washington in December, 1904. 78 Pac. 900. The court held that the act deprived citizens of their liberty and property without due process of law, and denied to them the equal protection of the laws. It also held that the trade of a horseshoer is not a subject of regulation under the police power of the state, as a business concerning and directly affecting the health, welfare, or comfort of its inhabitants; and that, therefore, a law which provided for the examina-

tion and registration of horseshoers in certain cities was unconstitutional, as an illegitimate exercise of the police power.

The supreme court of Illinois, in *Bessette v. People*, 193 Ill. 334, 56 L. R. A. 558, 62 N. E. 215, also held that a law of the same nature, providing for the regulation and licensing of horseshoers, was unconstitutional as an illegal interference with the liberty of the individual in adopting and pursuing such calling as he may choose, subject only to the restraint necessary to secure the common welfare. See also *Godcharles v. Wigeman*, 113 Pa. 431, 437, 6 Atl. 354; *Low v. Rees Printing Co.* 41 Neb. 127, 145, 24 L. R. A. 702, 43 Am. St. Rep. 670, 59 N. W. 362. In *these cases the courts upheld the right of [64] free contract and the right to purchase and sell labor upon such terms as the parties may agree to.

It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives. We are justified in saying so when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law. The purpose of a statute must be determined from the natural and legal effect of the language employed; and whether it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose. *Minnesota v. Barber*, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Brimmer v. Rebman*, 138 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213. The court looks beyond the mere letter of the law in such cases. *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064.

It is manifest to us that the limitation of the hours of labor as provided for in this section of the statute under which the indictment was found, and the plaintiff in error convicted, has no such direct relation to, and no such substantial effect upon, the health of the employee, as to justify us in regarding the section as really a health law. It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employees (all being men, *sui juris*), in a private business, not dangerous in any degree to morals, or in any real and substantial degree to the health of the employees. Under such circumstances the freedom of master and employee to contract with each other in

relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution.

The judgment of the Court of Appeals of New York, as well as that of the Supreme Court and of the County Court of Oneida County, must be reversed and the case re-

[65]manded to *the County Court for further proceedings not inconsistent with this opinion.

Reversed.

Mr. Justice **Harlan** (with whom Mr. Justice **White** and Mr. Justice **Day** concurred) dissenting:

While this court has not attempted to mark the precise boundaries of what is called the police power of the state, the existence of the power has been uniformly recognized, equally by the Federal and State courts.

All the cases agree that this power extends at least to the protection of the lives, the health, and the safety of the public against the injurious exercise by any citizen of his own rights.

In *Patterson v. Kentucky*, 97 U. S. 501, 24 L. ed. 1115, after referring to the general principle that rights given by the Constitution cannot be impaired by state legislation of any kind, this court said: "It [this court] has, nevertheless, with marked distinctness and uniformity, recognized the necessity, growing out of the fundamental conditions of civil society, of upholding state police regulations which were enacted in good faith, and had appropriate and direct connection with that protection to life, health, and property which each state owes to her citizens." So in *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357: "But neither the [14th] Amendment,—broad and comprehensive as it is,—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people."

Speaking generally, the state, in the exercise of its powers, may not unduly interfere with the right of the citizen to enter into contracts that may be necessary and essential in the enjoyment of the inherent rights belonging to everyone, among which rights is the right "to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or

[66]avocation." This was declared *in *Allgeyer v. Louisiana*, 165 U. S. 578, 589, 41 L. ed. 832, 835, 17 Sup. Ct. Rep. 427, 431. But

198 U. S.

in the same case it was conceded that the right to contract in relation to persons and property, or to do business, within a state, may be "regulated, and sometimes prohibited, when the contracts or business conflict with the policy of the state as contained in its statutes." (p. 591, L. ed. p. 836, Sup. Ct. Rep. p. 432.)

So, as said in *Holden v. Hardy*, 169 U. S. 366, 391, 42 L. ed. 780, 790, 18 Sup. Ct. Rep. 383, 388: "This right of contract, however, is itself subject to certain limitations which the state may lawfully impose in the exercise of its police powers. While this power is inherent in all governments, it has doubtless been greatly expanded in its application during the past century, owing to an enormous increase in the number of occupations which are dangerous, or so far detrimental to the health of employees as to demand special precautions for their well-being and protection, or the safety of adjacent property. While this court has held, notably in the cases *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616, and *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064, that the police power cannot be put forward as an excuse for oppressive and unjust legislation, it may be lawfully resorted to for the purpose of preserving the public health, safety, or morals, or the abatement of public nuisances; and a large discretion 'is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests.' *Lawton v. Steele*, 152 U. S. 133, 136, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499, 501." Referring to the limitations placed by the state upon the hours of workmen, the court in the same case said (p. 395, L. ed. p. 792, Sup. Ct. Rep. p. 389): "These employments, when too long pursued, the legislature has judged to be detrimental to the health of the employees, and, so long as there are reasonable grounds for believing that this is so, its decision upon this subject cannot be reviewed by the Federal courts."

Subsequently, in *Gundling v. Chicago*, 177 U. S. 183, 188, 44 L. ed. 725, 728, 20 Sup. Ct. Rep. 633, 635, this court said: "Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and

*to what particular trade, business, or oc-[67]cupation they shall apply, are questions for the state to determine, and their determination comes within the proper exercise of the police power by the state, and, unless the regulations are so utterly unreasonable and extravagant in their nature and

purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the state to pass, and they form no subject for Federal interference. As stated in *Crowley v. Christensen*, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13, 'the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community.'

In *St. Louis I. M. & S. R. Co. v. Paul*, 173 U. S. 404, 409, 43 L. ed. 746, 748, 19 Sup. Ct. Rep. 419, and in *Knowlton Iron Co. v. Harbison*, 183 U. S. 13, 21, 22, 46 L. ed. 55, 61, 22 Sup. Ct. Rep. 1, it was distinctly adjudged that the right of contract was not "absolute, but may be subjected to the restraints demanded by the safety and welfare of the state." Those cases illustrate the extent to which the state may restrict or interfere with the exercise of the right of contracting.

The authorities on the same line are so numerous that further citations are unnecessary.

I take it to be firmly established that what is called the liberty of contract may, within certain limits, be subjected to regulations designed and calculated to promote the general welfare, or to guard the public health, the public morals, or the public safety. "The liberty secured by the Constitution of the United States to every person within its jurisdiction does not import," this court has recently said, "an absolute right in each person to be at all times and in all circumstances wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good." *Jacobson v. Massachusetts*, 196 U. S. 11, ante, 643, 25 Sup. Ct. Rep. 358.

[68] *Granting, then, that there is a liberty of contract which cannot be violated even under the sanction of direct legislative enactment, but assuming, as according to settled law we may assume, that such liberty of contract is subject to such regulations as the state may reasonably prescribe for the common good and the well-being of society, what are the conditions under which the judiciary may declare such regulations to be in excess of legislative authority and void? Upon this point there is no room for dispute; for the rule is universal that a legislative enactment, Federal or state, is never to be disregarded or held invalid unless it be, beyond question, plainly and palpably in excess of legislative

power. In *Jacobson v. Massachusetts*, 196 U. S. 11, ante, 643, 25 Sup. Ct. Rep. 358, we said that the power of the courts to review legislative action in respect of a matter affecting the general welfare exists only "when that which the legislature has done comes within the rule that, if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law," citing *Mugler v. Kansas*, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; *Minnesota v. Barber*, 136 U. S. 313, 320, 34 L. ed. 455, 458, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Atkin v. Kansas*, 191 U. S. 207, 223, 48 L. ed. 148, 158, 24 Sup. Ct. Rep. 124. If there be doubt as to the validity of the statute, that doubt must therefore be resolved in favor of its validity, and the courts must keep their hands off, leaving the legislature to meet the responsibility for unwise legislation. If the end which the legislature seeks to accomplish be one to which its power extends, and if the means employed to that end, although not the wisest or best, are yet not plainly and palpably unauthorized by law, then the court cannot interfere. In other words, when the validity of a statute is questioned, the burden of proof, so to speak, is upon those who assert it to be unconstitutional. *M'Culloch v. Maryland*, 4 Wheat. 316, 421, 4 L. ed. 579, 605.

Let these principles be applied to the present case. By the statute in question it is provided that "no employee shall be required, or permitted, to work in a biscuit, bread, or cake *bakery, or confectionery es-[69]tablishment, more than sixty hours in any one week, or more than ten hours in any one day, unless for the purpose of making a shorter work day on the last day of the week; nor more hours in any one week than will make an average of ten hours per day for the number of days during such week in which such employee shall work."

It is plain that this statute was enacted in order to protect the physical well-being of those who work in bakery and confectionery establishments. It may be that the statute had its origin, in part, in the belief that employers and employees in such establishments were not upon an equal footing, and that the necessities of the latter often compelled them to submit to such exactions as unduly taxed their strength. Be this as it may, the statute must be taken as expressing the belief of the people of New York that, as a general rule, and in the case of the average man, labor in excess of sixty hours during a week in such establishments

may endanger the health of those who thus labor. Whether or not this be wise legislation it is not the province of the court to inquire. Under our systems of government the courts are not concerned with the wisdom or policy of legislation. So that, in determining the question of power to interfere with liberty of contract, the court may inquire whether the means devised by the state are germane to an end which may be lawfully accomplished and have a real or substantial relation to the protection of health, as involved in the daily work of the persons, male and female, engaged in bakery and confectionery establishments. But when this inquiry is entered upon I find it impossible, in view of common experience, to say that there is here no real or substantial relation between the means employed by the state and the end sought to be accomplished by its legislation. *Mugler v. Kansas*, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273. Nor can I say that the statute has no appropriate or direct connection with that protection to health which each state owes to her citizens (*Patterson v. Kentucky*, 97 U. S. 501, 24 L. ed. 1115); or that it is not promotive of the health of the employees in question (*Holden v. Hardy*, 169 U. S. 366, 391, 42 L. ed. 780, 790, 18 Sup. Ct. Rep. 383; *Lawton v. Steele*, 152 U. S. 133, 139, 38 L. ed. 385, 389, 14 Sup. Ct. Rep. 499); *or that the regulation prescribed by the state is utterly unreasonable and extravagant or wholly arbitrary (*Gundling v. Chicago*, 177 U. S. 183, 188, 44 L. ed. 725, 728, 20 Sup. Ct. Rep. 633). Still less can I say that the statute is, beyond question, a plain, palpable invasion of rights secured by the fundamental law. *Jacobson v. Massachusetts*, 196 U. S. 11, ante, 643, 25 Sup. Ct. Rep. 358. Therefore I submit that this court will transcend its functions if it assumes to annul the statute of New York. It must be remembered that this statute does not apply to all kinds of business. It applies only to work in bakery and confectionery establishments, in which, as all know, the air constantly breathed by workmen is not as pure and healthful as that to be found in some other establishments or out of doors.

Professor Hirt in his treatise on the "Diseases of the Workers" has said: "The labor of the bakers is among the hardest and most laborious imaginable, because it has to be performed under conditions injurious to the health of those engaged in it. It is hard, very hard, work, not only because it requires a great deal of physical exertion in an overheated workshop and during unreasonably long hours, but more so because of the erratic demands of the public, compelling the baker to perform the greater part of his

work at night, thus depriving him of an opportunity to enjoy the necessary rest and sleep,—a fact which is highly injurious to his health." Another writer says: "The constant inhaling of flour dust causes inflammation of the lungs and of the bronchial tubes. The eyes also suffer through this dust, which is responsible for the many cases of running eyes among the bakers. The long hours of toil to which all bakers are subjected produce rheumatism, cramps, and swollen legs. The intense heat in the workshops induces the workers to resort to cooling drinks, which, together with their habit of exposing the greater part of their bodies to the change in the atmosphere, is another source of a number of diseases of various organs. Nearly all bakers are pale-faced and of more delicate health than the workers of other crafts, which is chiefly due to their hard work and their irregular and unnatural mode of living, whereby the power of resistance against disease is *great-^[71]ly diminished. The average age of a baker is below that of other workmen; they seldom live over their fiftieth year, most of them dying between the ages of forty and fifty. During periods of epidemic diseases the bakers are generally the first to succumb to the disease, and the number swept away during such periods far exceeds the number of other crafts in comparison to the men employed in the respective industries. When, in 1720, the plague visited the city of Marseilles, France, every baker in the city succumbed to the epidemic, which caused considerable excitement in the neighboring cities and resulted in measures for the sanitary protection of the bakers."

In the Eighteenth Annual Report by the New York Bureau of Statistics of Labor it is stated that among the occupations involving exposure to conditions that interfere with nutrition is that of a baker. (p. 52.) In that Report it is also stated that, "from a social point of view, production will be increased by any change in industrial organization which diminishes the number of idlers, paupers, and criminals. Shorter hours of work, by allowing higher standards of comfort and purer family life, promise to enhance the industrial efficiency of the wage-working class,—improved health, longer life, more content and greater intelligence and inventiveness." (p. 82.)

Statistics show that the average daily working time among workmen in different countries is, in Australia, eight hours; in Great Britain, nine; in the United States, nine and three-quarters; in Denmark, nine and three-quarters; in Norway, ten; Sweden, France, and Switzerland, ten and one-half; Germany, ten and one-quarter; Bel-

gium, Italy, and Austria, eleven; and in Russia, twelve hours.

We judicially know that the question of the number of hours during which a workman should continuously labor has been, for a long period, and is yet, a subject of serious consideration among civilized peoples, and by those having special knowledge of the laws of health. Suppose the statute prohibited labor in bakery and confectionery establishments in excess of eighteen hours each day. No one, I take it, could dispute the power of the state to enact such a statute. But the statute *before us does not embrace extreme or exceptional cases. It may be said to occupy a middle ground in respect of the hours of labor. What is the true ground for the state to take between legitimate protection, by legislation, of the public health and liberty of contract is not a question easily solved, nor one in respect of which there is or can be absolute certainty. There are very few, if any, questions in political economy about which entire certainty may be predicated. One writer on relation of the state to labor has well said: "The manner, occasion, and degree in which the state may interfere with the industrial freedom of its citizens is one of the most delectable and difficult questions of social science." Jevons, 33.

We also judicially know that the number of hours that should constitute a day's labor in particular occupations involving the physical strength and safety of workmen has been the subject of enactments by Congress and by nearly all of the states. Many, if not most, of those enactments fix eight hours as the proper basis of a day's labor.

I do not stop to consider whether any particular view of this economic question presents the sounder theory. What the precise facts are it may be difficult to say. It is enough for the determination of this case, and it is enough for this court to know, that the question is one about which there is room for debate and for an honest difference of opinion. There are many reasons of a weighty, substantial character, based upon the experience of mankind, in support of the theory that, all things considered, more than ten hours' steady work each day, from week to week, in a bakery or confectionery establishment, may endanger the health and shorten the lives of the workmen, thereby diminishing their physical and mental capacity to serve the state and to provide for those dependent upon them.

If such reasons exist that ought to be the end of this case, for the state is not amenable to the judiciary, in respect of its legislative enactments, unless such enactments are plainly, palpably, beyond all question, [73] inconsistent with the Constitution *of the

United States. We are not to presume that the state of New York has acted in had faith. Nor can we assume that its legislature acted without due deliberation, or that it did not determine this question upon the fullest attainable information and for the common good. We cannot say that the state has acted without reason, nor ought we to proceed upon the theory that its action is a mere sham. Our duty, I submit, is to sustain the statute as not being in conflict with the Federal Constitution, for the reason—and such is an all-sufficient reason—it is not shown to be plainly and palpably inconsistent with that instrument. Let the state alone in the management of its purely domestic affairs, so long as it does not appear beyond all question that it has violated the Federal Constitution. This view necessarily results from the principle that the health and safety of the people of a state are primarily for the state to guard and protect.

I take leave to say that the New York statute, in the particulars here involved, cannot be held to be in conflict with the 14th Amendment, without enlarging the scope of the amendment far beyond its original purpose, and without bringing under the supervision of this court matters which have been supposed to belong exclusively to the legislative departments of the several states when exerting their conceded power to guard the health and safety of their citizens by such regulations as they in their wisdom deem best. Health laws of every description constitute, said Chief Justice Marshall, a part of that mass of legislation which "embraces everything within the territory of a state, not surrendered to the general government; all which can be most advantageously exercised by the states themselves." *Gibbons v. Ogden*, 9 Wheat. 1, 203, 6 L. ed. 23, 71. A decision that the New York statute is void under the 14th Amendment will, in my opinion, involve consequences of a far-reaching and mischievous character; for such a decision would seriously cripple the inherent power of the states to care for the lives, health, and well-being of their citizens. Those are matters which can be best controlled by the states. *The preservation of the just powers of the [74] states is quite as vital as the preservation of the powers of the general government.

When this court had before it the question of the constitutionality of a statute of Kansas making it a criminal offense for a contractor for public work to permit or require his employees to perform labor upon such work in excess of eight hours each day, it was contended that the statute was in derogation of the liberty both of employees and employer. It was further contended

that the Kansas statute was mischievous in its tendencies. This court, while disposing of the question only as it affected public work, held that the Kansas statute was not void under the 14th Amendment. But it took occasion to say what may well be here repeated: "The responsibility therefor rests upon legislators, not upon the courts. No evils arising from such legislation could be more far reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and upon grounds merely of justice or reason or wisdom annul statutes that had received the sanction of the people's representatives. We are reminded by counsel that it is the solemn duty of the courts in cases before them to guard the constitutional rights of the citizen against merely arbitrary power. That is unquestionably true. But it is equally true—indeed, the public interests imperatively demand—that legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably beyond all question in violation of the fundamental law of the Constitution." *Atkin v. Kansas*, 191 U. S. 207, 223, 48 L. ed. 148, 158, 24 Sup. Ct. Rep. 124, 128.

The judgment, in my opinion, should be affirmed.

Mr. Justice **Holmes** dissenting:

I regret sincerely that I am unable to [75] agree with the judgment *in this case, and that I think it my duty to express my dissent.

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious, or if you like as tyrannical, as this, and which, equally with this, interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered

with by school laws, by the Postoffice, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics. The other day we sustained the Massachusetts vaccination law. *Jacobson v. Massachusetts*, 197 U. S. 11, ante, 643, 25 Sup. Ct. Rep. 358. United States and state statutes and decisions cutting down the liberty to contract by way of combination are familiar to this court. *Northern Securities Co. v. United States*, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436. Two years ago we upheld the prohibition of sales of stock on margins, or for future delivery, in the Constitution of California. *Otis v. Parker*, 187 U. S. 606, 47 L. ed. 323, 23 Sup. Ct. Rep. 168. The decision sustaining an eight-hour law for miners is still recent. *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383. Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*. *It [76] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise. But I think that the proposition just stated, if it is accepted, will carry us far toward the end. Every opinion tends to become a law. I think that the word "liberty," in the 14th Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first instalment of a general regulation of the hours of work. Whether in the latter aspect it would be open to the charge of inequality I think it unnecessary to discuss.

[77] *GEORGE W. BEAVERS, *Appt.*,

v.

CHARLES J. HAUBERT, United States
Marshal, etc. (No. 354.)GEORGE W. BEAVERS, *Appt.*,

v.

CHARLES J. HAUBERT, United States
Marshal, etc. (No. 355.)

(See S. C. Reporter's ed. 77-91.)

Criminal law—removal to another Federal district for trial—effect of pending indictment in district from which the removal is sought—right to speedy trial—probable cause.

1. The prosecution of proceedings to remove to another Federal district for trial a person there charged with an offense against the United States is not an unlawful interference with the jurisdiction of the Federal circuit court in whose custody the accused was then held to await the trial of indictments pending against him in that court, where such proceedings were had with the consent of that court.
2. Constitutional rights of the accused to a speedy trial of the indictments pending against him in a Federal circuit court are not violated by the prosecution, with the consent of that court, of proceedings to remove the accused to another Federal district for the trial of an indictment there found against him.
3. Evidence of probable cause, in proceedings to remove a person to another Federal district for trial, afforded by an indictment charging him with an offense against the United States, is not rebutted, even if subject to rebuttal, where the rebuttal testimony is negative and for the most part confined to general statements, and the accused claims his privilege, under the state practice, of exemption from cross-examination.

[Nos. 354, 355.]

Argued February 23, 1905. Decided April 17, 1905.

A PPEAL from the District Court of the United States for the Eastern District of New York to review an order remanding to the custody of the United States marshal the petitioner in habeas corpus proceedings, to inquire into his detention to await an order for his removal to another Federal district for trial. *Affirmed.* Also an

A PPEAL from the Circuit Court of the United States for the Eastern District of New York to review an order dismissing

NOTE.—On the removal to another Federal district for trial of a person there charged with an offense against the United States—see note to *Greene v. Henkel*, 46 L. ed. U. S. 177.

As to delay of prosecution as ground for discharge of the accused—see note to *Re Begerow*, 56 L. R. A. 513.

a writ of habeas corpus arising out of the same proceedings. *Affirmed.*

Statement by Mr. Justice **McKenna**:

These cases were submitted together. No. 354 is an appeal from an order and judgment of the district court of the eastern district of New York, in habeas corpus, remanding to *the custody of appellee. No. [78] 355 is an appeal from an order of the United States circuit court for the same district, dismissing a writ of habeas corpus arising out of the same proceedings as No. 354. The same questions of law are presented, and we need not further distinguish the cases.

The arrest from which appellant prayed to be discharged was made upon a commitment and warrant in proceedings to remove him to the District of Columbia, to be tried upon an indictment there found against him. He attacks the commitment and warrant as not being due process of law, in that the commissioner who issued them had no jurisdiction to entertain proceedings against him, or to require bail, or in default thereof to commit him to await the order of the district judge, because indictments were pending against him in the circuit court of the United States for the eastern district of New York. The contention is that while the indictments were so pending he could not be removed to another jurisdiction.

The facts are as follows: On the 16th of July, 1903, two indictments were found against appellant in the eastern district of New York, charging him with violations of §§ 1781 and 1782 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 1212), and on the 25th of July, 1903, another indictment was found against him in the same district for the violation of § 1781.

On the 3d of September, 1903, a bench warrant was issued on the indictments and proceedings instituted against him on the indictment of July 25, 1903. A warrant of removal was issued by the district judge of the southern district of New York, and subsequently an order was entered by the circuit court, directing appellant to surrender himself to the United States marshal for said district, and in pursuance thereof the appellant did so, and entered into a recognizance before one of the district judges for said district in the penal sum of \$10,000 for his appearance in the circuit court for the eastern district at the next regular term.

On the 1st of June, 1904, he appeared in said court, in pursuance of the notice from the United States district attorney, *for the [79] purpose of pleading to the indictments. On the 7th of June, a continuance having been granted, he moved to quash the indictment on affidavits and other papers proper-

ly served on the district attorney. On the 8th he appeared before the circuit court, "prepared to move upon and plead to the said indictments." Thereupon the district attorney refused to proceed further with the indictments, but stated his intention to institute proceedings for the removal of appellant to the District of Columbia, under the indictments found against him there. The court thereupon continued the proceedings until the 13th of June, 1904, from time to time thereafter, until the date of the petition herein, and enlarged him from day to day upon his recognizance, which is still in full force. On the 8th of June, 1904, he was arrested upon the warrant now in question. The indictments have not been quashed or nolle prossed, and the appellant is ready to plead thereto if the motions submitted in respect thereto be overruled.

The petitioner alleges that the only evidence adduced by the government was a certified copy of the indictment, which, it is alleged, constituted no proof, but was incompetent and inadmissible because it failed to state facts sufficient to constitute a crime, and because it appeared from the testimony of the witnesses on whose testimony it was found and who were called before the commissioner that there was no probable cause to believe he was guilty of any offense against the United States, and whatever strength the indictment possessed was rebutted by such evidence.

Mr. William M. Seabury argued the cause, and, with **Mr. Bankson T. Morgan**, filed a brief for appellant:

In criminal cases, priority of jurisdiction is determined by the date of service of process.

United States v. Lee, 84 Fed. 631; *Craig v. Hoge*, 95 Va. 275, 28 S. E. 317; *Union Mut. L. Ins. Co. v. University of Chicago*, 10 Biss. 191, 6 Fed. 443; *Owens v. Ohio C. R. Co.* 20 Fed. 10; *Wilmer v. Atlanta & R. Air Line R. Co.* 2 Woods, 409, Fed. Cas. No. 17,775; *Herndon v. Ridgway*, 17 How. 424, 15 L. ed. 100; *Chaffee v. Hayward*, 20 How. 208, 215, 18 L. ed. 804, 852; *Boswell v. Otis*, 9 How. 336, 348, 13 L. ed. 164, 169; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Mexican C. R. Co. v. Pinkney*, 149 U. S. 194, 209, 37 L. ed. 699, 705, 13 Sup. Ct. Rep. 859.

The fact that Beavers had given bail on the first arrest, and was not in actual custody of the marshal when the second arrest took place, is immaterial.

Re Beavers, 125 Fed. 988; *Taylor v. Taintor*, 16 Wall. 371, 21 L. ed. 290; *Anonymous*, 6 Mod. 231; *Cosgrove v. Winney*, 174 U. S. 68, 43 L. ed. 898, 19 Sup. Ct. Rep. 598; *Re Grice*, 79 Fed. 633; *United States v.*
198 U. S.

Stevens, 16 Fed. 105; *Turner v. Wilson*, 49 Ind. 581; *Devine v. State*, 5 Sneed, 625; *Levy v. Arnsthall*, 10 Gratt. 641; *Ex parte Gibbons*, 1 Atk. 238; *Spear*, *Extradition*, p. 445; *Petersdorff*, *Bail*, pp. 91, 406.

In every instance where a conflict of jurisdiction has arisen between a state and Federal court, but one rule has been adopted. The court whose jurisdiction has first attached to the person or thing has universally held and retained it until its completion. No other court has been permitted by its process to interfere with the jurisdiction of the court which has first attached. Few propositions are more clearly established by judicial decision.

Byers v. McAuley, 149 U. S. 608, 614, 615, 37 L. ed. 867, 871, 13 Sup. Ct. Rep. 906; *Hagan v. Lucas*, 10 Pet. 400, 9 L. ed. 470; *Taylor v. Carryl*, 20 How. 583, 15 L. ed. 1028; *Peck v. Jenness*, 7 How. 612, 625, 12 L. ed. 841, 846; *Freeman v. Howe*, 24 How. 450, 16 L. ed. 749; *Ellis v. Davis*, 109 U. S. 485, 498, 27 L. ed. 1006, 1010, 3 Sup. Ct. Rep. 327; *Krippendorf v. Hyde*, 110 U. S. 276, 280, 28 L. ed. 145, 147, 4 Sup. Ct. Rep. 27; *Covell v. Heyman*, 111 U. S. 176, 28 L. ed. 390, 4 Sup. Ct. Rep. 355; *Borer v. Chapman*, 119 U. S. 587, 600, 30 L. ed. 532, 537, 7 Sup. Ct. Rep. 342; *Re Chambers*, 98 Fed. 866; *Jordan v. Taylor*, 98 Fed. 643; *Keegan v. King*, 96 Fed. 758; *Chapin v. Jamcs*, 11 R. I. 87, 23 Am. Rep. 412; *The E. L. Cain*, 45 Fed. 367; *Moran v. Sturges*, 154 U. S. 256, 269, 279, 38 L. ed. 981, 985, 14 Sup. Ct. Rep. 1019; *Re Chetwood*, 165 U. S. 443, 460, 41 L. ed. 782, 788, 17 Sup. Ct. Rep. 385; *Pacific Coast S. S. Co. v. Bancroft-Whitney Co.* 36 C. C. A. 135, 94 Fed. 186; *Yonley v. Lavender*, 21 Wall. 276, 22 L. ed. 536; *Sharon v. Terry*, 13 Sawy. 387, 1 L. R. A. 572, 36 Fed. 337, 131 U. S. 40, 33 L. ed. 94, 9 Sup. Ct. Rep. 705.

The same principle is universally applicable where Federal and state courts each claim jurisdiction over the same person at the same time.

Ableman v. Booth, 21 How. 506, 16 L. ed. 169; *Tarble's Case (United States v. Tarble)* 13 Wall. 397, 20 L. ed. 597; *Robb v. Connolly*, 111 U. S. 624, 28 L. ed. 542, 4 Sup. Ct. Rep. 544; *Re Spangler*, 11 Mich. 298; *Re James*, 18 Fed. 853.

It has also been uniformly adopted whenever a state has sought the rendition of a fugitive from another state having him in custody. Though the duty of rendition is ordinarily absolute, it is settled in such cases that, where a fugitive whose surrender is demanded is held in custody in the state upon which the demand is made, on account of an offense committed therein, the duty to surrender is postponed until the exist-

ing charge against the prisoner has been satisfied.

12 Am. & Eng. Enc. Law, p. 604; *Re Troutman*, 24 N. J. L. 634; *Re Briscoe*, 51 How. Pr. 422; *Hobbs v. State*, 32 Tex. Crim. Rep. 312, 40 Am. St. Rep. 782, 22 S. W. 1035; *Taintor v. Taylor*, 36 Conn. 242, 4 Am. Rep. 58, 16 Wall. 366, 21 L. ed. 287; *Ex parte Rosenblat*, 51 Cal. 285; Clark, Crim. Proc. p. 63; Spear, Extradition, pp. 442-445.

Equally established is its application whenever Federal courts of different districts have asserted jurisdiction at the same time over the same personal property.

Re Miller, 30 Fed. 895; *Ames v. Union P. R. Co.* 60 Fed. 967; *Clyde v. Richmond & D. R. Co.* 65 Fed. 336; *Chattanooga Terminal R. Co. v. Felton*, 69 Fed. 273; *New York Security & T. Co. v. Equitable Mortg. Co.* 71 Fed. 556; *Wiswall v. Sampson*, 14 How. 60, 14 L. ed. 325.

This principle is not restricted in its application to questions of jurisdiction between courts of different sovereignties, but is applicable wherever two courts subject to the same general sovereignty and existing under the same judicial system seek to exercise criminal jurisdiction over the same person for antagonistic purposes at the same time.

Re Johnson, 167 U. S. 125, 42 L. ed. 104, 17 Sup. Ct. Rep. 735; *Re Beavers*, 125 Fed. 988; *Re Miller*, 30 Fed. 895; *Clyde v. Richmond & D. R. Co.* 65 Fed. 336; *New York Security & T. Co. v. Equitable Mortg. Co.* 71 Fed. 556; *Buck v. Colbath*, 3 Wall. 344-349, 18 L. ed. 261, 262; *Covell v. Heyman*, 111 U. S. 176, 28 L. ed. 390, 4 Sup. Ct. Rep. 355.

We refer by way of analogy to the reasoning in similar cases arising in interstate rendition proceedings.

Re Troutman, 24 N. J. L. 634; *Re Briscoe*, 51 How. Pr. 422; *Taintor v. Taylor*, 36 Conn. 242, 4 Am. Rep. 58, 16 Wall. 366, 21 L. ed. 287; *Hobbs v. State*, 32 Tex. Crim. Rep. 312, 40 Am. St. Rep. 782, 22 S. W. 1035.

The appellant was and is in the potential custody of the circuit court of the United States.

Taylor v. Taintor, 16 Wall. 371, 21 L. ed. 287; *Re Beavers*, 125 Fed. 988; *Cosgrove v. Winney*, 174 U. S. 68, 43 L. ed. 898, 19 Sup. Ct. Rep. 598.

A United States commissioner is a subordinate ministerial officer,—an arm or branch of the district court,—and is himself neither court nor judge.

United States v. Allred, 155 U. S. 595, 39 L. ed. 274, 15 Sup. Ct. Rep. 231; *Todd v. United States*, 158 U. S. 278, 39 L. ed. 982, 15 Sup. Ct. Rep. 889; *Rice v. Ames*, 180

U. S. 371-378, 45 L. ed. 577-583, 21 Sup. Ct. Rep. 406; *United States v. Schumann*, 2 Abb. (U. S.) 523, Fed. Cas. No. 16,235; *United States v. Jones*, 134 U. S. 483, 33 L. ed. 1007, 10 Sup. Ct. Rep. 615; *Re Ellerbe*, 4 McCrary, 449, 13 Fed. 530; *Re Perkins*, 100 Fed. 950; *Ex parte Doll*, 7 Phila. 595.

Even conceding the right of the commissioner to issue process against the appellant, we contend that such process could not be lawfully executed by the marshal against him so long as he was in the custody of superior jurisdiction.

Re Beavers, 125 Fed. 988; *Hobbs v. State*, 32 Tex. Crim. Rep. 312, 40 Am. St. Rep. 782, 22 S. W. 1035; *Re Troutman*, 24 N. J. L. 634; *Higgins v. Dewey*, 27 Abb. N. C. 81, 39 N. Y. S. R. 94, 14 N. Y. Supp. 894.

An accused person is entitled to a trial at the earliest opportunity after allowing reasonable time to the prosecution to prepare for trial.

Sutherland, U. S. Const. p. 664; *United States v. Fox*, 3 Mont. 512; note to *Re Begerow*, 85 Am. St. Rep. 178-204.

And it is the duty of the prosecution diligently to prosecute, without vexatious, capricious, or oppressive delays.

Nixon v. State, 2 Smedes & M. 497, 41 Am. Dec. 601; Cooley, Const. Lim. 7th ed. p. 440.

Proceedings under U. S. Rev. Stat. § 1014, U. S. Comp. Stat. 1901, p. 716, are in all respects similar to criminal proceedings instituted before a committing magistrate in the state where the arrest is made, and are controlled and governed by the rules of evidence and procedure in such state.

Re Dana, 68 Fed. 886; *United States v. Rundlett*, 2 Curt. C. C. 42, Fed. Cas. No. 16,208; *United States v. Case*, 8 Blatchf. 251, Fed. Cas. No. 14,742; *United States v. Horton*, 2 Dill. 94, Fed. Cas. No. 15,393; *United States v. Brawner*, 7 Fed. 86; *United States v. Martin*, 9 Sawy. 90, 17 Fed. 150; *Re Burkhardt*, 33 Fed. 25; *United States v. Greene*, 100 Fed. 941.

It may be conceded that this court will not review questions relating merely to the sufficiency of evidence to sustain a finding of probable cause, and that, if there was before the commissioner competent legal evidence to sustain his finding, such finding will not be reviewed here.

Greene v. Henkel, 183 U. S. 249, 46 L. ed. 177, 22 Sup. Ct. Rep. 218; *United States v. Lantry*, 30 Fed. 232; *United States v. Greene*, 108 Fed. 816; *Price v. McCarthy*, 32 C. C. A. 162, 59 U. S. App. 578, 89 Fed. 84.

We raise no question of sufficiency. Although in a removal proceeding where no competent evidence was offered in rebuttal, this court held that an indictment was

prima facie evidence of the petitioner's guilt (*Beavers v. Henkel*, 194 U. S. 73, 48 L. ed. 882, 24 Sup. Ct. Rep. 605), it is perfectly clear that an indictment is not legal evidence of guilt, such as a court or jury might hear. It is a mere charge or accusation drawn by a prosecuting officer. It is not evidence or proof in the ordinary acceptance of those terms in courts of justice. When, therefore, its averments are controverted by sworn proof, such as might be heard by a jury on a criminal trial, the case is not one presenting a question of sufficiency, such as would arise from a conflict between testimony of equal competency and probative force.

The decision in *Beavers v. Henkel*, 194 U. S. 73, 48 L. ed. 882, 24 Sup. Ct. Rep. 605, went no further than the earlier decisions of the lower courts which have recognized an indictment, when standing alone and uncontroverted, as prima facie evidence of probable cause, sufficient to sustain the finding of the commissioner.

Re Alexander, 1 Low. Dec. 530, Fed. Cas. No. 162; *United States v. Pope*, 24 Int. Rev. Rec. 29, Fed. Cas. No. 16,069; *United States v. Greene*, 100 Fed. 941, 108 Fed. 816; *Greene v. Henkel*, 183 U. S. 249, 46 L. ed. 177, 22 Sup. Ct. Rep. 218.

An indictment is not, and should not be regarded as, conclusive in removal proceedings.

United States v. Greene, 100 Fed. 941; *Re Richter*, 100 Fed. 295; *Re Belknap*, 96 Fed. 614; *Re Wood*, 95 Fed. 288; *United States v. Price*, 84 Fed. 636; *Re Price*, 83 Fed. 830, Affirmed in 32 C. C. A. 162, 59 U. S. App. 578, 89 Fed. 84; *Re Dana*, 68 Fed. 886; *United States v. Fowkes*, 49 Fed. 50; *Re Wolf*, 27 Fed. 606; *Re Alexander*, 1 Low. Dec. 530, Fed. Cas. No. 162; *United States v. Haskins*, 3 Sawy. 262, Fed. Cas. No. 15,322; *United States v. Pope*, 24 Int. Rev. Rec. 29, Fed. Cas. No. 16,069.

Assistant Attorney General **Purdy** argued the cause and filed a brief for appellee:

Every sovereignty has the power to waive its right to try a person accused of having committed an offense against its laws, and may elect to surrender such accused person, without his consent, to a demanding state.

Taylor v. Taintor, 16 Wall. 366, 21 L. ed. 287; *Re Hess*, 5 Kan. App. 763, 48 Pac. 596; *State v. Allen*, 2 Humph. 258.

Mr. Justice **McKenna**, after stating the facts as above, delivered the opinion of the court:

It will be observed that indictments were found against appellant in the eastern district of New York. He was then living in
198 U. S.

the city of New York, which is in the southern district. He was removed from the latter, by removal proceedings, to the former for trial, and, having been called upon to plead to the indictments, he made certain motions in respect thereto. The district attorney, however, announced an intention not to proceed further with the prosecution, and announced further that he intended to prosecute proceedings to remove appellant to the District of Columbia for trial. This was done, and with the consent of the court. It is stated in Judge Thomas's opinion that the circuit court "deferred the hearing of the motions pending the hearing before the commissioner, for the purpose of allowing the warrant to be served upon the defendant (petitioner), and to permit the proceedings to continue before the commissioner."

The appellant contends, nevertheless, that the commissioner had no power to issue warrants, and relies on two propositions:

(1) The proceedings were void because they were an unlawful interference with the jurisdiction of the circuit court for the eastern district of New York, in the custody of which he was.

* (2) The proceedings were a violation of [85] appellant's constitutional rights to a speedy trial by jury upon such indictments.

(1) In support of the first proposition is urged the principle "that where jurisdiction has attached to person or thing, it is—unless there is some provision to the contrary—exclusive in effect until it has wrought its function." *Taylor v. Taintor*, 16 Wall. 366, 370, 21 L. ed. 287, 290. But this is primarily the right of the court or sovereignty, and has its most striking examples in cases of extradition. The cited case shows that whatever right a party may have is not a constitutional right. The question in the case was the effect on the bail of a defendant given to a state of the action by its governor sending him out of the state under extradition proceedings. It was held that his bail was exonerated. The court said: "It is the settled law of this class of cases that the bail will be exonerated where the performance of the condition is rendered impossible by the act of God, the act of the obligee, or the act of the law." And the act of the governor of a state yielding to the requisition of the governor of another state was decided to be the act of the law. It was further said: "In such cases the governor acts in his official character, and represents the sovereignty of the state in giving efficacy to the Constitution of the United States and the law of Congress. If he refuse there is no means of compulsion. But if he act, and the fugitive is surrendered, the state whence he is removed can no longer require his appearance before her tri-

bunals, and all obligations which she has taken to secure that result thereupon at once, *ipso facto*, lose their binding effect."

This case establishes that the sovereignty where jurisdiction first attaches may yield it, and that the implied custody of a defendant by his sureties cannot prevent. They may, however, claim exemption from further liability to produce him.

There is nothing in *Re Johnson*, 167 U. S. 120, 42 L. ed. 103, 17 Sup. Ct. Rep. 735, which militates against this view. Indeed, that it is the right of the court or sovereignty to insist upon or waive its jurisdiction *is there decided. Page 126, L. ed. [86] page 105, Sup. Ct. Rep. page 737. In *Cosgrove v. Winney* [174 U. S. 64, 43 L. ed. 897, 19 Sup. Ct. Rep. 598], *Cosgrove* was brought into this country from Canada under a treaty which confined action against him to the very offense for which he was surrendered, until he should have an opportunity of returning. His subsequent arrest for a nonextraditable offense was held to be a violation of the process under which he was brought into the United States, and therefore illegal.

The circuit court, as we have seen in the case at bar, consented to the removal of the appellant, and we are not called upon to decide whether the government had the right of election, without such consent, to proceed in New York or the District of Columbia.

(2) Undoubtedly a defendant is entitled to a speedy trial and by a jury of the district where it is alleged the offense was committed. This is the injunction of the Constitution, but suppose he is charged with more than one crime, to which does the right attach? He may be guilty of none of them, he may be guilty of all. He cannot be tried for all at the same time, and his rights must be considered with regard to the practical administration of justice. To what offense does the right of the defendant attach? To that which was first charged, or to that which was first committed? Or may the degree of the crimes be considered? Appellant seems to contend that the right attaches and becomes fixed to the first accusation, and, whatever be the demands of public justice, they must wait. We do not think the right is so unqualified and absolute. If it is of that character, it determines the order of trial of indictments in the same court. Counsel would not so contend at the oral argument, but such manifestly is the consequence. It must be remembered that the right is a constitutional one, and, if it has any application to the order of trials of different indictments, it must relate to the time of trial, not to the place of trial. The place of trial

depends upon other considerations. It must be in the district where the crime was committed. There is no other injunction or condition, *and it cannot be complicated by [87] rights having no connection with it. The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice. It cannot be claimed for one offense and prevent arrest for other offenses; and removal proceedings are but process for arrest,—means of bringing a defendant to trial. And this leads to the other contentions of appellant.

Upon the hearing before the commissioner the government introduced in evidence a copy of the indictment and proof of the identity of appellant. The latter called witnesses, and made a statement in his own behalf, and contends that he rebutted every material allegation of the indictment, and that the finding of the commissioner gave to the indictment the effect of conclusive proof.

Two questions are involved,—whether appellant may rebut the indictment, and whether he has done so. If the latter be answered in the negative,—and we think it must be,—no reply need be given to the other.

There is no question made of the sufficiency of the indictment. It certainly charges a crime. It charges that Beavers was superintendent of the division of salaries and allowances in the office of the First Assistant Postmaster General, and that he entered into a corrupt agreement with W. Scott Towers, an agent of the Elliott & Hatch Book Typewriter Company, whereby Towers promised to pay to Beavers the sum of \$25 out of each \$200 paid to said company for book typewriters, and that Beavers received from Towers, in pursuance of the agreement, a draft for the sum of \$350. The agreement was made and the draft given for the purpose of influencing Beavers's official judgment and action. The only testimony that is material to notice was delivered by Henry J. Gensler, Charles Flint, Howard W. Jacobs, and E. H. Schley.

Gensler testified that up to June, 1900, he was an agent of the Elliott & Hatch Book Typewriter Company, and as such *had [88] charge of all the trade in the locality of the District of Columbia. After that time his son had such charge. It may be inferred that he had some knowledge of his son's business and was familiar with sales made during the year 1900. He testified that he had no knowledge of any agreement with Towers and Beavers in October, 1900, relating to Beavers's official conduct with re-

gard to the Elliott & Hatch Book Typewriter Company.

Flint was the assistant treasurer and the assistant secretary of the company from February, 1901, to March, 1903. He testified that during the year 1901 the corporation, so far as the books and accounts showed, paid no money to Beavers for any purpose whatever, and that he had no knowledge that would lead him to believe that such money was paid. He further testified that if any money of the corporation had been paid for the purpose of securing the contract of the government it would necessarily have come under his notice. Also, that he had no knowledge of money being paid by Towers to Beavers, nor had he knowledge of money having been authorized by the corporation to be paid, either directly or indirectly, to Beavers, either \$350, or any sum, on July 11, 1901, or any other time, and if such payment had been authorized he would have known it. He further testified that the sales to the Postoffice Department were to Mr. Gensler, and the method adopted was that the machines were charged to Gensler as being outright purchases by him at \$140 each. The machines returned were credited to his account. A few sales were charged directly against the Postmaster General, with the understanding that they were to be paid for at \$200 and charged to Gensler at \$140. He also testified that while he was assistant treasurer he had no knowledge of the payment of money to Gensler, or of authority given Gensler to pay money to Towers for Beavers, for the purpose of influencing Beavers's official action in regard to the sale of the Elliott & Hatch Book Typewriter, or that Beavers ever received

[89] *anything of value from the company for such purpose; and that if such payment had been made he believed he would have known it.

Howard W. Jacobs was bookkeeper and cashier of the corporation; Schley became secretary and treasurer in 1899. Both these witnesses testified as to knowledge of the affairs of the corporation, the trades made by it, and sales in Washington of machines, and the business and knowledge of the payment by the corporation or any of its officers or agents to Beavers, or to Towers for Beavers, substantially as Flint. The witnesses also testified that the Elliott & Hatch machines were the best of the book typewriters, and their usual price was \$200.

Beavers was sworn for the purpose, as expressed by his counsel, "of permitting the accused to make a statement in his own behalf." In answer to questions of his counsel he testified that he was the person accused, and the person against whom three

indictments had been found in the eastern district of New York, charged with violations of §§ 1781 and 1782 of the Revised Statutes of the United States. That it was not at his instance the Elliott & Hatch typewriter was placed in the Postoffice Department; it was placed there under the direction of the First Assistant Postmaster General. It was the rule of the Department, in making the allowance for the typewriter, to act under the instructions of that officer, and he so acted. Under a like rule he acted in the purchase of the machines, and he further testified that he entered into no agreement with Towers whereby he was to receive \$25 for each typewriter thereafter purchased by the Postoffice Department. He admitted he received a draft from Towers, but it was in the nature of a loan, as he remembered it; also that he received many drafts from Towers, who was a man of considerable influence with the banks of Washington, and frequently obtained drafts for him (Beavers) and had notes discounted for him. This practice ran through their entire acquaintance. There was not, he further testified, on or *about July 11, [90] 1901, any matter relating to the Elliott & Hatch Book typewriter pending before him.

Counsel for government attempted to cross-examine Beavers, to which the latter's counsel objected. The commissioner ruled against the objection, and counsel directed Beavers not to answer. The objection to cross-examination was based upon the ground that Beavers took the stand merely for the purpose of making a statement in answer to the charge made against him, and to explain the facts alleged, in accordance with § 196 of the New York Code of Criminal Procedure, and, it was urged, that that section, or any other section which governed the proceedings, did not contemplate cross-examination. And counsel further observed that as the indictment, which was the basis of the proceedings, was not the only one found against Beavers "for that reason it would be extremely unwise to allow him to enter into any rambling cross-examination."

The commissioner committed the appellant in default of bail, finding that there was probably cause that the offenses charged had been committed. The finding was affirmed by the district court in the proceedings for habeas corpus.

We think the finding was justified; in other words, the proof afforded by the indictment was not overcome; and this is all that it is necessary to now decide. Regarding the letter of the testimony when weighed with the indictment, it does not remove all reasonable grounds of presumption of the commission of the offense. The

degree of proof is not that necessary upon the trial of the offense, and a certain latitude of judgment must be allowed the commissioner. We cannot say that such latitude was exceeded. The testimony was negative, and, for the most part, confined to general statements, and Beavers resisted cross-examination and the test of the circumstances which might thereby have been elicited. But granting that he could, under the New York Code, offer himself, to be sworn, and deliver a statement under the directions of questions by counsel, and be [91] exempt from cross-examination, *nevertheless the deficiencies of his statement may be urged against him. It cannot be said, therefore, that the commissioner's finding of probable cause was not justified.

The contention that the District of Columbia is not a district of the United States within the meaning of § 1014 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 716), authorizing the removal of accused persons from one district to another, is disposed of by *Benson v. Henkel*, 198 U. S. 1, ante, 919, 25 Sup. Ct. Rep. 569.

The orders of the Circuit Court and the District Court dismissing the writs of habeas corpus are affirmed.

JOHN B. HUMPHREY, *Plff. in Err.*,
v.

CHARLES T. TATMAN, Trustee in Bankruptcy of Nelson H. Davis.

(See S. C. Reporter's ed. 91-95.)

Bankruptcy. — preference — taking possession under unrecorded chattel mortgage.

Taking possession of the mortgaged property under an unrecorded chattel mortgage does not amount to a preference voidable by the mortgagor's trustee in bankruptcy, although such action was taken within four months of the bankruptcy proceedings, if a possession so acquired is good as against the trustee under the state laws.

[No. 169.]

Argued March 7, 1905. Decided April 17, 1905.

IN ERROR to the Superior Court of the State of Massachusetts for the County of Worcester in that state to review a judgment for plaintiff in an action by a trustee in bankruptcy to recover an alleged preference, entered pursuant to the mandate of the Supreme Judicial Court of that state on an appeal from a judgment of the Superior Court in favor of defendant. *Reversed.*

See same case below, 184 Mass. 361, 63 L.

R. A. 738, 100 Am. St. Rep. 562, 68 N. E. 844.

The facts are stated in the opinion.

Mr. William H. Brown argued the cause, and, with Mr. Henry W. Putnam, filed a brief for plaintiff in error:

It was necessary to take possession of the property to make the mortgage effective against others than the parties thereto. The demands of the local law were, however, satisfied by the possession taken, and the possession related back to the delivery of the mortgage, and made it good from the beginning.

Mitchell v. Black, 6 Gray, 100; *Chase v. Denny*, 130 Mass. 566.

The law of the state is accepted as to the validity of the mortgage.

Etheridge v. Sperry, 139 U. S. 266, 277, 35 L. ed. 171, 176, 11 Sup. Ct. Rep. 563; *Haskell v. Merrill*, 179 Mass. 120, 60 N. E. 485.

The error which the Massachusetts court made was in considering that the transaction must stand for four months in a form valid as to everyone; but it was wrong not to recognize a mortgage transfer which was perfectly good between the parties, merely because it could be defeated by creditors intervening with attachments or the like.

Re Antigo Screen Door Co. 59 C. C. A. 248, 123 Fed. 249.

And this mortgage was also valid before possession taken, as against wrongdoers.

Pratt v. Harlow, 16 Gray, 379.

And before there was any intervening creditor or purchaser it was made good even as to them, by the possession taken and the words used.

Re New York Economical Printing Co. 49 C. C. A. 133, 110 Fed. 514; *First Nat. Bank v. Pennsylvania Trust Co.* 60 C. C. A. 100, 124 Fed. 968.

When the mortgage was given, an equivalent was taken which was a full consideration. Such transactions are not preferences.

Jaquith v. Alden, 189 U. S. 78, 47 L. ed. 717, 23 Sup. Ct. Rep. 649.

The transfer was complete, and the plaintiff in error took possession of his own property, and not of the property of the bankrupt.

Re Antigo Screen Door Co. 59 C. C. A. 248, 123 Fed. 249; *First Nat. Bank v. Pennsylvania Trust Co.* 60 C. C. A. 100, 124 Fed. 968; *Re New York Economical Printing Co.* 49 C. C. A. 133, 110 Fed. 514; *Sabin v. Camp*, 98 Fed. 974; *Deland v. Miller & C. Bank*, 119 Iowa, 368, 93 N. W. 304.

Under the bankrupt act of 1867 the transaction would have been legal, and not a preference.

Gibson v. Warden, 14 Wall. 247, 20 L. ed.

800; *Sawyer v. Turpin*, 91 U. S. 114, 23 L. ed. 235; *Clark v. Iselin*, 21 Wall. 360, 372, 22 L. ed. 568; *Stewart v. Platt*, 101 U. S. 731, 25 L. ed. 816; *Hauselt v. Harrison*, 105 U. S. 401, 26 L. ed. 1075.

Mr. **Charles T. Tatman** argued the cause and filed a brief for defendant in error:

The transfer did not take place until possession was taken.

Moody v. Wright, 13 Met. 17, 46 Am. Dec. 706; *Gibson v. Warden*, 14 Wall. 244, 247, 20 L. ed. 797, 800; *Mathews v. Hardt*, 79 App. Div. 570, 80 N. Y. Supp. 462; *Re Sheridan*, 98 Fed. 406; *Landis v. McDonald*, 88 Mo. App. 335; *Re Ronk*, 111 Fed. 154; *Hewit v. Berlin Mach. Works*, 194 U. S. 296, 48 L. ed. 986, 24 Sup. Ct. Rep. 690.

The Massachusetts recording act was enacted to secure publicity.

Smith v. Howard, 173 Mass. 89, 53 N. E. 143.

An assignee in insolvency or a trustee in bankruptcy is not one of the parties, within the meaning of that act.

Blanchard v. Cooke, 144 Mass. 207, 11 N. E. 83; *Bingham v. Jordan*, 1 Allen, 373, 79 Am. Dec. 748; *Haskell v. Merrill*, 179 Mass. 120, 60 N. E. 485.

The construction of a state statute is a matter upon which the decision of the state court is final.

Haskell v. Merrill, 179 Mass. 120, 60 N. E. 485; *Re H. G. Andrae Co.* 117 Fed. 561.

The spirit and purpose of the bankrupt law is to consider fraudulent all transfers which ought to be recorded, but which are kept secret. The object in setting the time limit of four months after record made or possession taken was to admit of the trustee in bankruptcy claiming the goods so transferred. There is no object in making such a transfer and delivery of possession an act of bankruptcy, unless the creditors are to have the advantage of getting back the property or its value.

See *Buckingham v. McLean*, 13 How. 151, 14 L. ed. 91; *Re Klingaman*, 101 Fed. 691.

This was a lien obtained through legal proceedings within four months of the filing of a petition in bankruptcy, and was therefore null and void.

Wilson Bros. v. Nelson, 183 U. S. 191, 46 L. ed. 147, 22 Sup. Ct. Rep. 74; *Re Emslie*, 98 Fed. 716; *Re Ball*, 123 Fed. 164.

It has been held by this court that a lien obtained more than four months before the filing of a petition in bankruptcy is recognized as valid by the bankrupt law, although not perfected until within the four months, but that where a lien is obtained within four months the property is discharged therefrom by the bankruptcy.

198 U. S. U. S., Book 49.

Metcalf Bros. v. Barker, 187 U. S. 165, 47 L. ed. 122, 23 Sup. Ct. Rep. 67.

But in the case at bar the lien was not obtained, and did not exist under the Massachusetts law, so far as this trustee is concerned, until possession of the goods was taken three weeks before the filing of the petition.

Haskell v. Merrill, 179 Mass. 120, 60 N. E. 485; *Tatman v. Humphrey*, 184 Mass. 361, 63 L. R. A. 738, 100 Am. St. Rep. 562, 68 N. E. 844.

*Mr. Justice **Holmes** delivered the opinion [92] of the court:

This is an action brought by a trustee in bankruptcy, the defendant in error, to recover an alleged preference. The case was heard on agreed facts, which may be summed up as follows: Davis filed a voluntary petition in bankruptcy on May 23, 1901. Two years before, on May 6, 1899, being then solvent, he executed to the plaintiff in error, Humphrey, a mortgage of his present and after-acquired stock in trade and fixtures, which covered the goods in controversy; but the mortgage was not recorded, and the goods remained in Davis's possession. On April 30, 1901, Humphrey, having reasonable cause to believe that Davis was insolvent, took possession of the goods, in accordance, it fairly is implied, with the terms of the mortgage, although against the wishes and protest of Davis. The defendant in error was qualified as trustee on June 18, 1901, and at once demanded the goods without payment of the mortgage debt. The case went from the superior court to the supreme judicial court of the state, and the latter court ordered judgment for the plaintiff (184 Mass. 361, 63 L. R. A. 738, 100 Am. St. Rep. 562, 68 N. E. 844), which was entered below, and thereupon the case was brought here.

It may be assumed, in view of the recent decision in *Thompson v. Fairbanks*, 196 U. S. 516, ante, 577, 25 Sup. Ct. Rep. 306, that, if the taking possession was good as against the trustee in bankruptcy so far as the Massachusetts law is concerned, it should be held good here. We assume also, without deciding, that if, as against the trustee, the mortgage is to be regarded as first having come into being when the mortgagee took possession, it would be void. In the latter view the anomalous case would be presented of a mortgage of all a man's stock in trade to secure a past debt, executed to one who had reasonable cause to believe that the mortgagor was insolvent and that he was receiving a preference, but executed without intent to prefer on the part of the mortgagor. There would be a preference within the definition in § 60a, and the mort-

[93]gagee would know it, but he *could not be said in a strict sense to have reasonable cause to believe that it was intended to give a preference. We assume, for purposes of decision, that such a case must be regarded as falling within the intent of the act.

The question, then, is one of Massachusetts law, and unfortunately the decision does not leave us free from doubt upon that point. If hereafter the supreme court of the state should adopt a different view from that to which we have been driven, this case would cease to be a precedent. The language of the Massachusetts statute is, "unless the property mortgaged has been delivered to and retained by the mortgagee, the mortgage shall not be valid against a person other than the parties thereto, until it has been so recorded; and a record made subsequently to the time limited [fifteen days] shall be void." Mass. Rev. Laws, chap. 198, § 1. There are cases which indicate that an assignee in bankruptcy is a universal successor, like an executor or a husband, and so that, as it is put in *Lowell, Bankruptcy*, § 309, the assignee is the bankrupt. *Phosphate Sewage Co. v. Molleson*, 5 Ct. Sess. Cas. 4th series, 1125, 1138; *Bank of Scotland v. Cuthbert*, 1 Rose, 462, 481; *Selkirk v. Davies*, 2 Dow, P. C. 230, 248, 2 Rose, 291, 317. So, in the Roman law, *Bonorum emptor ficto se herede agit*. Gaius, IV. § 35. But it is the settled law of Massachusetts that such a fictitious identity does not satisfy the statute, that the trustee in bankruptcy is "a person other than the parties thereto," and that, therefore, as against him the mortgage is void. *Bingham v. Jordan*, 1 Allen, 373, 78 Am. Dec. 748; *Blanchard v. Cooke*, 144 Mass. 207, 226, 11 N. E. 83; *Haskell v. Merrill*, 179 Mass. 120, 124, 125, 60 N. E. 485. *Haskell v. Merrill* is cited and relied on in the supreme court of the state, and we assume that it and the other cases cited still correctly state the law. It is clear under these cases that recording or taking possession after the qualification of the trustee would be too late, and it certainly would seem not illogical to hold that as against him the mortgage was to be treated as nonexistent at any earlier date, until the things were done which made it good under [94]the *act. In this case the court speaks of "the proceedings by which the mortgagee obtained his lien, three weeks before the filing of the petition," which at least suggests, if it does not adopt, the idea that the mortgage then first came into being as against the trustee.

On the other hand, the court says in terms that "the defendant's acquisition of possession of the mortgaged property before the commencement of the proceedings in bankruptcy, and before third persons had ac-

quired liens or rights by attachment or otherwise, gave him a title which was good at common law against creditors, and which would have been good against an assignee in insolvency under the statutes of this commonwealth, or against an assignee in bankruptcy under the United States bankruptcy act of 1867." We feel bound, on the whole, to take this as expressing a deliberate attitude of the court on the question under discussion, as undoubtedly that has been its attitude in the past.

In *Briggs v. Parkman* (1841) 2 Mct. 258, 37 Am. Dec. 89, a messenger in insolvency took possession of the mortgaged property on July 15, at half-past one. At half-past three the mortgage was recorded. The first publication of the notice of issuing the warrant to the messenger was on July 16, and that by the terms of the insolvent law fixed the time when the property passed. It was held that the mortgage was valid as against the assignee in insolvency. In *Mitchell v. Black* (1856) 6 Gray, 100, a similar decision was made as to a bill of sale by way of security, and it was intimated that the law did not interfere with the action of purchasers in perfecting a title under a contract to which there was no legal objection when made. This case was relied on in *Sawyer v. Turpin*, 91 U. S. 114, 23 L. ed. 235, a case like the present, decided as we decide this, and cited by the court below. In *Bingham v. Jordan* (1861) 1 Allen, 373, 79 Am. Dec. 748, which decided that the assignee in insolvency was not a "party" within the statute, *Briggs v. Parkman* was referred to for its implications in favor of that view, without a hint that the decision was disapproved and seemingly with no *consciousness of inconsistency. Finally, in [95] *Folsom v. Clemence* (1873) 111 Mass. 273, twelve years after *Bingham v. Jordan*, it was held that a mortgage made more than six months before the date of a petition in bankruptcy, and recorded within the six months, was valid. This case also betrays no sense of inconsistency with its predecessor, and is cited by the supreme court of Massachusetts as authority for its last-quoted statement of law. See, further, *Bliss v. Crosier*, 159 Mass. 498, 34 N. E. 1075.

As the supreme court of Massachusetts says that taking possession under the mortgage within four months would be valid as against the trustee in bankruptcy but for supposed peculiarities of the present bankruptcy law, and as *Thompson v. Fairbanks*, 196 U. S. 517, ante, 578, 25 Sup. Ct. Rep. 306, although distinguishable from the present case, decides that it is valid under the present bankruptcy law if good by the laws

of the state, it follows that the mortgagee was entitled to keep his goods, and that the judgment against him was wrong.

Judgment reversed.

HIRAM REMINGTON, *Plff. in Err.*,
v.
CENTRAL PACIFIC RAILROAD COM-
PANY.

(See S. C. Reporter's ed. 95-100.)

Appeal—direct review of circuit court judgment—removal of causes—time for filing petition—estoppel—sufficiency of petition—presentation and filing—service of process on foreign corporation—res judicata.

1. The jurisdiction of the court below as a Federal court was so involved as to sustain a direct review, in the Supreme Court of the United States, of a Federal circuit court judgment dismissing an action which had been removed from the state court, where the ground of the judgment was lack of a valid service of process on the defendant, and the plaintiff had moved to remand the cause.
2. A petition for the removal of a cause from a state court to a Federal circuit court is not too late, although defendant may be in default in the state court for failure to answer in time, if such petition is filed as soon as the cause becomes a removable one.
3. Defendant is not estopped to insist upon its right to remove a cause from a state court to a Federal circuit court because, on the day after the right of removal was made to appear, its motion to stay proceedings pending an appeal from an order denying a motion to set aside the service of summons was successfully argued in the state court.
4. A petition is not insufficient to justify the removal of a cause from a state court to a Federal circuit court because the allegation that the time had not arrived at which the defendant was required to answer or plead is an allegation of a conclusion of law.
5. The presentation of the petition to a judge of the state court at chambers, and the filing of the petition in the state court, satisfy the statutory requirements respecting the removal of a cause from the state to a Federal circuit court.
6. The denial by an inferior state court of a motion to vacate the service of summons is

not *res judicata* on the question of the validity of such service, when raised in the Federal circuit court to which the cause has been removed.

7. Service of summons on a director of a foreign corporation who is casually within the state for a few days confers no jurisdiction on a Federal court, where the corporation is doing no business and has no property in the state.

[No. 460.]

Submitted February 27, 1905. Decided April 17, 1905.

IN ERROR to the Circuit Court of the United States for the Northern District of New York to review a judgment dismissing for want of jurisdiction of the defendant an action against a foreign corporation which had been removed to that court from a court of that state. *Affirmed.*

The facts are stated in the opinion.

Mr. James G. Flanders submitted the cause for plaintiff in error:

A judgment of the circuit court of the United States against a party contending that that court has no jurisdiction because the case has not been duly removed from a state court may be reviewed as to the question of jurisdiction by this court upon writ of error directly to that court.

Powers v. Chesapeake & O. R. Co. 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264.

The decision of the question whether or not the court acquired jurisdiction by a proper service of process may be reviewed by this court upon writ of error directly to the circuit court.

Shepard v. Adams, 168 U. S. 618-622, 42 L. ed. 602, 603, 18 Sup. Ct. Rep. 214.

The defendant waived and is estopped from asserting any right it may have had to remove this suit from the state court to the circuit court of the United States, by obtaining from the state court, after the defendant's attorneys had full and positive information of the amount of the judgment demanded by the plaintiff in the complaint, the order staying proceedings.

NOTE.—On direct review in the Federal Supreme Court of circuit or district court judgments or decrees—see note to *Gwin v. United States*, 46 L. ed. U. S. 741.

On removal of causes from state to Federal courts—see notes to *Whelan v. New York*, L. E. & W. R. Co. 1 L. R. A. 65; *Seddon v. Virginia T. & C. Steel & I. Co.* 1 L. R. A. 108; *Ferguson v. Ross*, 3 L. R. A. 322; *Huskins v. Cincinnati, N. O. & T. P. R. Co.* 3 L. R. A. 545; *Austin v. Gagan*, 5 L. R. A. 476; *Bierbower v. Miller*, 9 L. R. A. 228; *Broadhead v. Shoemaker*, 11 L. R. A. 567; *Delaware R. Constr. Co. v. Meyer*, 25 L. ed. U. S. 593; *Butler v. National Home for Disabled Volunteer Soldiers*, 36 L. ed. U. S. 346; *Torrence* 198 U. S.

v. Shedd, 36 L. ed. U. S. 528; and *Little York Gold Washing & Water Co. v. Keyes*, 24 L. ed. U. S. 656.

As to conclusiveness and effect of judgments as between Federal and state courts—see notes to *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 478; *Union & Planters' Bank v. Memphis*, 49 C. C. A. 468.

On service of process on foreign corporations—see notes to *Foster v. Charles Betcher Lumber Co.* 23 L. R. A. 490; and *Eldred v. American Palace-Car Co.* 45 C. C. A. 3.

On service on state officer as service on foreign corporation—see note to *Mutual Reserve Fund Life Assn. v. Phelps*, 47 L. ed. U. S. 987.

Manning v. Amy, 140 U. S. 137-141, 35 L. ed. 386-388, 11 Sup. Ct. Rep. 757; *Hanover Nat. Bank v. Smith*, 13 Blatchf. 224, Fed. Cas. No. 6,035; *Case v. Olney*, 106 Fed. 433; *Chicago, I. & N. P. R. Co. v. Minnesota & N. W. R. Co.* 29 Fed. 337; *West Virginia v. King*, 112 Fed. 369; *Hudson River R. & Terminal Co. v. Day*, 54 Fed. 545; *Hulbert v. Russo*, 64 Fed. 8.

The pendency of the motion to set aside the service of the summons did not have the effect to extend the time to appear or answer.

Wedekind v. Southern P. Co. 36 Fed. 279; *Olds v. City Trust, S. D. & Surety Co.* 114 Fed. 975.

The order granted October 24, 1903, did not extend the time to answer. It contained a stay of proceedings pending the appeal and until ten days after the decision thereof. But a stay of proceedings, under the Code, does not operate to extend the time for pleading.

Platt v. Townsend, 3 Abb. Pr. 9; *Sniffen v. Peck*, 6 N. Y. Civ. Proc. Rep. 188; *McGowan v. Leavenworth*, 2 E. D. Smith, 24.

Although the state court was clothed with power to open the default and allow the defendant to appear or answer, the opening of the default, if granted, could not restore the defendant's right, once lost, to file the petition for removal.

Price v. Lehigh Valley R. Co. 65 Fed. 825; *Rock Island Nat. Bank v. J. S. Keator Lumber Co.* 52 Fed. 897; *Hurd v. Gere*, 38 Fed. 537; *Austin v. Gagan*, 5 L. R. A. 476, 39 Fed. 626.

The order of the state court denying the defendant's motion to set aside the service of the summons, whether right or wrong, is the law of the case, and was binding alike upon the defendant and the state and Federal courts.

Duncan v. Gegan, 101 U. S. 810, 812, 25 L. ed. 875, 876; *Loomis v. Carrington*, 18 Fed. 97; *Bragdon v. Perkins-Campbell Co.* 82 Fed. 338; *Allmark v. Platte S. S. Co.* 76 Fed. 615; *Denison v. Shawmut Min. Co.* 124 Fed. 860; *Olds v. City Trust, S. D. & Surety Co.* 114 Fed. 975; *Brooks v. Farwell*, 1 McCrary, 132, 2 McCrary, 220, 4 Fed. 166; *Kidder v. Northwestern Mut. L. Ins. Co.* 117 Fed. 997.

In *Coffin v. Philadelphia, W. & B. R. Co.* 118 Fed. 688, the court held the cause removable before the service or filing of the complaint, or any other paper disclosing the amount in controversy.

See also *Zinkeisen v. Hufschmidt*, 1 Cent. L. J. 144, Fed. Cas. No. 18,214; *Beck & P. Lithographing Co. v. Wacker & B. Brewing & Malting Co.* 22 C. C. A. 11, 46 U. S. App. 486, 76 Fed. 10.

The petition should have set forth facts,

if they existed, which, taken in connection with the facts already on the record in the case, would show the court that the conclusion of law averred was correct.

Kansas City Suburban Belt R. Co. v. Herman, 187 U. S. 63-70, 47 L. ed. 76-79, 23 Sup. Ct. Rep. 24.

All the jurisdictional facts must appear in the petition, or in the record as it had been made in the state court before the filing of the petition, and cannot be shown by amendment in the circuit court of the United States.

Jackson v. Allen, 132 U. S. 27-34, 33 L. ed. 249, 10 Sup. Ct. Rep. 249; *Crehore v. Ohio & M. R. Co.* 131 U. S. 240, 33 L. ed. 144, 9 Sup. Ct. Rep. 692; *Cameron v. Hodges*, 127 U. S. 322, 32 L. ed. 132, 8 Sup. Ct. Rep. 1154.

Defendant was in default. Hence there was no controversy, and the action was not removable.

Berrian v. Chetwood, 9 Fed. 678; *Bailey v. American Cent. Ins. Co.* 2 McCrary, 413, 8 Fed. 686.

The removal act requires that the petition be filed in the state court at the time, or any time before, the defendant is required to answer or plead to the declaration or complaint of the plaintiff. This court has construed this to mean as soon as the defendant is required to make any defense whatever in the state court, so that, if the case should be removed, the validity of all his defenses may be tried and determined in the circuit court of the United States, and therefore that a petition for removal filed after the time at which he is required to plead to the jurisdiction of the court or in abatement of the writ is too late.

Martin v. Baltimore & O. R. Co. 151 U. S. 673, 686, 38 L. ed. 311, 316, 14 Sup. Ct. Rep. 533; *Golday v. Morning News*, 156 U. S. 518, 524, 39 L. ed. 517, 519, 15 Sup. Ct. Rep. 559; *Wabash Western R. Co. v. Brown*, 164 U. S. 271, 277, 278, 41 L. ed. 431, 434, 17 Sup. Ct. Rep. 126.

The petition and bond for removal should have been presented to the state court in session. Their presentation to a justice of the state court at chambers, and filing with the clerk, were insufficient.

Williams v. Massachusetts Ben. Asso. 47 Fed. 533; *LaPage v. Day*, 74 Fed. 977; *Fox v. Southern R. Co.* 80 Fed. 945; *Shedd v. Fuller*, 36 Fed. 609; *Roberts v. Chicago, St. P. M. & O. R. Co.* 45 Fed. 433.

What defendant's counsel wanted the court below to do, and what the court below did, was to act as a court of errors and review the decision of the state court.

Oglesby v. Attrill, 14 Fed. 214; *Cole Silver Min. Co. v. Virginia & Gold Hill Water*

Co. 1 Sawy. 685, Fed. Cas. No. 2,990; *Hayes v. Dayton*, 20 Fed. 690.

A motion can only be repeated on new grounds, and not on mere additional or cumulative evidence.

Ray v. Connor, 3 Edw. Ch. 478; *Hoffman v. Livingston*, 1 Johns. Ch. 211.

A motion once heard and determined cannot be renewed without leave.

Klumpp v. Gardner, 44 Hun, 515; *Melville v. Matthewson*, 17 Jones & S. 388; *First Nat. Bank v. Hamilton*, 50 How. Pr. 116; *Mahr v. Norwich Union F. Ins. Soc.* 127 N. Y. 452, 28 N. E. 391; *Banks v. American Tract Soc.* 4 Sandf. Ch. 438; *Rogers v. Hoenig*, 46 Wis. 361, 1 N. W. 17; *Webster v. Oconto County*, 47 Wis. 228, 2 N. W. 335.

An order made on an interlocutory motion is as much an adjudication and is as binding as a final judgment.

Dwight v. St. John, 25 N. Y. 203; *Williams v. Barkley*, 165 N. Y. 48, 58 N. E. 765; *Culross v. Gibbons*, 130 N. Y. 447, 29 N. E. 839; *Brown v. New York*, 66 N. Y. 385.

An appeal from an order or judgment, and a stay of proceedings pending such appeal, do not suspend the order or judgment, or affect its validity or effect.

Sixth Ave. R. Co. v. Gilbert Elev. R. Co. 71 N. Y. 430; *Genet v. Delaware & H. Canal Co.* 113 N. Y. 472, 21 N. E. 390; *Hovey v. McDonald*, 109 U. S. 150, 160, 161, 27 L. ed. 888, 3 Sup. Ct. Rep. 136; *Knox County v. Harshman*, 132 U. S. 14, 16, 33 L. ed. 249, 250, 10 Sup. Ct. Rep. 8.

Mr. Maxwell Evarts submitted the cause for defendant in error:

This court is without jurisdiction of the case, which should have been carried to the circuit court of appeals for the second circuit.

Louisville Trust Co. v. Knott, 191 U. S. 225, 48 L. ed. 159, 24 Sup. Ct. Rep. 119; *Bache v. Hunt*, 193 U. S. 523, 48 L. ed. 774, 24 Sup. Ct. Rep. 547; *Courtney v. Pradt*, 196 U. S. 89, ante, 398, 25 Sup. Ct. Rep. 208.

A defendant inadvertently in default for a few days as to the filing of a general appearance is not, when relieved from that default, deprived of his right to remove the cause to the Federal court, if such right is his in every other respect.

Dancel v. Goodyear Shoe Mach. Co. 106 Fed. 551; *Cady v. Associated Colonies*, 119 Fed. 420.

The petition and bond on removal were filed in time, under any aspect of the case.

Powers v. Chesapeake & O. R. Co. 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264; *Speckart v. German Nat. Bank*, 85 Fed. 12; *Fogarty v. Southern P. Co.* 121 Fed. 941; **198 U. S.**

Guarantee Co. of N. A. v. Hanway, 44 C. C. A. 312, 104 Fed. 369.

The presentation to a justice of the supreme court of the state was a fulfilment of the requirements of the removal act.

Noble v. Massachusetts Ben. Asso. 48 Fed. 337; *Loop v. Winters*, 115 Fed. 362.

The judgment of the court setting aside the service of the summons was right.

Conley v. Mathieson Alkali Works, 190 U. S. 406, 47 L. ed. 1113, 23 Sup. Ct. Rep. 728; *St. Clair v. Cox*, 106 U. S. 350-359, 27 L. ed. 222-226, 1 Sup. Ct. Rep. 354; *Wabash Western R. Co. v. Brow*, 164 U. S. 271, 41 L. ed. 431, 17 Sup. Ct. Rep. 126; *Clews v. Woodstock Iron Co.* 44 Fed. 31; *Bentlif v. London & C. Finance Corp.* 44 Fed. 667; *Reifsnider v. American Imp. Pub. Co.* 45 Fed. 433; *Swann v. Mutual Reserve Life Asso.* 100 Fed. 922.

A case begun in the state court, in which a motion has been made to set aside the service of the summons, can be removed to the Federal court, and the motion then made in that court.

Morris v. Graham, 51 Fed. 53; *McGillin v. Claflin*, 52 Fed. 657; *Donahue v. Calumet Fire Clay Co.* 94 Fed. 23; *Tortat v. Hardin Min. & Mfg. Co.* 111 Fed. 426; *Kauffman v. Kennedy*, 25 Fed. 785; *Mincer v. Markham*, 28 Fed. 387.

The defendant is no more bound by a decision in the state court before the case became a removable controversy, and when it had no volition in the matter, than is a defendant who is compelled to litigate a case in the state court after the case has been removed to the Federal court, because of the fact that the state court declines to acquiesce therein, and continues to adjudicate the case in the state court.

Kern v. Huidekoper, 103 U. S. 485, 26 L. ed. 354; *Goldey v. Morning News*, 156 U. S. 518, 525, 39 L. ed. 517, 519, 15 Sup. Ct. Rep. 559.

Interlocutory orders made in the state court clearly do not, by virtue of their removal to the United States circuit court, receive any such additional force and effect as to preclude the circuit court from doing with them what the state court might have done if the cause had remained there.

Bryant v. Thompson, 27 Fed. 881.

This court has no jurisdiction of a case brought direct from the circuit court, except when such case was dismissed upon the ground that the court below had no jurisdiction as a court of the United States, or the motion to remand was rested upon the contention that there was a lack of jurisdiction in the Federal court as contradistinguished from the state court.

Courtney v. Pradt, 196 U. S. 89, ante, 398, 25 Sup. Ct. Rep. 208.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a writ of error to the circuit court upon a judgment dismissing the action for want of jurisdiction of the defendant. That question is certified from the court below.

The action was brought in the supreme court of the state of New York on April 10, 1903, by serving a summons on a director of the defendant in error, the railroad. On April 22 the plaintiff's attorney gave twenty days' additional time to the defendant in which to appear generally or specially, or to move to vacate the summons. On May 11 a firm of lawyers gave notice of a motion to set aside the service, and also that they appeared only for that purpose. An agreement was made giving the defendant time to appear after the motion was decided. The motion was not decided until September 28, 1903, when it was denied, and an order to that effect was entered on October 2. The defendant's attorneys filed a notice of appeal on October 15, and the next day gave notice of a motion to stay proceedings on the order, to be made on [97] October 24. *On the same October 16, the plaintiff made an affidavit in which it appeared that the sum which he sought to recover was more than \$2,000. This contained the first definite notice to defendant, as no declaration had been filed. An order to take plaintiff's deposition and this affidavit were served on the defendant on October 23. On October 26 a petition for removal to the United States circuit court was presented by the defendant to a judge of the state court in chambers, and the bond was approved. Before the petition for removal was filed, the motion for a stay came up, on October 24, in the state court, and was argued, and a stay was ordered, the defendant at the same time being relieved from any default in appearing. The matter of the appeal was not passed upon. This order was entered on October 26. On November 4 the record was filed in the United States court.

In the circuit court the defendant renewed its motion to set aside the service of the summons, the plaintiff objecting on various grounds, which will be dealt with, and moving to remand the case. On July 23, 1904, the court granted the defendant's motion and overruled the plaintiff's, and on August 30 a judgment was entered dismissing the action for want of jurisdiction of the defendant. See *Wabash Western R. Co. v. Brow*, 164 U. S. 271, 41 L. ed. 431, 17 Sup. Ct. Rep. 126. The plaintiff's rights were saved by a bill of exceptions, the form of the judgment, and a certificate of the judge, and the case now is brought here.

It is objected by the defendant that this court has not jurisdiction, on the ground

that it does not appear that the want of jurisdiction of the court below as a Federal court was the ground of the judgment. But it appears clearly that the ground of the judgment was the absence of service on the defendant, and that the plaintiff denied the validity of the attempt to remove. See *Excelsior Wooden Pipe Co. v. Pacific Bridge Co.* 185 U. S. 282, 284, 285, 46 L. ed. 910, 912, 913, 22 Sup. Ct. Rep. 681, and cases cited. The former question was decided to be subject to review on error by this court in *Shepard v. Adams*, 168 U. S. 618, 42 L. ed. 602, 18 Sup. Ct. Rep. 214. That case has not been overruled. The latter question was held also *proper to be brought here, in [98] *Powers v. Chesapeake & O. R. Co.* 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264. The jurisdiction of this court must be sustained.

Coming, then, to the motion to remand, it is said that the petition to remove was filed too late, because the time for answer had expired. It would be a strong interpretation of the New York Code of Civil Procedure, § 418, to say that it requires an answer within twenty days after the summons, when no complaint, or even notice stating the sum of money for which judgment will be taken (§ 419), has been served. See *Dancel v. Goodyear Shoe Mach. Co.* 106 Fed. 551. But it is a sufficient reply to the motion and to the objection to the removal, that the petition was filed as soon as the case became a removable one. *Powers v. Chesapeake & O. R. Co.* 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264; *Kansas City Suburban Belt R. Co. v. Herman*, 187 U. S. 63, 67, 68, 47 L. ed. 76-78, 23 Sup. Ct. Rep. 24. The suggestion that the defendant was estopped by the fact that it followed up its motion to stay in the state court in accordance with its notice, on October 24, when the right to remove had been made to appear the day before, seems to us too technical, supposing it to be open here. Indeed, it was a proper preliminary in one respect. The order made on that motion was "that the defendant be relieved from any default in appearing herein, and that all proceedings on the part of the plaintiff be stayed, pending said appeal and until ten days after the decision thereof, except" an order for the examination of the plaintiff. It did not estop the defendant from insisting on a substantial right, that it got rid of a purely formal objection, which still is pressed, — in our opinion without ground. *Dancel v. Goodyear Shoe Mach. Co.* 106 Fed. 551. The order did not take effect until October 26. *Wilcox v. National Shoe & Leather Bank*, 67 App. Div. 466, 73 N. Y. Supp. 900; *Hastings v. Twenty-third Ward Land Improv. Co.* 46 App. Div. 609, 61 N. Y. Supp.

998; *Vilas v. Page*, 106 N. Y. 439, 455, 13 N. E. 743.

It is urged that the petition did not justify removal, because the allegation that the time had not arrived at which the defendant was required to answer or plead was an allegation of a conclusion of law. Allegations [99] which involve such conclusions *import that the facts which justify them are true. Many such allegations are permitted, to avoid an intolerable prolixity on matters not likely to be controverted. *Haskel v. Merrill*, 179 Mass. 120, 123, 60 N. E. 485; *Alton v. First Nat. Bank*, 157 Mass. 341, 343, 18 L. R. A. 144, 34 Am. St. Rep. 285, 32 N. E. 228; *Com. v. Clancy*, 154 Mass. 128, 132, 27 N. E. 1001; *Windram v. French*, 151 Mass. 547, 551, 8 L. R. A. 750, 24 N. E. 914; *Evans*, Pl. 1st ed. 48, 139, 143-146, 149-157, 164. The facts appeared of record. When the defendant expected the plaintiff to demand more than \$2,000 is immaterial. The only material point is when the demand was stated in the case. Assuming the objection to be open here, if there was any defect, which we do not imply, it was but a defect of form. *Powers v. Chesapeake & O. R. Co.* 169 U. S. 92, 98, 101, 42 L. ed. 673, 675, 676, 18 Sup. Ct. Rep. 264. The presenting of the petition to a judge in chambers, and the filing of it in the state court, satisfied the statute. See *Noble v. Massachusetts Ben. Asso.* 48 Fed. 337; *Loop v. Winters*, 115 Fed. 362.

We come, then, to the setting aside of the summons. We assume, for purposes of decision, as we already have assumed, that *Shepard v. Adams*, 168 U. S. 618, 42 L. ed. 602, 18 Sup. Ct. Rep. 214, is consistent with the decisions that the jurisdiction of the circuit court as a Federal court only is in question. *Louisville Trust Co. v. Knott*, 191 U. S. 225, 48 L. ed. 159, 24 Sup. Ct. Rep. 119; *Bach v. Hunt*, 193 U. S. 523, 48 L. ed. 774, 24 Sup. Ct. Rep. 547; *Courtney v. Pradt*, 196 U. S. 89, ante, 398, 25 Sup. Ct. Rep. 208. If there has been no valid service the court has no power, and a distinction is possible between such a case and a mere question touching the proper limits between equity and law, or the traditional authority of the court. We leave *Shepard v. Adams* as we find it, since a reconsideration of the point is not necessary to decide the present case. It is said that the decision of the state court, although appealed from, was *res judicata*. But it stood no higher than a similar decision made by the circuit court, if the case had been begun before that court. It may be that the defendant would have had no right to renew its motion, but the circuit court would have had power to give it leave. If the circuit court was satisfied that it, or

198 U. S.

its predecessor the state court, had made a mistake, *it had power to reopen the matter. [100] It did so, and its action in that respect is not open to question here. However stringent may be the practice in refusing to reconsider what has been done, it still is but practice, not want of jurisdiction, that makes the rule.

The plaintiff in error does not argue the merits of the order of the circuit court. Assuming that they, as well as the jurisdiction of the court to make the order, are open here, we see no sufficient reason for disturbing the decision. The circuit court was warranted by the affidavits before it in finding that the defendant was doing no business and had no property in the state of New York, and that the service on a director casually within the state for a few days was bad. *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 47 L. ed. 1113, 23 Sup. Ct. Rep. 728; *Geer v. Mathieson Alkali Works*, 190 U. S. 428, 47 L. ed. 1122, 23 Sup. Ct. Rep. 807. The arguments do not seem to us to need to be noticed in greater detail. *Judgment affirmed.*

CITY OF COVINGTON, Kentucky, and John N. Middendorf, Assessor of the City of Covington, Kentucky, *Appts.*,

v.

FIRST NATIONAL BANK OF COVINGTON, Kentucky. (No. 113.)

FIRST NATIONAL BANK OF COVINGTON, Kentucky, *Appt.*,

v.

CITY OF COVINGTON, Kentucky, and John N. Middendorf, Assessor of the City of Covington, Kentucky. (No. 114.)

(See S. C. Reporter's ed. 100-115.)

Judgment—conclusiveness as between Federal and state courts—state taxation of national banks—discrimination.

1. An adjudication of a state court that a bank

NOTE.—On conclusiveness of judgments generally—see notes to *Sharon v. Terry*, 1 L. R. A. 572; *Bollong v. Schuyler Nat. Bank*, 3 L. R. A. 142; *Wiese v. San Francisco Musical Fund Soc.* 7 L. R. A. 577; *Morrill v. Morrill*, 11 L. R. A. 155; *Bank of United States v. Beverly*, 11 L. ed. U. S. 76; *Johnson Steel Street R. Co. v. Wharton*, 38 L. ed. U. S. 429; and *Southern P. R. Co. v. United States*, 42 L. ed. U. S. 355.

As to conclusiveness and effect of judgments as between Federal and state courts—see notes to *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 478; and *Union & P. Bank v. Memphis*, 49 C. C. A. 468.

On state taxation of national banks—see notes to *McHenry v. Downer*, 45 L. R. A. 737; and *Providence Bank v. Billings*, 7 L. ed. 939.

963

has a contract exemption from taxation on its capital stock is not *res judicata* in the Federal courts as to taxes for years other than the one directly involved in the judgment, where, by the settled law of the state, an adjudication in respect of taxes for one year cannot be pleaded as an estoppel in suits involving taxes of other years.

2. The retroactive provision of Ky. act March 21, 1900, relating solely to national banks, by which such banks are charged with a liability for taxes for past years on their capital stock, whether held within or without the state, and are subjected to a penalty in addition for delinquency, operates as a discrimination against such banks, prohibited by U. S. Rev. Stat. § 5219 (U. S. Comp. Stat. 1901, p. 3502), where, until the passage of that act, national banks were not required to return for taxation shares of their capital stock held outside of the state.
3. A discrimination against national banks, forbidden by U. S. Rev. Stat. § 5219, does not necessarily result from the adoption by the state of a different method of taxation with reference to national banks from that it has adopted for state banks.

[Nos. 113, 114.]

Argued January 5, 1905. Decided April 17, 1905.

CROSS APPEALS from the Circuit Court of the United States for the Eastern District of Kentucky to review a decree which enjoined the collection of certain taxes on the shares of capital stock of a national bank, and refused to enjoin taxes of other years. *Affirmed.*

See same case below, 103 Fed. 523, 129 Fed. 792.

Statement by Mr. Justice Day:

This case was here upon a former appeal, which was dismissed for want of final decree in the court below. *Covington v. Covington First Nat. Bank*, 185 U. S. 270, 46 L. ed. 906, 22 Sup. Ct. Rep. 645.

The original action was brought to enjoin the assessment or collection of taxes on certain shares of capital stock of the First National Bank of Covington for the years from 1893 to 1900, inclusive, and to enjoin the arrest of the president and cashier of the bank for not listing such shares, and for a decree adjudicating the same not liable to taxation up to the time of the expiration of the charter of the bank on November 17, 1904.

The principal grounds alleged and relied upon are that, by reason of the acceptance of the terms of the act of the general assembly of Kentucky, passed in 1886, known as the Hewitt law, an irrevocable contract had been made between the bank and the state, whereby the former was to pay to the state taxes at a certain rate on its stock, sur-

plus, and undivided profits, which, when paid, were to be in full of all other state, county, or municipal taxes, except those levied on the bank's real estate. It was averred that complainant had regularly paid such taxes up to and including those due July 1, 1900. That the fact that the bank had such irrevocable contract had been adjudicated and finally determined by a decision in the *court of appeals of Kentucky [102] in a litigation wherein the state and the city of Covington and the bank were parties. The bill further set up that an attempt was being made to compel the complainant to list for taxation its shares of stock under an act of the state of Kentucky, passed March 21, 1900 (Session Acts 1900, p. 65). The act under which the taxes were assessed is given in the margin of the opinion in the case of *Covington v. First Nat. Bank*, 185 U. S. 270, 46 L. ed. 906, 22 Sup. Ct. Rep. 645, and for convenience of reference is also inserted in the margin here.† It was also

†“An Act Relating to the Taxation of the Shares of Stock of National Banks.

“Whereas, the Supreme Court of the United States has lately decided that article three (3), chapter one hundred and three (103), of the acts of 1891, 1892, and 1893 is void and of no effect in so far as the same provides for the taxation of the franchise of national banks, in consequence of which decision there is not now, and has not been since adoption of said article in 1892, any adequate mode of taxing national banks, while state banks are now, and have been ever since 1892, taxable for all purposes, state and local; therefore:

“Be it enacted by the General Assembly of the Commonwealth of Kentucky:

“Section 1. That the shares of stock in each national bank of this state shall be subject to taxation for all state purposes, and shall be subject to taxation for the purposes of each county, city, town, and taxing district in which the bank is located.

“Sec. 2. For purposes of the taxation provided for by the next preceding section, it shall be the duty of the president and the cashier of the bank to list the said shares of stock with the assessing officers authorized to assess real estate for taxation, and the bank shall be and remain liable to the state, county, city, town, and district for the taxes upon said shares of stock.

“Sec. 3. When any of said shares of stock have not been listed for taxation for any of said purposes under levy or levies of any year or years since the adoption of the revenue law of 1892, it shall be the duty of the president and cashier to list the same for taxation under said levy or levies: *Provided*, That where any national bank has heretofore, for any year or years paid taxes upon its franchise as provided in article three (3) of the revenue law of 1892, said bank shall be excepted from the operation of this section as to said year or years: *And provided further*, That where any national bank has heretofore, for any year or years, paid state taxes under the Hewitt bill in excess of the state taxes required by this act for the same year or years, said bank shall

averred in the bill that the act of March 21, 1900, *which undertakes to impose taxes for the years 1893 and following, is unconstitutional and void, and operates to discriminate against the complainant, in violation of § 5219 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 3502). The defendants having filed a plea to the jurisdiction and a general demurrer to the bill, upon motion for a temporary injunction, attempts to enforce taxes levied or assessed upon the shares of capital stock at any time previous to March 21, 1900, were enjoined. 103 Fed. 523.

December 17, 1900, a decree was entered, but, not being final, the writ of error was dismissed. 185 U. S. 270, 46 L. ed. 906, 22 Sup. Ct. Rep. 645. After the case was sent back to the circuit court the prior decision in that court was followed, and it was further held that the judgment of the state court was not a bar to the right to collect taxes for other years than the year directly involved in the judgment set up, and that, as the Hewitt law and its acceptance by the bank had been conclusively held not to constitute an irrevocable contract as to taxes between the state and the complainant, and as the law was valid as to future taxation, the injunction could not be granted as to taxes assessed under the law of March 21, 1900, after its passage. A decree was, therefore, entered, dismissing the complainant's bill as to taxes levied after said date, and [104] permitting the former *decree enjoining the assessment and levying of taxes before the passage of the law to stand. 129 Fed. 792.

From so much of the decree as enjoined the taxes assessed prior to March 21, 1900, the city appealed; from so much thereof as refused the injunction and dismissed the bill as to taxes assessed after that date, the bank appealed. Both appeals are now before this court:

Messrs. Shelley D. Rouse and Edmund F. Trabue argued the cause, and, with **Messrs. James S. Pirtle, John C. Doolan, and Atilla Cox, Jr.**, filed a brief for the bank:

Shares of stock of the nonresident share-

holders of the national banks were not taxable in Kentucky as the "other personal property" of residents of Kentucky was taxable.

Baldwin v. Shine, 84 Ky. 502, 2 S. W. 164; *Lexington v. Fishback*, 109 Ky. 770, 60 S. W. 727; *Frankfort v. Fidelity Trust & S. V. Co.* 111 Ky. 667, 64 S. W. 470.

No retroactive power such as is claimed here is given under U. S. Rev. Stat. § 5219, U. S. Comp. Stat. 1901, p. 3502. That section is the source of all state power to tax national banks.

Owensboro Nat. Bank v. Owensboro, 173 U. S. 664, 668, 43 L. ed. 850, 852, 19 Sup. Ct. Rep. 537.

To tax in a state property whose situs is elsewhere amounts to taking property without due process.

Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385, 395, 47 L. ed. 513, 517, 23 Sup. Ct. Rep. 463.

And to tax by retroactive statute property not previously taxable for the period of time covered by the proposed tax equally offends the same principle.

Bellevue v. Peacock, 89 Ky. 495, 25 Am. St. Rep. 552, 12 S. W. 1042.

The entire act of March 21, 1900, is void because it taxes national banks upon a basis not the legal equivalent of the basis upon which state banks are taxed.

Owensboro Nat. Bank v. Owensboro, 173 U. S. 664, 43 L. ed. 850, 19 Sup. Ct. Rep. 537; *Van Allen v. Assessors (Churchill v. Utica)* 3 Wall. 573, 18 L. ed. 229.

There could be no assessment of the shares of appellee's capital stock until after the passage of the act of March 21, 1900.

Franklin County Court v. Louisville & N. R. Co. 84 Ky. 59; *Com. use of Marion County v. Louisville & N. R. Co.* 89 Ky. 139, 9 S. W. 805.

The judgment of the Campbell circuit court, affirmed by the Kentucky court of appeals, adjudging in the bank's favor an irrevocable contract under the "Hewitt law," exempting the bank from all taxation except by that law imposed, is *res judicata* of that question, and prevents its relitigation here.

Bank of Kentucky v. Stone, 88 Fed. 383; *New Orleans v. Citizens' Bank*, 167 U. S.

be entitled to credit by said excess upon its state taxes required by this act.

"Sec. 4. All assessments of shares of stock contemplated by this act shall be entered upon the assessor's books, certified, and reported by the assessing officers as assessments of real estate are entered, certified, and reported, and the same shall be certified to the proper collecting officers for collection as assessments of real estate are certified for collection of taxes thereon.

"Sec. 5. The assessments of said shares of stock and collection of taxes thereon, as contemplated by this act, may be enforced as as-
198 U. S.

assessments of real estate, and collection of taxes thereon may be enforced.

"Sec. 6. The purpose of this act is to place national banks of this state, with respect to taxation, upon the same footing as state banks as nearly as may be consistently with said article three (3) of the revenue law and said decision of the supreme court.

"Sec. 7. Whereas, it is important that state banks and national banks should be taxed equally for all purposes, an emergency exists, and this act shall take effect and be in force from and after its passage."

Approved March 21, 1900.

371, 42 L. ed. 202, 17 Sup. Ct. Rep. 905; *Deposit Bank v. Frankfort*, 191 U. S. 499, 48 L. ed. 276, 24 Sup. Ct. Rep. 154.

The circuit court erred in applying what it supposed to be the Kentucky rule, viz., that all the Kentucky decisions invoked were made after the judgment of the Campbell circuit court aforesaid.

Douglass v. Pike County, 101 U. S. 677, 25 L. ed. 968.

Messrs. **F. J. Hanlon** and **J. H. Hazelrig** argued the cause, and, with *Mr. Ira Julian*, filed a brief for the city of Covington:

The retroactive feature of the act is not inhibited by either the state or the Federal Constitution.

Scobee v. Bean, 109 Ky. 526, 59 S. W. 860; *Butler v. Toledo*, 5 Ohio St. 225; *Marion County v. Louisville & N. R. Co.* 91 Ky. 388, 15 S. W. 1061; *Mattingly v. District of Columbia*, 97 U. S. 687, 24 L. ed. 1098; *Louisville & N. R. Co. v. Com.* 1 Bush. 250; *Cooley, Const. Lim.* 5th ed. pp. 455-471; *London v. Hope*, 26 Ky. L. Rep. 112, 80 S. W. 807; *Florida, C. & P. R. Co. v. Reynolds*, 183 U. S. 471, 46 L. ed. 283, 22 Sup. Ct. Rep. 176; *Chester v. Black*, 132 Pa. 568, 6 L. R. A. 802, 19 Atl. 276; *Mills v. Charleton*, 29 Wis. 400, 9 Am. Rep. 578; *Re Van Antwerp*, 56 N. Y. 261; *Lang v. Kiendl*, 27 Hun. 66; *Plumer v. Marathon County*, 46 Wis. 184, 50 N. W. 416; *Cooley, Taxn.* 309; *Louisville & J. Ferry Co. v. Com.* 108 Ky. 717, 57 S. W. 624.

A liberal construction has been given to U. S. Rev. Stat. § 5219, U. S. Comp. Stat. 1901, p. 3502, by this court.

Adams v. Nashville, 95 U. S. 22, 24 L. ed. 370; *First Nat. Bank v. Kentucky*, 9 Wall. 362, 19 L. ed. 703; *Davenport Nat. Bank v. Board of Equalization*, 123 U. S. 83, 31 L. ed. 94, 8 Sup. Ct. Rep. 73; *Van Slyke v. Wisconsin*, 154 U. S. 581, and 20 L. ed. 240, 14 Sup. Ct. Rep. 1168; *First Nat. Bank v. Ayers*, 160 U. S. 660, 40 L. ed. 573, 16 Sup. Ct. Rep. 412; *First Nat. Bank v. Chehalis County*, 166 U. S. 440, 41 L. ed. 1069, 17 Sup. Ct. Rep. 629; *Merchants' & M. Bank v. Pennsylvania*, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829; *Lander v. Mercantile Nat. Bank*, 186 U. S. 458, 46 L. ed. 1247, 22 Sup. Ct. Rep. 908; *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. ed. 895, 7 Sup. Ct. Rep. 826.

The act of March 21, 1900, does not discriminate against the shares in national banks.

Paducah Street R. Co. v. McCracken County, 105 Ky. 472, 49 S. W. 178; *Com. v. Citizens' Nat. Bank*, 25 Ky. L. Rep. 2100, 80 S. W. 158; *Scobee v. Bean*, 109 Ky. 526, 59 S. W. 860; *Citizens Nat. Bank v. Com.* 25 Ky. L. Rep. 2254, 80 S. W. 479; *Hammond*

v. Massachusetts, 154 U. S. 550, and 18 L. ed. 229, 14 Sup. Ct. Rep. 1202; *Churchill v. Utica*, 154 U. S. 550 and 18 L. ed. 236, 14 Sup. Ct. Rep. 1198; *New York v. Tax & A. Comrs.* 4 Wall. 244, 18 L. ed. 344; *First Nat. Bank v. Ayers*, 160 U. S. 660, 40 L. ed. 573, 16 Sup. Ct. Rep. 412.

The estoppel proposed by appellee should not prevail in this court because the same would not prevail in the courts of Kentucky.

Mills v. Duryee, 7 Cranch, 484, 3 L. ed. 413; *Hampton v. McConnel*, 3 Wheat. 234, 4 L. ed. 378; *M'Elmoyle v. Cohen*, 13 Pet. 326, 10 L. ed. 184; *Christmas v. Russell*, 5 Wall. 290, 18 L. ed. 475; *Thompson v. Whitman*, 18 Wall. 457, 21 L. ed. 897; *Phoenix F. & M. Ins. Co. v. Tennessee*, 161 U. S. 184, 40 L. ed. 664, 16 Sup. Ct. Rep. 471; *Metcalf v. Watertown*, 153 U. S. 671, 38 L. ed. 861, 14 Sup. Ct. Rep. 947; *Cooper v. Newell*, 173 U. S. 555, 43 L. ed. 808, 19 Sup. Ct. Rep. 506; *Union & R. Bank v. Memphis*, 49 C. C. A. 455, 111 Fed. 570, 189 U. S. 71, 47 L. ed. 712, 23 Sup. Ct. Rep. 604.

Besides, the same being a non-Federal question, in which only citizens of Kentucky are concerned, this court will, for that reason alone, follow the state court decisions on that subject.

Phoenix F. & M. Ins. Co. v. Tennessee, 161 U. S. 184, 40 L. ed. 664, 16 Sup. Ct. Rep. 471; *Abraham v. Casey*, 179 U. S. 218, 45 L. ed. 159, 21 Sup. Ct. Rep. 88; *Bergman v. Bly*, 13 C. C. A. 319, 27 U. S. App. 650, 66 Fed. 43; *Lavin v. Emigrant Industrial Sav. Bank*, 18 Blatchf. 1, 1 Fed. 650; *Shelby v. Guy*, 11 Wheat. 367, 6 L. ed. 496; *Green v. Neal*, 6 Pet. 299, 8 L. ed. 405; *Morley v. Lake Shore & M. S. R. Co.* 146 U. S. 166, 36 L. ed. 928, 13 Sup. Ct. Rep. 54; *Fidelity Ins. & S. D. Co. v. Shenandoah Iron Co.* 42 Fed. 376; *Tioga R. Co. v. Blossburg & C. R. Co.* 20 Wall. 137-143, 22 L. ed. 331-334; *Union Nat. Bank v. Bank of Kansas City*, 136 U. S. 235, 34 L. ed. 345, 10 Sup. Ct. Rep. 1013; *Leighton v. Young*, 18 L. R. A. 266, 3 C. C. A. 176, 10 U. S. App. 298, 52 Fed. 439; *Sandford v. Poe*, 60 L. R. A. 641, 16 C. C. A. 305, 37 U. S. App. 378, 69 Fed. 546; *Bauserman v. Blunt*, 147 U. S. 647, 37 L. ed. 316, 13 Sup. Ct. Rep. 466; *Thompson v. Searcy County*, 6 C. C. A. 674, 12 U. S. App. 618, 57 Fed. 1030; *Luther v. Borden*, 7 How. 1, 12 L. ed. 581; *Lavin v. Emigrant Industrial Sav. Bank*, 18 Blatchf. 1, 1 Fed. 641; *Christy v. Pridgeon*, 4 Wall. 196, 18 L. ed. 322; *Leffingwell v. Warren*, 2 Black, 603, 17 L. ed. 262; *Sioux City Terminal R. & Warehouse Co. v. Trust Co. of N. A.* 27 C. C. A. 73, 49 U. S. App. 523, 82 Fed. 124; *Hill v. Hite*, 29 C. C. A. 549, 56 U. S. App. 403, 85 Fed. 268; *Union P. R. Co. v. Reed*, 25 C. C. A. 389, 49 U. S. App. 233, 80 Fed. 234; *Rice v. Adler-Goldman Commission Co.* 18

C. C. A. 15, 36 U. S. App. 266, 71 Fed. 151; *Hodgdon v. Burleigh*, 4 Fed. 121; *Duden v. Maloy*, 43 Fed. 407; *South Covington & C. S. R. Co. v. Gest*, 34 Fed. 628; *Sutherland-Innes Co. v. Evart*, 30 C. C. A. 305, 58 U. S. App. 335, 86 Fed. 597.

Under the Kentucky doctrine, there is no such thing as *res judicata* in tax cases, except for the particular taxes involved.

Newport v. Com. 106 Ky. 434, 45 L. R. A. 518, 50 S. W. 845, 51 S. W. 433; *Louisville Bridge Co. v. Louisville*, 22 Ky. L. Rep. 703, 58 S. W. 598; *Negley v. Henderson*, 22 Ky. L. Rep. 912, 59 S. W. 19; *Bell County Coke & Improv. Co. v. Pineville*, 23 Ky. L. Rep. 933, 64 S. W. 525; *Frankfort v. Deposit Bank*, 111 Ky. 950, 65 S. W. 10; *Louisville Bridge Co. v. Louisville*, 23 Ky. L. Rep. 1655, 65 S. W. 814.

[107] *Mr. Justice Day delivered the opinion of the court:

That the acceptance of the provisions of the so-called Hewitt law did not constitute an irrevocable contract, releasing the bank from taxes upon compliance with its terms, has been settled. *Bank Tax Cases*, 102 Ky. 174, 44 L. R. A. 825, 39 S. W. 1030; *Citizens' Sav. Bank v. Owensboro*, 173 U. S. 636, 43 L. ed. 840, 19 Sup. Ct. Rep. 530. Reference is made to the various cases leading up to this result in *Deposit Bank v. Frankfort*, 191 U. S. 499, 508, 48 L. ed. 276, 279, 24 Sup. Ct. Rep. 154. We are therefore left upon this branch of the case to consider the effect of the judgment of the state court of Kentucky, set up in the complainant's bill as an adjudication of the rights of the parties and a final determination that the acceptance of the Hewitt law had the effect of a valid contract. When this case was before the circuit court for the second time (129 Fed. 792), Judge Cochran, after an elaborate review of the Kentucky cases, reached the conclusion that, as the taxes involved in the case in which the adjudication was had were for a different year than those involved in this suit, the former judgment did not have the effect of an estoppel between the parties, being only conclusive, under the Kentucky decisions, as to taxes in the years involved in the suit in which the judgment was rendered. We do not doubt that this is the settled law of the supreme court of Kentucky. Nor does it make any difference, in the view which that court takes of the matter, that the adjudication as to the right to collect the taxes involved the finding of an exemption by contract, which included, not only the taxes for the years in suit, but all taxes which might be levied under the authority of the contract. The ground upon which the court based its decision with reference to the

effect of such adjudication is stated in the case of *Newport v. Com.* 106 Ky. 444, 45 L. R. A. 518, 50 S. W. 845, 51 S. W. 433, as follows:

"The only question remaining for decision is upon the plea of *res judicata*. The plea in this case avers that the subject-matter of the *former suit was identical with that [108] involved in this action, and that the facts were the same in both actions, except that the former action attempted to collect a tax for the year 1893, and the present action was attempting to collect a tax for the year 1894. . . .

"The authorities seem to hold that when a court of competent jurisdiction has, upon a proper issue, decided that a contract, out of which several distinct promises to pay money arose, has been adjudged invalid in a suit upon one of those promises, the judgment is an estoppel to a suit upon another promise founded on the same contract. But taxes do not arise out of contract. They are imposed *in invitum*. The taxpayer does not agree to pay, but is forced to pay, and the right to litigate the legality of a tax upon all grounds must of necessity exist, regardless of former adjudications as to the validity of a different tax."

It is unnecessary to cite the cases; they will be found in Judge Cochran's opinion. It is sufficient to say that, if this case had been decided in the state court in Kentucky, the adjudication pleaded herein, not involving taxes for the same years as those now in controversy, would not avail as an estoppel between the parties. It is true that a different rule prevails in the courts of the United States. The reasons therefor were stated in an opinion by Mr. Justice White, speaking for the court, in the case of *New Orleans v. Citizens' Bank*, 167 U. S. 371, 42 L. ed. 202, 17 Sup. Ct. Rep. 905, and in cases arising in a Federal jurisdiction the doctrine therein announced will doubtless be adhered to. The learned counsel for the plaintiff in error refer to the decision of this court in *Deposit Bank v. Frankfort*, 191 U. S. 499, 48 L. ed. 276, 24 Sup. Ct. Rep. 154, as authority for the doctrine that, where a contract right has been adjudicated which involves an exemption from all taxation, such adjudication will conclude the parties as to the right to legally tax for other years, although the particular year was not directly involved in the suit in which the adjudication was made. But in that case the court was dealing with the effect to be given to a judgment of a Federal court in which such *contract right had been ad- [109] judicated, when the Federal judgment was set up in a state court; and in that case it was recognized, in the opinion of the court as well as in the dissenting opinion, that

the courts of Kentucky, in giving effect to the judgments of their own courts, were guided by a different rule, and in that state an adjudication involving taxes for one year cannot be pleaded as an estoppel in suits involving taxes for other years. 191 U. S. 514, 524, 48 L. ed. 282, 24 Sup. Ct. Rep. 154.

The case of *Deposit Bank v. Frankfort* was only concerned with the effect to be given to a Federal judgment adjudicating a contract right, when pleaded in a state court. We are now dealing with the weight to be attached to a state judgment when pleaded as *res judicata* in a Federal court. That was the very question decided by this court in the case of *Union & Planters' Bank v. Memphis*, 189 U. S. 71, 47 L. ed. 712, 23 Sup. Ct. Rep. 604, wherein it was held that the Federal courts were not required to give to such judgments any greater force or effect than was awarded to them by the courts of the state where they were rendered. Upon this branch of the case the question then is, What effect is given in the courts of Kentucky to such pleas of estoppel? As we have seen, it is there settled that the judgment would not be effectual to protect the alleged contract rights of the complainant as to the taxes involved for years other than the one directly involved in the adjudication set up. We therefore find no error in the judgment of the circuit court refusing an injunction upon the ground of an estoppel by judgment.

As to the taxes for the years prior to the passage of the act of March 21, 1900, it is argued by the bank that to give this retroactive effect to the law will be to deprive it and its stockholders of their property without due process of law, and will be in violation of § 5219 of the Revised Statutes, prohibiting discrimination against national banks and their stockholders. The act of March 21, 1900, as stated in the preamble, was passed because of a decision of this court holding prior legislation of the state undertaking to tax the property of national banks unconstitutional. *Owensboro Nat. Bank v. *Owensboro*, 173 U. S. 664, 43 L. ed. 850, 19 Sup. Ct. Rep. 537. In the *Owensboro Case* it was held that § 5219, Rev. Stat. U. S., was the measure of the power of the state to tax national banks, their property, or franchises, which power was confined to the taxing of the stock in the name of the shareholders and the assessment of the real estate of the banks, and that taxation under the laws of the state of Kentucky upon the franchise of the bank was not within the purview of the authority conferred by the act of Congress, and was therefore illegal. Section 5219 of the Revised Statutes of the United States is as follows:

"Sec. 5219. Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the state within which the association is located; but the legislature of each state may determine and direct the manner and place of taxing all the shares of national banking associations located within the state, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by nonresidents of any state shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either state, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed."

Under the new taxing law (act of March 21, 1900), it is declared to be the purpose to require the bank to return the shares of stock for the years prior to 1900, and since the adoption of the revenue law of 1892, with the privileges and deductions stated in § 3 of the act. Notwithstanding the prior revenue law had been held invalid, and there was no statute specifically taxing these shares of national bank stock on the statute books of Kentucky, prior to the passage of the act of March 21, 1900, the supreme court of Kentucky, in the case of **Scobee v. Bean*, [111] 109 Ky. 526, 59 S. W. 860, has held that there was ample statute law in that state for the taxing of shares in national banks under the laws of that state providing for the taxation of real and personal property of every kind, and that the provision that the individual shareholder in a corporation shall not be required to list his property therein so long as the corporation pays the taxes on its property of every kind, impliedly requires the individual to list his shares and pay the tax in the absence of the return required by law of the corporation. In that case the court held that there was nothing in its decisions running counter to § 5219. These views were further enforced in *Com. v. Citizens' Nat. Bank*, 25 Ky. L. Rep. 2100, 80 S. W. 158; *London v. Hope*, 26 Ky. L. Rep. 112, 80 S. W. 817; *Citizens' Nat. Bank v. Com.* 25 Ky. L. Rep. 2254, 80 S. W. 479. Following the state court in the interpretation of its own statutes, it may be said that, as to shareholders residing in Kentucky and over whom the state has jurisdiction, the supreme court of that state has construed its statutes as requiring shareholders in national banks for the years

1893 to 1900, inclusive, to return their shares for taxation; and if they did not make the return the duty was required of the corporation. In this view of the law it may be that, as to local shareholders, the act of March 21, 1900, as held by the supreme court of Kentucky, created no new right of taxation, but gave simply a new remedy, which by the law, is operative to enforce pre-existing obligations. It may be admitted that § 5219 permits the state to require the bank to pay the tax for the shareholders. *First Nat. Bank v. Kentucky*, 9 Wall. 353, 19 L. ed. 701; *Van Slyke v. Wisconsin*, 154 U. S. 581, and 20 L. ed. 240, 11 Sup. Ct. Rep. 1168; *First Nat. Bank v. Chehalis County*, 166 U. S. 440, 41 L. ed. 1069, 17 Sup. Ct. Rep. 629.

But there is nothing in the general statutes of Kentucky before the act of March 21, 1900, specifically requiring national banks to return shares of stock in the corporation when such shares are held by persons domiciled beyond the state. This situs of shares of foreign-held stock in an incorporated company, in the absence of legisla-
 [112] tion imposing a duty upon the *company to return the stock within the state as the agent of the owner, is at the domicile of the owner. *Cooley*, Taxn. 16. It is true that the state may require its own corporations to return the foreign-held shares for the owner for the purposes of taxation. *Corry v. Baltimore*, 196 U. S. 466, ante, 556, 25 Sup. Ct. Rep. 297. Section 5219, Rev. Stat., authorizes the state to tax all the shares of a national banking association, including those owned by nonresidents, as well as those owned in the state, in the city or town where the bank is located; but this section does not itself impose the tax; it is authority for state legislation to thus tax national bank shareholders. And this statute is express authority to the state by appropriate legislation to make the bank the agent of the shareholders for the purpose of returning the shares and paying the taxes thereon.

In *Com. v. Citizens' Nat. Bank*, 25 Ky. L. Rep. 2100, 80 S. W. 158, the Kentucky court of appeals seems to have held that a national bank might be required, under § 4241, Ky. Stat. 1903, to return the shares held in it for the years 1893 to 1900, inclusive, as omitted property. In that case it is said: "It was held under the previous statute that the shares of stock in national banks might be assessed to the shareholder by the assessor, and should be given in by the shareholder in the list of his personal property. *Scobec v. Bean*, 109 Ky. 526, 59 S. W. 860. The act of March 21, 1900, did not [it was held], therefore, make that taxable which was not taxable before, but sim-

ply provided another mode for the assessment of the shares of stock and the payment of the taxes. It was the duty of the assessor to make the assessment. It was also the duty of the president and cashier of the bank to list the shares of stock with the assessor; but when the assessment was not made the property was simply omitted from the tax list, and the sheriff is authorized by § 4241, Ky. Stat. [1903] to institute the proceeding to have any omitted property assessed." And the court further held the bank liable for the penalty imposed for not listing taxable property. The ground *upon [113] which this judgment rests is that shareholders were bound to return the shares in the years from 1893 to 1900 under the then existing state law, and the act of 1900 made the bank the agent of the shareholders, and did not require a new duty, but only imposed the duty upon the agent as a means of making effectual the former obligation of the shareholders. None of the Kentucky cases deals with the effect of the requirement under the act of 1900, that the bank return the shares of stock held by foreign stockholders, who clearly were not required, under the previous laws of that state, to return shares of stock when neither the shares nor the owners were within the state.

Section 5219 requires that a state, in taxing national banks, shall be subject to the restriction that the taxation shall not be at a greater rate than is assessed upon other capital in the hands of the individual citizen. Neither this section nor § 5210 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3498), requiring a list of the shareholders to be kept by the bank, has the effect to levy taxes. It is a limitation upon the right of the state, and the state must not discriminate against national banks by the use of methods of taxation differing from those in use in taxing other moneyed capital in the hands of individual citizens.

It is averred in the amended bill, and, the answer having been stricken from the files and the case submitted upon the plea to the jurisdiction and general demurrer, it must be taken as true, "that during said years [1893 to 1900] many of its shareholders were nonresidents of the state of Kentucky, who, in many instances, have sold and transferred their shares of stock during said time."

The statutes of the state of Kentucky, which have been construed by the supreme court of that state in the cases cited, to require the payment of taxes by the shareholders or by the bank for its shareholders, can have reference only to shareholders within the jurisdiction of the state. Whether the system operates as a discrimination

[114] against national banks within the prohibition of § 5219, involving, as it does, a *right of Federal creation, must be ultimately determined in this court. The act of March 21, 1900, imposes upon the bank a liability for taxes assessed upon its shareholders, whether within or without the state. This liability did not exist before the passage of the act, and in *Com. v. Citizens' Nat. Bank*, 25 Ky. L. Rep. 2100, 80 S. W. 158, the court of appeals of Kentucky held that the statutes of the state made the bank liable for a penalty of 20 per cent for the years 1893 to 1900, inclusive. It seems to us that to permit the statute to require the bank to return the shares of such foreign-held stock, and be subjected to a penalty in addition, is imposing upon national banks a burden not borne by other moneyed capital within the state. In support of the equivalency of taxation, which it is the purpose of § 5219 to require, this court said, in *Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664, 676, 43 L. ed. 850, 855, 19 Sup. Ct. Rep. 537, 540: "The alleged equivalency, in order to be of any cogency, must of necessity contain two distinct and essential elements,—equivalency in law and equivalency in fact."

Without considering the question of constitutional power to tax nonresident shareholders by means of this retroactive law, it seems to us that, in imposing upon the bank the liability for the past years, for taxes and penalty, upon stock held without the state, and which before the taking effect of the act under consideration it was not required to return, there has been imposed upon national banks in this retroactive feature of the law a burden not borne by other moneyed capital in the state. This law makes a bank liable for taxes upon property beyond the jurisdiction of the state, not required to be returned by the bank as agent for the shareholders, by a statute passed in pursuance of the authority delegated in § 5219; thus imposing a burden not borne by other moneyed capital within the state.

We think the circuit court was right in that part of the decree which enjoined the collection of taxes against the bank for the years 1893 to 1900, inclusive.

[115] As to the alleged discrimination against shareholders in *national banks because the assessment of the property of state banks is upon the franchise, and not upon the shares of stock, there is nothing in the bill to show that this difference in method operates to discriminate against national bank shareholders by assessing their property at higher rates than are imposed upon capital invested in state banks. And, as to the deduction of the value of real estate and

other deductions allowed to state banks, the supreme court of Kentucky has held that all deductions allowed to state banks must be allowed in like manner in assessing the property of shareholders in national banks. *Com. v. Citizens' Nat. Bank*, 25 Ky. L. Rep. 2100, 80 S. W. 158. Nor does the allegation that in cities of the first, second, and third class state banks are assessed upon their shares for city taxation, but upon their franchises and property for state and county taxation, in the absence of averments of fact showing that thereby a heavier burden of taxation is imposed upon national than state banks in such cities, warrant judicial interference for the protection of shareholders in national banks. *Davenport Nat. Bank, v. Board of Equalization*, 123 U. S. 83, 31 L. ed. 94, 8 Sup. Ct. Rep. 73.

Judgment affirmed.

FERNAND BONIN, Valcour Bonin, *et al.*,
Plffs. in Err.,
v.
GULF COMPANY.

(See S. C. Reporter's ed. 115-118.)

Appeal—review of judgment of circuit court of appeals—certiorari.

1. The mere assertion of title under a patent from the United States presents no question which, of itself, deprives the judgment of the circuit court of appeals, in a petitory action for real property, of that finality which exists if the jurisdiction of the circuit court depends solely upon diversity of citizenship.
2. Certiorari to a circuit court of appeals will not be granted upon dismissing, for lack of jurisdiction, a writ of error to that court, where the judgment sought to be reviewed was entered May 27, 1902, the writ of error was allowed May 22, 1903, the cause docketed June 1, 1903, and the petition for certiorari filed February 17, 1905.

[No. 50.]

Argued and submitted March 16, 1905. Decided April 24, 1905.

IN ERROR to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Eastern District of Louisiana in favor of defendant in a petitory action for real property, orig-

NOTE.—On certiorari in United States courts—see notes to *Clark v. Hackett*, 17 L. ed. U. S. 69; and *Lau Ow Bew v. United States*, 1 C. C. A. 5.

inally begun in the District Court of St. Mary's Parish, in the state of Louisiana. Dismissed for want of jurisdiction. Also a

PETITION for certiorari to review the same judgment. *Denied*.

See same case below, 53 C. C. A. 31, 116 Fed. 251.

The facts are stated in the opinion.

Mr. Branch K. Miller argued the cause and filed a brief for plaintiffs in error on the question of jurisdiction:

The circuit court of the United States has jurisdiction, irrespective of the citizenship of the parties, of an action in ejectment, where the controversy turns upon the validity of a patent of the United States.

Doolan v. Carr, 125 U. S. 618, 620, 31 L. ed. 844, 845, 8 Sup. Ct. Rep. 1228; *Jones v. Florida, C. & P. R. Co.* 41 Fed. 70; *Pierce v. Molliken*, 78 Fed. 196; *Hills v. Homton*, 4 Sawy. 195, Fed. Cas. No. 6,508.

If the jurisdiction of the circuit court can be maintained on any ground besides that of the character of the parties, the judgment of the court of appeals is not final, but is reviewable by writ of error in this court.

Northern P. R. Co. v. Soderberg, 188 U. S. 528, 47 L. ed. 580, 23 Sup. Ct. Rep. 365; *Warner v. Searle & H. Co.* 191 U. S. 195, 48 L. ed. 145, 24 Sup. Ct. Rep. 79.

There is not involved in the present case the constitutionality of any act of Congress; but to pass upon the validity or effect of the patent necessarily involves a construction of the acts of Congress under which the patent was issued. In such a case the judgment of the court of appeals is not final, but is reviewable on writ of error in this court.

Spreckles Sugar Ref. Co. v. McClain, 192 U. S. 397-410, 48 L. ed. 496-500, 24 Sup. Ct. Rep. 376.

In any case where the construction of an act of Congress is invoked by the plaintiff's petition, the judgment of the court of appeals is not final, and will be taken from that court to the Supreme Court.

Hughes, Fed. Proc. pp. 465 (2).

Where jurisdiction of the circuit court rests not alone on the diverse citizenship of the parties, but also on a Federal question, the jurisdiction of the circuit court of appeals is not final, but subject to review on a writ of error from the Supreme Court.

Huguley Mfg. Co. v. Galetton Cotton Mills, 184 U. S. 290, 46 L. ed. 546, 22 Sup. Ct. Rep. 452.

It has been held that a Federal question is presented if it appears from the plaintiff's statement of facts that, by a construction which may be fairly claimed and con-

tended for, a provision of a statute would defeat plaintiff's right of recovery.

Minnesota v. Duluth & I. R. R. Co. 87 Fed. 497.

The rule that a Federal question must appear from the plaintiff's pleadings will not be permitted to defraud the Federal courts of jurisdiction. Accordingly a suit against a receiver of the Federal court is removable, though the fact as to the appointment is not stated in the complaint.

Winters v. Drake, 102 Fed. 545.

It has been held that, where it was necessary to determine the meaning and effect of an act of Congress under which a patent issued, the case was one of which the Supreme Court had jurisdiction.

French-Glenn Live Stock Co. v. Springer, 185 U. S. 47-54, 46 L. ed. 800-803, 22 Sup. Ct. Rep. 563.

Messrs. Branch K. Miller and David Todd also filed a brief for plaintiff in error on the merits.

Messrs. Edgar H. Farrar, B. F. Jonas, and E. B. Kruttschnitt submitted the cause for defendant in error.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

This was a petitory action for real property, or an action of ejectment, brought by the heirs of Gonsoulin, plaintiffs in error, against the Gulf Company, defendant in error, in the district court of St. Mary's parish, Louisiana, where the land was situated. The petition alleged that a grant or concession by the Spanish government was originally made to Dubuclet, St. Clair, and Gonsoulin in 1783, and that the interests of Dubuclet and St. Clair were conveyed to the heirs of Gonsoulin after 1808.

That the United States government issued a patent to the heirs of Gonsoulin, and that petitioners' "claim by said grant and concession covering said lands dates back to the year 1783 or thereabouts, and said concession was recognized and confirmed by the United States government after proper and legal surveys had defined the boundaries and segregated said grants."

That said lands were "now in the possession of, and illegally detained and held by, the Gulf Company, a body corporate, organized under the laws of the state of New Jersey, domiciled in the state of New Jersey."

The Gulf Company filed its petition for the removal of the cause, alleging that it was, at the time the suit was brought, and when the petition was filed, a citizen of New Jersey, and *that the heirs of Gonsoulin were [117] citizens of the state of Louisiana. The cause was removed accordingly, and plaintiffs filed in the circuit court an amended and supple-

mental petition, stating that all the plaintiffs were citizens of Louisiana, and that defendant was a citizen of New Jersey, and praying that petitioners "be recognized as the true and lawful owners of the said property described in the patent, letters patent, or grant, issued to Dautrieve Dubuclet, Benoist de St. Clair and François Gonsoulin by the United States of America, on August 21st, 1878," and that they be put in possession.

Plaintiffs pitched their title solely on this patent. Defendant, for peremptory exception, pleaded the prescription of ten years, the prescription of thirty years, and *res judicata*.

On the trial the circuit court charged the jury to find for defendant on the pleas of prescription, and nonsuited defendant on the plea of *res judicata*. Verdict was returned, and judgment entered accordingly, and the case having been carried to the circuit court of appeals for the fifth circuit, the judgment was affirmed. 53 C. C. A. 31, 116 Fed. 251.

The jurisdiction of the circuit court rested alone on diversity of citizenship. The assertion of title under a patent from the United States presented no question which, of itself, conferred jurisdiction. *Florida C. & P. R. Co. v. Bell*, 176 U. S. 328, 44 L. ed. 490, 20 Sup. Ct. Rep. 399. No dispute or controversy as to the effect or construction of the Constitution, or of any law or treaty of the United States, on which the result depended, appeared by the record to have been really and substantially involved, so that it could be successfully contended that jurisdiction was invoked on the ground that the suit arose under Constitution, law, or treaty. *Arbuckle v. Blackburn*, 191 U. S. 405, 48 L. ed. 239, 24 Sup. Ct. Rep. 148.

On the pleadings and evidence, the questions in the circuit court were questions of prescription and of *res judicata*; in the circuit court of appeals, of prescription; and plaintiffs' petitions did not assert, in legal and logical form, or at all, the existence of a real controversy, in itself, constituting an independent ground of jurisdiction.

[118] *The judgment of the circuit court of appeals was, therefore, final, and the writ of error must be dismissed.

The judgment was entered in the circuit court of appeals May 27, 1902; this writ of error was allowed June 22, 1903; and the case was docketed here June 1, 1903.

Plaintiffs in error filed a petition for certiorari herein, February 17, 1905, which was submitted February 27, and its consideration postponed to the hearing on the merits. In our opinion, that writ should not be granted. *Ayres v. Polsdorfer*, 187 U. S. 535, 47 L. ed. 317, 23 Sup. Ct. Rep. 196.

Writ of error dismissed; certiorari denied.

HOWE SCALE COMPANY OF 1886 and
Fay-Sholes Company, *Petitioners*,

v.

WYCKOFF, SEAMANS, & BENEDICT.

(See S. C. Reporter's ed. 118-140.)

Unfair competition—use of family name.

1. Unfair competition does not arise out of the use in a corporate name of the surnames of one or more of the incorporators, where such use by the individuals themselves or in a partnership would not be open to that charge.
2. A manufacturer of typewriters under the names "Remington" and "Remington Standard" is not entitled to protection against the adoption by persons bearing respectively the surnames "Remington" and "Sholes" of the name "Remington-Sholes" for their typewriters, and the giving of that name to the corporation formed for their manufacture and sale, where the only confusion in the minds of the public as to the origin of the product results from the similarity in names, and not from the manner of their use.

[No. 130.]

Argued January 16, 17, 1905. Decided April 24, 1905.

ON WRIT and Cross Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a decree which reversed a decree of the Circuit Court for the District of Vermont enjoining the use of the designation "Remington" or "Rem-Sho" as the name or part of the name of typewriting machines, and remanded the cause with instructions to decree in favor of complainant only as to the name "Remington." Decrees of both courts below reversed, and the cause remanded to the Circuit Court, with directions to dismiss the bill.

See same case below, 58 C. C. A. 510, 122 Fed. 348.

Statement by Mr. Chief Justice **Fuller**:

This was a bill exhibited, in September, 1898, by Wyckoff, Seamans, & Benedict, a corporation of New York, in the circuit court of the United States for the district of Vermont, against the Howe Scale Company of 1886, a corporation of Vermont, alleging that complainant had been for many years engaged in the manufacture and sale of typewriting machines known in the markets and to the trade and public, and referred to,

NOTE.—On the right to use one's own name as a trademark or trade name—see notes to *R. W. Rogers Co. v. Williams Rogers Mfg. Co.* 17 C. C. A. 579; *Kathreiner's Malzkaffee, etc. v. Pastor Kneipp Medicine Co.* 27 C. C. A. 357; *Rumford Chemical Works v. Muth*, 1 L. R. A. 45; and *Alff v. Radam*, 9 L. R. A. 146.

identified, offered for sale, and sold as the "Remington typewriter," and the "Remington Standard typewriter," and that the words "Remington" and "Remington Standard" had been registered in the Patent Office under the act of Congress; and charging defendant with fraud and unfair competition in making use of the corporate name "Remington-Sholes Company" and the designations "Remington-Sholes," "Rem-Sho" and "Remington-Sholes Company," in advertising for sale, offering for sale, and selling typewriting machines; and praying for an accounting, and for an injunction restraining defendant from advertising or offering for sale or selling typewriting machines manufactured by the "Remington-Sholes Company," bearing the name "Remington" or "Remington-Sholes" or "Rem-Sho" or "Remington-Sholes Company," and from advertising or offering for sale or selling any such machines under said designation or under any designation of which the name "Remington" was a part.

Defendant was the sales agent of the "Remington-Sholes Company," a corporation of Illinois, and was engaged in selling the typewriting machines called the "Remington-Sholes" or "Rem-Sho" typewriter, which were manufactured by the Illinois corporation at Chicago. The right to use those designations in the way they were used was asserted by the defense, of which the Remington-Sholes Company, and subsequently the Fay-Sholes Company, had charge. The word

[120] "Rem-Sho" was alleged to have been registered in the Patent Office as a trademark.

The circuit court found that defendant's use of the name "Remington" was an unjustifiable invasion of complainant's right to the use of that name, and entered a decree, August 14, 1901, denying an account for gains and profits, without prejudice to the recovery thereof from the Remington-Sholes Company; and perpetually enjoining the use of the designation "Remington," or "Rem-Sho," as the name or part of the name of any typewriting machine whatsoever manufactured by the "Remington-Sholes Company," or by defendant, or any person or concern, and from selling, offering, or advertising for sale in any manner, typewriting machines so manufactured "under the name of or as 'Remington-Sholes' or 'Rem-Sho,' or by any designation of which the word 'Remington' or the abbreviation 'Rem' shall constitute a part." 110 Fed. 520.

The case was carried by appeal to the circuit court of appeals for the second circuit, and was there heard before Circuit Judges Wallace, Lacombe, and Coxe. April 20, 1903, the decree was reversed, without costs, and the cause remanded "with instructions to decree in favor of complainant only as to

the name 'Remington.'" Lacombe, J., delivered an opinion in support of that decree, Coxe, J., concurring in the conclusion because "unable to distinguish this cause from *R. W. Rogers' Co. v. Wm. Rogers Mfg. Co.* 17 C. C. A. 576, 35 U. S. App. 843, 70 Fed. 1017;" Wallace, J., dissented, holding that the decree of the circuit court should be reversed with instructions to dismiss the bill. 58 C. C. A. 510, 122 Fed. 348.

It appeared that the mandate of the circuit court of appeals was issued April 22, 1903, and that the circuit court entered a final decree, June 22, 1903, enjoining the use of the word "Remington," and also that after the original decree of the circuit court the Remington-Sholes Company changed its corporate name to that of Fay-Sholes Company, and ceased to make its machines marked with the registered trademark "Rem-Sho," and with the inscription "Remington-Sholes Company, Mgrs., Chicago."

*It also appeared that in October, 1901, [121] complainant filed its bill in the circuit court of the United States for the northern district of Illinois against the Remington-Sholes Company, for alleged unfair trade competition, and that, after answers filed, an order was entered staying proceedings until the determination of this cause, and providing that if this cause resulted in favor of complainant, that cause should be sent at once to an accounting.

On petition of the Howe Scale Company of 1886, and the Fay-Sholes Company, filed October 22, 1903, and on petition of Wyckoff, Seamans, & Benedict, filed December 21, 1903, writ and cross writ of certiorari were granted.

For some years prior to 1860 E. Remington and his three sons were engaged at Ilion, New York, in the manufacture of firearms under the firm name of E. Remington & Sons. The father died in 1863, and in 1865 the sons, who had continued the business, organized the corporation E. Remington & Sons under the laws of New York. About 1866 E. Remington & Sons produced a breech-loading rifle that obtained great vogue throughout the world, and was and is known as "the Remington rifle." The "Remington sewing machine" and other machines were also manufactured and sold.

In 1873 E. Remington & Sons began the manufacture of a typewriting machine, the most important features of which were invented and patented by Christopher Latham Sholes. It was the pioneer writing machine, and called "the Typewriter," and "the Sholes & Glidden typewriter," and in 1880 the names "Remington" and "Remington Standard" were used instead, as they have since been continuously.

One of complainant's witnesses testified

that the typewriter was called "Remington" "for the reason that the name Remington was known the world over, owing to their building guns for foreign governments, building sewing machines, and having one of the largest manufacturing works in the world." In March, 1886, the typewriter branch of the business of E. Remington & Sons was sold to Messrs. Wyckoff, Seamans, & Benedict, [122] *and there was also transferred the exclusive right to the name "Standard Remington Typewriter," by which name the assignment states the machines were generally known. The assignment contained the express reservation to E. Remington & Sons of the right to engage in the manufacture and sale of typewriters at any time after ten years from its date.

Complainant's typewriting machines have been for years conspicuously marked with the name "Remington" and with a large "Red Seal" trademark on the paper table and frame; the name and address "Remington Standard Typewriter, manufactured by Wyckoff, Seamans, & Benedict, Ilion, N. Y., U. S. A.," on the cross bar in front of the keyboard; the words and figures "No. 6 Remington Standard Typewriter No. 6" on the front of the base, and the words "This machine is protected by 67 American and foreign patents" on the back. "Remington" and "Remington Standard" and the "Red Seal" have all been registered by complainant as trademarks.

In 1892 Z. G. Sholes, a son of Christopher Latham Sholes, invented a typewriting machine, and early in 1893 the Z. G. Sholes Company was organized under the laws of Wisconsin for its manufacture, but the stock of the company was never issued, and no machine was ever made or sold by it. Later in the year Franklin and Carver Remington, sons of Samuel Remington, formerly president of the E. Remington & Sons corporation, bought a three-fourths interest in Sholes' invention, Sholes retaining one fourth, and a like interest in the stock of the company, paying from eight to nine thousand dollars. They entered into a written agreement with Sholes, which provided, among other things, that "no further, other, or different business of any kind or nature shall be transacted by said corporation or in its behalf, except that the same may be dissolved, in due form of law, as soon as practicable hereafter." Franklin Remington gave his entire time to the promotion of the enterprise, and advanced for expenses from six to seven thousand dollars in addition to the original investment of eight or nine thousand. [123] The name of the machine *was subsequently changed by Sholes from "The Z. G. Sholes" to "The Remington Sholes." There-

after the Remingtons and Sholes induced Head and Fay of Chicago to furnish funds to manufacture the Remington-Sholes machine; and a corporation organized in the spring of 1894 for its manufacture was designated the "Remington-Sholes Typewriter Company." This company purchased tools and machinery, and its typewriting machines were placed on the market in December, 1894. In the fall of 1896 the company had become so deeply indebted that it became necessary to take steps to meet its obligations, and at a meeting of the stockholders December 14, 1896, it was resolved that the property and assets be sold at public auction, the buyer to have the privilege of using all or any part of the company's corporate name. Thereupon Fay purchased in his own name, but as trustee for himself and other stockholders, the whole of the assets of the company, together with its good will, the exclusive right to use its trademarks, etc., and for some months carried on the business at the factory formerly occupied by the Remington-Sholes Typewriter Company. The charter of that company was surrendered in April, 1897, and the Remington-Sholes Company was incorporated under the laws of Illinois, and purchased all the assets, good will, trademarks, trade names, etc., theretofore belonging to Fay and the Remington-Sholes Typewriter Company. And the new company continued at the same factory and through the same instrumentalities to manufacture and sell its typewriters. It was stipulated that the common stock of the new company "was divided among the stockholders in keeping with the amounts of cash actually invested by them in the Remington-Sholes Typewriter Company, and that the allotment of said common stock to said Franklin Remington was in keeping with such plan."

The machines made and sold by the Remington-Sholes Typewriter Company were plainly marked with the words "Remington-Sholes, Chicago." After the new company entered on the business the trademark "Rem-Sho" was adopted * (registered as a trade- [124] mark October 19, 1907), and the machines were also marked on the cross bars with the words "Remington-Sholes Company, Mfrs., Chicago." The Remington-Sholes Typewriter Company widely advertised that its machine "was not the Remington Standard typewriter," and the catalogues circulated by the Remington-Sholes Company declared: "We state, then, emphatically that this company has no connection whatever with that well-known and excellent machine, the Remington Standard typewriter, and caution possible customers against confusing the 'Rem-Sho' with that machine or any other."

Messrs. Austen G. Fox and George P. Fisher, Jr., argued the cause, and, with **Messrs. James H. Peirce and William Henry Dennis**, filed a brief for the **Howe Scale Company et al.**:

A personal name, such as the name "Remington," is incapable of exclusive appropriation, and its registration in the patent office cannot render it a valid trademark.

Singer Mfg. Co. v. June Mfg. Co. 163 U. S. 169, 41 L. ed. 118, 16 Sup. Ct. Rep. 1002; *Brown Chemical Co. v. Meyer*, 139 U. S. 540, 35 L. ed. 247, 11 Sup. Ct. Rep. 625; *McLean v. Fleming*, 96 U. S. 245, 24 L. ed. 828; *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 37 L. ed. 1144, 14 Sup. Ct. Rep. 151; *Harson v. Halkyard*, 22 R. I. 102, 46 Atl. 271; *Jamieson v. Jamieson*, 15 R. P. C. 169; *Elgin Nat. Watch Co. v. Illinois Watch Case Co.* 179 U. S. 665, 45 L. ed. 365, 21 Sup. Ct. Rep. 270; *Sarrazin v. W. R. Irby Cigar & Tobacco Co.* 46 L. R. A. 541, 35 C. C. A. 496, 93 Fed. 625; *Brower v. Boulton*, 53 Fed. 389.

A man's name is his own property, and he has the same right to its use and enjoyment as he has to that of any other species of property, the only restriction imposed by this court upon the use of a personal name being that it shall be a reasonable, honest, and fair exercise of such right.

Brown Chemical Co. v. Meyer, 139 U. S. 540, 35 L. ed. 247, 11 Sup. Ct. Rep. 625; *McLean v. Fleming*, 96 U. S. 245, 24 L. ed. 828; *Singer Mfg. Co. v. June Mfg. Co.* 163 U. S. 169, 41 L. ed. 118, 16 Sup. Ct. Rep. 1002.

To a personal name (or like generic name) no secondary signification can attach that will diminish the right of anyone bearing such name to use it in every honest way and for every legitimate purpose; and where a personal or generic name has acquired a secondary signification, the most that can be required of a person having a right to use such name is that he shall accompany its use with such indications as to show that the thing manufactured is the work of the one making it.

Singer Mfg. Co. v. June Mfg. Co. 163 U. S. 169, 41 L. ed. 118, 16 Sup. Ct. Rep. 1002; *Holzappel's Compositions Co. v. Rahtjen's American Composition Co.* 183 U. S. 1, 46 L. ed. 49, 22 Sup. Ct. Rep. 6; *Baker v. Baker*, 53 C. C. A. 157, 115 Fed. 297; *Duryea v. National Starch Mfg. Co.* 25 C. C. A. 139, 45 U. S. App. 649, 79 Fed. 651.

In cases like that at bar the ground of the relief is the injury to a complainant by the passing off of defendant's wares for those of complainant; and where a complainant invariably marks his wares with his name and address (e. g., Wyckoff, Seamans, & Benedict, Ilion, N. Y.) and with a

designating mark (e. g., "Remington Standard Typewriter"), the fact that a defendant has invariably marked his wares with his name and address (e. g., Remington-Sholes Company, Mfrs., Chicago) and with a different distinctive mark (e. g., "Rem-Sho") is most persuasive of the absence of any intent to pass off his wares as and for complainant's.

Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co. 128 U. S. 598, 32 L. ed. 535, 9 Sup. Ct. Rep. 166; *Elgin Nat. Watch Co. v. Illinois Watch Case Co.* 179 U. S. 665, 45 L. ed. 365, 21 Sup. Ct. Rep. 270; *Singer Mfg. Co. v. June Mfg. Co.* 163 U. S. 169, 41 L. ed. 118, 16 Sup. Ct. Rep. 1002; *Holzappel's Compositions Co. v. Rahtjen's American Composition Co.* 183 U. S. 1, 46 L. ed. 49, 22 Sup. Ct. Rep. 6; *Corbin v. Gould*, 133 U. S. 308, 33 L. ed. 611, 10 Sup. Ct. Rep. 312; *Coats v. Merriek Thread Co.* 149 U. S. 562, 37 L. ed. 847, 13 Sup. Ct. Rep. 966; *P. Lorillard Co. v. Peper*, 30 C. C. A. 496, 57 U. S. 565, 86 Fed. 956; *Kann v. Diamond Steel Co.* 32 C. C. A. 324, 61 U. S. App. 22, 89 Fed. 706; *Proctor & G. Co. v. Globe Ref. Co.* 34 C. C. A. 405, 92 Fed. 357; *Dadirrian v. Yacubian*, 39 C. C. A. 321, 98 Fed. 872; *Sebastian, Trade-Marks*, 4th ed. 123.

The issuance of cautionary circulars (such as defendant has widely distributed to call attention to the fact that it "has no connection whatever with that well-known and excellent machine, the Remington Standard Typewriter, etc.") is recognized by the courts as clearly repugnant to any purpose to palm off defendant's wares for complainant's.

Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co. 128 U. S. 598, 32 L. ed. 535, 9 Sup. Ct. Rep. 166; *Singer Mfg. Co. v. June Mfg. Co.* 163 U. S. 169, 41 L. ed. 118, 16 Sup. Ct. Rep. 1002; *Hazelton Boiler Co. v. Hazelton Tripod Boiler Co.* 142 Ill. 494, 30 N. E. 339; *Genesee Salt Co. v. Burnap*, 20 C. C. A. 27, 43 U. S. App. 243, 73 Fed. 818.

The decisions are uniform in holding that where the name or mark adopted by a defendant is sufficiently different from that employed by a complainant to enable the ordinary purchaser, using reasonable care, to distinguish defendant's from complainant's goods, no injunction will issue. The name "Sholes" amply differentiates the compound names "Remington-Sholes" and "Remington-Sholes Company" from the single name "Remington."

Liggett & M. Tobacco Co. v. Finzer, 128 U. S. 182, 32 L. ed. 395, 9 Sup. Ct. Rep. 60; *Proctor & G. Co. v. Globe Ref. Co.* 34 C. C. A. 405, 92 Fed. 357; *Coats v. Merriek Thread Co.* 149 U. S. 562, 37 L. ed. 847, 13

Sup. Ct. Rep. 966; *Meneely v. Meneely*, 62 N. Y. 427, 20 Am. Rep. 489; *Corbin v. Gould*, 133 U. S. 308, 33 L. ed. 611, 10 Sup. Ct. Rep. 312; *P. Lorillard Co. v. Peper*, 30 C. C. A. 496, 57 U. S. App. 565, 86 Fed. 956.

The courts have uniformly recognized that a man's use of his name in a firm name is a reasonable, honest, and legitimate use.

Meneely v. Meneely, 62 N. Y. 427, 20 Am. Rep. 489, 1 Hun, 367; *National Starch Mfg. Co. v. Duryea*, 41 C. C. A. 244, 101 Fed. 117, 25 C. C. A. 139, 45 U. S. App. 649, 79 Fed. 651; *Gilman v. Hunnewell*, 122 Mass. 139; *England v. New York Pub. Co.* 8 Daly, 375; *Marcus Ward & Co. v. Ward*, 40 N. Y. S. R. 792, 15 N. Y. Supp. 913; *Burgess v. Burgess*, 3 De G. M. & G. 896.

It being a general custom to employ personal names for corporations, no distinction can be made between the use of such names in a firm and in a corporation, since in both cases the names adopted are selected and artificial.

Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co. 128 U. S. 598, 32 L. ed. 535, 9 Sup. Ct. Rep. 166; *Baker v. Baker*, 53 C. C. A. 157, 115 Fed. 297; *Celluloid Mfg. Co. v. Cellonite Mfg. Co.* 32 Fed. 94; *Monarch v. Rosenfeld*, 19 Ky. L. Rep. 14, 39 S. W. 236; *American Cereal Co. v. Eli Pettijohn Cereal Co.* 72 Fed. 903; *Hazelton Boiler Co. v. Hazelton Tripod Boiler Co.* 142 Ill. 494, 30 N. E. 339; *Scott Stamp & Coin Co. v. J. W. Scott Co.* 26 Jones & S. 379, 15 N. Y. Supp. 325; *Employers' Liability Assur. Corp. v. Employers' Liability Ins. Co.* 61 Hun, 552, 16 N. Y. Supp. 397, 24 Abb. N. C. 368, 10 N. Y. Supp. 845.

The courts recognize that the business of a corporation or of a firm in which a man has his capital invested and to which he devotes his whole time and energy is his business, and that he has a right to use his name in connection therewith.

Meneely v. Meneely, 62 N. Y. 427, 20 Am. Rep. 489; *National Starch Mfg. Co. v. Duryea*, 41 C. C. A. 244, 101 Fed. 117; *Monarch v. Rosenfeld*, 19 Ky. L. Rep. 14, 39 S. W. 236; *Scott Stamp & Coin Co. v. J. W. Scott Co.* 26 Jones & S. 379, 15 N. Y. Supp. 325; *Hazelton Boiler Co. v. Hazelton Tripod Boiler Co.* 142 Ill. 494, 30 N. E. 339.

Although it is true that there is no necessity for a man engaged in a corporation or in a firm to employ his name in connection therewith,—since both firm and corporate names are alike artificial,—this lack of necessity for using a personal name cannot affect the individual's right to so use it, because such use is a universally recognized legitimate and reasonable use of a personal name.

Meneely v. Meneely, 62 N. Y. 427, 20 Am. Rep. 489; *Turton v. Turton*, L. R. 42 Ch.

Div. 128; *Continental Ins. Co. v. Continental Fire Asso.* 96 Fed. 846; *Chivers & Sons v. Chivers & Co.* 17 R. R. C. 420.

The decisions recognize family reputation as a valuable heritage and as an ample reason for the use by a man of his name in the selection of a firm name and in its business. In the case at bar, defendant has never imitated complainant's signs, labels, or other indicia, nor trespassed upon its good will (which complainant owns), but has simply availed in an honest way of the family reputation (which complainant does not own) of Mr. Franklin Remington, the general manager of the Remington-Sholes Company.

Meneely v. Meneely, 62 N. Y. 427, 20 Am. Rep. 489; *National Starch Mfg. Co. v. Duryea*, 41 C. C. A. 244, 101 Fed. 117; *Gilman v. Hunnewell*, 122 Mass. 139.

Where a name is incapable of exclusive appropriation,—like the name Remington,—a court will not destroy the right of another to use such name, but will direct its injunctive process against the specific abuse of the right, if any such has occurred. The sweeping decrees of the lower courts in the case at bar are, therefore, manifestly in error.

Singer Mfg. Co. v. June Mfg. Co. 163 U. S. 169, 41 L. ed. 118, 16 Sup. Ct. Rep. 1002; *Meriden Britannia Co. v. Parker*, 39 Conn. 450, 12 Am. Rep. 401; *Elgin Nat. Watch Co. v. Illinois Watch Case Co.* 179 U. S. 665, 45 L. ed. 365, 21 Sup. Ct. Rep. 270.

Messrs. Austen G. Fox and George P. Fisher, Jr., also filed a brief in reply for the Howe Scale Company *et al.*:

That a personal name is incapable of exclusive appropriation is axiomatic. This court has also said that everyone has the same right to the use of his name as he has to the use of his other property. He may not, however, use it in such manner as to accomplish a fraud upon another.

Brown Chemical Co. v. Meyer, 139 U. S. 540, 35 L. ed. 247, 11 Sup. Ct. Rep. 625.

When a name has acquired more or less of a secondary meaning, that is, when it has come to denote the goods of a particular maker, then others who use that name must accompany the use with such indications as to show that the thing manufactured is the work of the one making it.

Singer Mfg. Co. v. June Mfg. Co. 163 U. S. 169, 41 L. ed. 118, 16 Sup. Ct. Rep. 1002.

The finding of the court of appeals that it was fraudulent for the individuals to bestow their names upon a corporation, while admitting their right to use them in individual or partnership business, is based: First, upon an error of fact; and, second, upon a misconstruction of the authorities on which the court relied. In *Goodyear's In-*

dia Rubber Glove Mfg. Co. v. Goodyear Rubber Co. 128 U. S. 598, 602, 32 L. ed. 535, 536, 9 Sup. Ct. Rep. 166, this court recognized that in cases like the present the use of the name "company" simply implies that persons have associated themselves together in business. The public accepts no other or more technical meaning of such word. A corporation, like a partnership, creates its own name, and at will it can make prominent or disguise the name of any of its constituents. There is, therefore, no distinction in fact between the meaning attached to a firm name and the same name in a corporate title. The authorities, since the leading case of *Meneely v. Meneely*, 62 N. Y. 427, 20 Am. Rep. 489, which has been repeatedly approved by this court, are conclusive that a partnership is free to employ the names of its members.

Messrs. **Edmund Wetmore** and **Henry D. Donnelly** argued the cause, and, with Messrs. *William W. Dodge* and *Archibald Cox*, filed a brief for Wyckoff, Seamans, & Benedict:

By long use in connection with appellee's product and business the name of "Remington" has acquired a secondary meaning, as denoting the machines of the complainant appellee; and such was the fact when the Remington-Sholes machines were first put upon the market.

Thompson v. Montgomery, L. R. 41 Ch. Div. 35 [1891] A. C. 217; *Wotherspoon v. Currie*, L. R. 5 H. L. 508; *Reddaway v. Banham* [1896] A. C. 199; *Valentine Meat Juice Co. v. Valentine Extract Co.* 83 L. T. N. S. 271; *Elgin Nat. Watch Co. v. Illinois Watch Case Co.* 179 U. S. 665, 45 L. ed. 365, 21 Sup. Ct. Rep. 270.

Having full knowledge, it is no defense that the name "Remington," or "Remington Company," or "Remington Typewriter Company" was assumed in good faith and without design to mislead the public and acquire appellee's trade.

Chas. S. Higgins Co. v. Higgins Soap Co. 144 N. Y. 462, 27 L. R. A. 42, 43 Am. St. Rep. 769, 39 N. E. 490; *Roy Watch Case Co. v. Camm-Roy Watch Case Co.* 28 Misc. 45, 58 N. Y. Supp. 979; *Fuller v. Huff*, 51 L. R. A. 332, 43 C. C. A. 453, 104 Fed. 141; *Johnston v. Ewing*, L. R. 7 App. Cas. 219.

The case at bar is not one where the Illinois corporation must, to a certain extent, use the name of the complainant appellee, and it is not, therefore, one of *damnum absque injuria*. It is the case of an unnecessary use of a name long previously employed by another in the same business, and in which the use thereof by the "second comer" constitutes an untrue and deceptive representation.

Fuller v. Huff, 51 L. R. A. 332, 43 C. C. 198 U. S.

A. 453, 104 Fed. 141; *R. W. Rogers Co. v. William Rogers Mfg. Co.* 17 C. C. A. 576, 35 U. S. App. 843, 70 Fed. 1017; *Clark Thread Co. v. Armitage*, 21 C. C. A. 178, 45 U. S. App. 62, 74 Fed. 936; *Meyer v. Dr. B. L. Bull Vegetable Medicine Co.* 7 C. C. A. 558, 18 U. S. App. 372, 58 Fed. 884; *Investor Pub. Co. v. Dobinson*, 72 Fed. 603.

In all cases except where reason and public policy forbid, a corporation is regarded as a legal entity, separate and apart from the natural persons composing it.

7 Am. & Eng. Enc. Law, 2d ed. p. 633; *Thomas v. Dakin*, 22 Wend. 69; *People ex rel. Watertown v. Watertown*, 1 Hill, 616; *Niagara County v. People*, 7 Hill, 504; *Fiet-sam v. Hay*, 122 Ill. 293, 3 Am. St. Rep. 492, 13 N. E. 501; *Dartmouth College v. Woodward*, 4 Wheat. 518-636, 4 L. ed. 629-659; 1 Cook, Corp. § 1, p. 2, § 6, pp. 20, 21.

The ordinary inherent right of every person to the honest use of his own name in business, provided it be honestly used, is not applicable to corporations which have appropriated surnames for use in connection with proprietary articles.

Le Page Co. v. Russia Cement Co. 17 L. R. A. 354, 2 C. C. A. 555, 5 U. S. App. 112, 51 Fed. 941; *Bissell Chilled Plow Works v. T. M. Bissell Plow Co.* 121 Fed. 357; *Chas. S. Higgins Co. v. Higgins Soap Co.* 144 N. Y. 462, 27 L. R. A. 42, 43 Am. St. Rep. 769, 39 N. E. 490; *DeLong v. DeLong Hook & Eye Co.* 10 Misc. 577, 32 N. Y. Supp. 203; *Wm. Rogers Mfg. Co. v. R. W. Rogers Co.* 66 Fed. 56; *Clark Thread Co. v. Armitage*, 67 Fed. 896; *Grand Lodge, A. O. U. W. v. Grahzm*, 31 L. R. A. 133, 96 Iowa, 592, 65 N. W. 837; *Peck Bros. & Co. v. Peck Bros. Co.* 62 L. R. A. 81, 51 C. C. A. 251, 113 Fed. 291; *Chickering v. Chickering & Sons*, 56 C. C. A. 475, 120 Fed. 69; *International Silver Co. v. Wm. G. Rogers Co.* 113 Fed. 526, 55 C. C. A. 83, 118 Fed. 133; *International Silver Co. v. Simeon L. & George Rogers Co.* 110 Fed. 955; *Garrett v. T. H. Garrett & Co.* 24 C. C. A. 173, 47 U. S. App. 250, 78 Fed. 472; *Valentine Meat Juice Co. v. Valentine Extract Co.* 83 L. T. N. S. 271, 17 Patent & Trademark Cases, 673.

Corporations which do not inherit their names, but assume them voluntarily, may not use their assumed names if such use will result in the confusion and deception of the public and the displacement of the good will of another's business.

Lee v. Haley, L. R. 5 Ch. 160; *Chas. S. Higgins Co. v. Higgins Soap Co.* 144 N. Y. 462, 27 L. R. A. 42, 43 Am. St. Rep. 769, 39 N. E. 490; *Wm. Rogers Mfg. Co. v. R. W. Rogers Co.* 66 Fed. 56, 17 C. C. A. 576, 35 U. S. App. 843, 70 Fed. 1017; *Garrett v. T. H. Garrett & Co.* 24 C. C. A. 173, 47 U. S. App. 250, 78 Fed. 472; *Stuart v. F. G.*

Stewart Co. 33 C. C. A. 480, 63 U. S. App. 561, 91 Fed. 243; *Meyer v. Dr. B. L. Bull Vegetable Medicine Co.* 7 C. C. A. 558, 18 U. S. App. 372, 58 Fed. 884; *De Long v. De Long Hook & Eye Co.* 89 Hun, 399, 35 N. Y. Supp. 509; *Peck Bros. & Co. v. Peck Bros. Co.* 62 L. R. A. 81, 51 C. C. A. 251, 113 Fed. 291.

The fact that the Illinois corporation had a large field from which to select its name, and yet took one similar to that of complainant appellee, is a clear indication of its intention to pirate appellee's good will.

Celluloid Mfg. Co. v. Cellonite Mfg. Co. 32 Fed. 97.

Where the name of defendant is selected for use because of its similarity to that of plaintiff, fraud is evident.

Taylor v. Taylor, 23 L. J. Ch. N. S. 255; *Landreth v. Landreth*, 22 Fed. 41; *Meyer v. Dr. B. L. Bull Vegetable Medicine Co.* 7 C. C. A. 558, 18 U. S. App. 372, 58 Fed. 884; *Peck Bros. & Co. v. Peck Bros. Co.* 62 L. R. A. 81, 51 C. C. A. 251, 113 Fed. 291.

The fact that the Illinois corporation used a different name from complainant appellee's true corporate name is of no consequence so long as the trade names of appellee were employed.

Celluloid Mfg. Co. v. Cellonite Mfg. Co. 32 Fed. 94; *Le Page Co. v. Russia Cement Co.* 17 L. R. A. 354, 2 C. C. A. 555, 5 U. S. App. 112, 51 Fed. 941; *Butterick Pub. Co. v. Standard Fashion Co.* N. Y. Law Journal, March 21, 1896; *Gray v. Taper-Sleeve Pulley Works*, 16 Fed. 436; *Meyer v. Dr. B. L. Bull Vegetable Medicine Co.* 7 C. C. A. 558, 18 U. S. App. 372, 58 Fed. 884; *Massam v. Thorley's Cattle Food Co.* L. R. 14 Ch. Div. 748; *Fuller v. Huff*, 51 L. R. A. 332, 43 C. C. A. 453, 104 Fed. 141; *Clark Thread Co. v. Armitage*, 67 Fed. 901.

That another may have the right to use a particular name, as well as complainant appellee, is unimportant if appellee's right be exclusive as against appellants.

Newman v. Alvord, 51 N. Y. 189, 10 Am. Rep. 588; *Wm. Rogers Mfg. Co. v. Rogers & S. Mfg. Co.* 11 Fed. 495; *Croft v. Day*, 9 Beav. 88; *Clark Thread Co. v. Armitage*, 67 Fed. 896, 21 C. C. A. 178, 45 U. S. App. 62, 74 Fed. 936.

While a person may not, in general, be deprived of his right to use his own name, the use must be as his own name, and not as the name of his goods, when the latter use would tend to displace the good will of another whose goods were known by the same or a similar name.

National Starch Mfg. Co. v. Duryea, 41 C. C. A. 244, 101 Fed. 117.

The right to the name need not be exclusive.

Shaver v. Heller & M. Co. 65 L. R. A. 878, 48 C. C. A. 48, 108 Fed. 821.

It is not material in this case whether the name "Remington" is or is not a lawful technical trademark, for the right of the appellee to the use of this name is so far exclusive as against the appellants that the court will treat the name as a descriptive term, to the benefit of which appellee is entitled.

Garrett v. T. H. Garrett & Co. 24 C. C. A. 173, 47 U. S. App. 250, 78 Fed. 472; *De Long v. De Long Hook & Eye Co.* 10 Misc. 577, 32 N. Y. Supp. 203; *Clark Thread Co. v. Armitage*, 67 Fed. 896, 21 C. C. A. 178, 45 U. S. App. 62, 74 Fed. 936; *Koehler v. Sanders*, 122 N. Y. 65, 9 L. R. A. 576, 25 N. E. 235; *Montgomery v. Thompson* [1891] A. C. 217; *Wotherspoon v. Currie*, L. R. 5 H. L. 508; *Reddaway v. Banham* [1896] A. C. 199; *Valentine Meat Juice Co. v. Valentine Extract Co.* 83 L. T. N. S. 271.

The fact that the defendant appellants and the Remington-Sholes Company and their officers cautioned their salesmen, dealers, and agents not to permit deception is evidence against them, as showing that they doubted the propriety of the use of the name "Remington," and that they believed such use was likely to create confusion and mislead intending purchasers.

Glenny v. Smith, 2 Drew & S. 476, 11 Jur. N. S. 964; *Pillsbury v. Pillsbury-Washburn Flour Mills Co.* 12 C. C. A. 432, 24 U. S. App. 395, 64 Fed. 841; *Walter Baker & Co. v. Baker*, 77 Fed. 181; *Chappell v. Davidson*, 2 Kay & J. 123, 8 De G. M. & G. 1.

If the name taken is so identified with the plaintiff that the defendant's use of it will induce the belief that his goods are those of the plaintiff, or that his business is an extension or amalgamation with, or is otherwise connected with, the plaintiff's business, and will thereby cause substantial damage, an injunction will be granted.

Kerly, Trade Marks, 2d ed. 476; *Randall v. British & A. Shoe Co.* 19 Rep. Pat. Laws (British) 393; *Eastman Photographic M. Co. v. John Griffiths Cycle Corp.* 15 R. P. Cas. 105.

The name "Remington-Sholes" was well calculated to induce the belief that the new company was an amalgamation comprising the business of the old one.

Manchester Brewery Co. v. North Cheshire & M. Brewery Co. [1898] 1 Ch. 539 [1899] A. C. 83.

The appellee's machine becoming widely known as the "Remington," and its business as that of the "Remington Typewriter Company," it is perfectly obvious that any new concern coming into the market and designating its business and product, either wholly or in part, by the name "Reming-

ton," would most certainly mislead and deceive purchasers.

Walter Baker & Co. v. Sanders, 26 C. C. A. 220, 51 U. S. App. 421, 80 Fed. 889; *Johnson & Johnson v. Bauer & Black*, 27 C. C. A. 374, 53 U. S. App. 437, 82 Fed. 662; *Read v. Richardson*, 45 L. T. N. S. 54; *Cox. Manual of Trade Mark Cases*, No. 698; *Saxlehner v. Eisner & M. Co.* 179 U. S. 19, 33, 45 L. ed. 60, 73, 21 Sup. Ct. Rep. 7; *Wotherspoon v. Currie*, 22 L. T. N. S. 260; *Birmingham Vinegar Brewery Co. v. Powell* [1897] A. C. 715; *Menendez v. Holt*, 128 U. S. 514, 521, 32 L. ed. 526, 527, 9 Sup. Ct. Rep. 143; 26 Am. & Eng. Enc. Law, p. 416.

"Ordinary purchasers" include incautious, unwary, and ignorant purchasers.

McLean v. Fleming, 96 U. S. 245, 256, 24 L. ed. 828, 832; *Celluloid Mfg. Co. v. Cello-nite Mfg. Co.* 32 Fed. 94; *Bissell Chilled Plow Works v. T. M. Bissell Plow Co.* 121 Fed. 366.

It has frequently been held that the ignorant and unwary purchaser is as much entitled to protection as the sharp and shrewd one.

Von Mumm v. Frash, 56 Fed. 830; *McLean v. Fleming*, 96 U. S. 256, 24 L. ed. 832; *Colman v. Crump*, 70 N. Y. 573; *Glen-ny v. Smith*, 11 Jur. N. S. 964; *Wotherspoon v. Currie*, L. R. 5 H. L. 508; *Singer Mfg. Co. v. Loog*, L. R. 8 App. Cas. 18.

Only things which are put prominently forward, so as to be likely to catch the eye of the purchaser and remain in his mind, need, generally, be considered.

Kerly, Trade Marks, p. 491.

Similarity in the main distinguishing feature is generally sufficient to constitute infringement or unfair competition.

Wotherspoon v. Currie, L. R. 5 H. L. 508; *Saxlehner v. Eisner & M. Co.* 179 U. S. 19, 33, 45 L. ed. 60, 73, 21 Sup. Ct. Rep. 7; *Pillsbury v. Pillsbury Washburn Flour Mills Co.* 12 C. C. A. 432, 24 U. S. App. 395, 64 Fed. 841; *Birmingham Vinegar Brewery Co. v. Powell* [1897] A. C. 715.

This case is to be considered and determined, to all intents and purposes, the same as if no one born into the name of "Remington" was connected with the artificial person the Remington-Sholes Company.

William Rogers Mfg. Co. v. R. W. Rogers Co. 66 Fed. 56; *Pillsbury v. Pillsbury-Washburn Flour Mills Co.* 12 C. C. A. 432, 24 U. S. App. 395, 64 Fed. 841; *Garrett v. T. H. Garrett & Co.* 24 C. C. A. 173, 47 U. S. App. 250, 78 Fed. 477; *Re Brinsmead* [1897] 1 Ch. 46; *Valentine Meat Juice Co. v. Valentine Extract Co.* 17 Pat. Rep. 673; *Peck Bros. & Co. v. Peck Bros. Co.* 62 L. R. A. 81, 51 C. C. A. 251, 113 Fed. 291; *Bissell Chilled Plow Works v. T. M. Bissell Plow Co.* 121 Fed. 357.

Moreover, as against the appellants, the right of appellee to be protected in the use of the name "Remington" is generic. There is no "state of the art," if the common law does not exclude that expression. Appellee's right is generic, as in the case of "Higgins' Soap," "Baker's Chocolate," "Heinisch's Shears," "Mumm's Champagne," "The Delineator," "Valentine's Meat Juice," "Clark's Spool Cotton," "Garrett's Snuff," and other instances which are the subject of authoritative adjudication.

Chas. S. Higgins Co. v. Higgins Soap Co. 144 N. Y. 463, 27 L. R. A. 42, 43 Am. St. Rep. 769, 39 N. E. 490; *Walter Baker & Co. v. Sanders*, 26 C. C. A. 220, 51 U. S. App. 421, 80 Fed. 889; *R. Heinisch's Sons Co. v. Boker*, 86 Fed. 765; *Von Mumm v. Wittemann*, 85 Fed. 966; *Butteric Co. v. Standard Fashion Co.* N. Y. S. C. (N. Y. Law Journal March 21, 1898); *Valentine Meat Juice Co. v. Valentine Extract Co.* 83 L. T. N. S. 271; *Clark Thread Co. v. Arm-itage*, 21 C. C. A. 178, 45 U. S. App. 62, 74 Fed. 936; *Garrett v. T. H. Garrett & Co.* 24 C. C. A. 173, 47 U. S. App. 250, 78 Fed. 472.

This slight change in the corporate title was of no consequence in so far as the public was concerned; and for the purposes of this case it may be regarded the same as if the word "typewriter" were written into the corporate name, and its designation were "Remington-Sholes Typewriter Company."

Chas. S. Higgins Co. v. Higgins Soap Co. 144 N. Y. 462, 27 L. R. A. 42, 43 Am. St. Rep. 769, 39 N. E. 490.

Postulating that the name "Remington" is lawfully and generically appellee's trade name and trademark, and points to and indicates its business and product, the question presented is whether or no the means employed by the appellants and the designations used by them exposed the ordinary unwary purchaser to mistake appellants' machines for appellee's; whether they tended to divert from appellee and attract to the appellants the legitimate trade that belonged to the former; and whether the use of the name "Remington-Sholes" as it was employed was not an unlawful invasion of the rights of appellee, and calculated to injure its business.

Pillsbury v. Pillsbury-Washburn Flour Mills Co. 12 C. C. A. 432, 24 U. S. App. 395, 64 Fed. 841.

Similarity, not identity, is the usual course when a party seeks to benefit himself by the good name of another.

Celluloid Mfg. Co. v. Cellonite Mfg. Co. 32 Fed. 97; *Carroll v. Ertheiler*, 1 Fed. 688; *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. 599; *Seixo v. Provezende*, L. R. 1 Ch. 192; *Bissell Chilled Plow Works v. T. M. Bissell Plow Co.* 121 Fed. 366.

Furthermore, since appellants appropriated the material and essential part of appellee's trade name and trademark, the burden is upon them to disprove the probability of deception, and not upon appellee to prove it.

Ford v. Foster, L. R. 7 Ch. 611; *Ewing v. Johnston*, L. R. 13 Ch. Div. 434; *Sebastian, Trade-Marks*, 4th ed. p. 124; *Kerly, Trade Marks*, 372, 373.

A person who has popularized a name has a right to be protected against its use in connection with other words or names.

Anheuser-Busch Brewing Asso. v. Piza, 23 Blatchf. 245, 24 Fed. 149; *Congress & E. Spring Co. v. High Rock Congress Spring Co.* 45 N. Y. 291, 6 Am. Rep. 82; *Carlsbad v. Kutnow*, 18 C. C. A. 24, 35 U. S. App. 750, 71 Fed. 168; *Apollinaris Co. v. Norrish*, 33 L. T. N. S. 242; *Cochrane v. Macnish* [1896] A. C. 231; *Fuller v. Huff*, 51 L. R. A. 332, 43 C. C. A. 453, 104 Fed. 141; *Saxlehner v. Eisner & M. Co.* 179 U. S. 19, 33, 45 L. ed. 60, 73, 21 Sup. Ct. Rep. 7.

The purpose of appellants and of the promoters of the Remington-Sholes Typewriter Company was not to differentiate the machines, but to simulate a resemblance to appellee's name sufficiently near to mislead the purchaser, and with enough variation to argue about, should they be brought into court. This is the usual artifice of the unfair trader.

Collinsplatt v. Finlayson, 88 Fed. 693; *National Biscuit Co. v. Baker*, 95 Fed. 135; *Croft v. Day*, 7 Beav. 84.

Furthermore, the name "Remington-Sholes Company" would be likely to induce the belief in the mind of the public that a corporation had been formed by an amalgamation or consolidation of appellee, generally known as the "Remington Typewriter Company" and "Remington Company," with a concern by the name of "Sholes," and that appellee had ceased to have a separate existence.

Manchester Brewery Co. v. North Cheshire & M. Brewery Co. [1898] 1 Ch. 539.

The law is intended to reach not only those who themselves deceive, but also those who enable others to deceive, the purchasing public.

Saxlehner v. Apollinaris Co. [1897] 1 Ch. 893.

In determining the question whether or no the use of the name "Remington" by the appellants was likely to create confusion and mislead the public, the court must bear in mind that we are not dealing with a local community understanding all the circumstances, but are dealing with the great public scattered throughout the civilized world, with no opportunities of information except what was communicated to them by the des-

ignations "Remington" typewriter and "Remington-Sholes" typewriter.

Le Page Co. v. Russia Cement Co. 17 L. R. A. 354, 2 C. C. A. 555, 5 U. S. App. 112, 51 Fed. 941; *Johnston v. Ewing*, L. R. 7 App. Cas. 219; *Reddaway v. Banham* [1896] A. C. 219.

Appellee's right of action included the use of the abbreviated form of expression by which the name "Remington" was made to be of value for evil in carrying on an unfair competition. There was the same unfair and disingenuous use of the name "Remington" under a different kind of a disguise.

Valentine Meat Juice Co. v. Valentine Extract Co. 17 Pat. Rep. 673; *Amoskeag Mfg. Co. v. Garner*, 54 How. Pr. 297.

The gradual approximation of "get up" and description to appellee's product was a badge of fraud; nor is it an answer to say that japanning typewriters in black, or designating them by numbers, was common to the trade when they were used in connection with appellee's trade name "Remington."

Lever v. Goodwin, L. R. 36 Ch. Div. 1.

The trade name and designation "Remington" had been so long and exclusively identified with the business of appellee as to inform the public that that name upon writing machines meant that they were its product; and since appellants adopted and used that name it was not material that their machines had not also the particular design and finish in which appellee's typewriters were presented to the public.

Fuller v. Huff, 51 L. R. A. 332, 43 C. C. A. 453, 104 Fed. 141; *Hier v. Abrahams*, 82 N. Y. 519, 37 Am. Rep. 589; *Le Page Co. v. Russia Cement Co.* 17 L. R. A. 354, 2 C. C. A. 555, 5 U. S. App. 112, 51 Fed. 941.

In the *Higgins Case* it appeared that the labels on the manufactured articles of the respective parties were entirely different. One used a bright yellow label, and the other a blue one. The distinctive word "German," which plaintiff used on its product, was absent from defendant's label.

Charles S. Higgins Co. v. Higgins Soap Co. 71 Hun, 101, 24 N. Y. Supp. 801.

In the *Valentine Case*, 83 L. T. N. S. 271, the packages were dissimilar,—the plaintiff's being a meat juice in liquid form, while the defendant's preparation was put up in the form of meat globules.

In *Menendez v. Holt*, 128 U. S. 514, 32 L. ed. 526, 9 Sup. Ct. Rep. 143, this court held that the use of the defendant's name in its advertisements did not tend to rebut the proof of fraud; and that, if the ordinary purchaser would be deceived by the designation employed, defendant must be debarred from using it.

To the same effect are *Powell v. Birmingham Vinegar Brewery Co.* [1894] 3 Ch. 449,

[1896] 2 Ch. 82; *Eno v. Dunn* [1890] A. C. 252; *Montgomery v. Thompson*, 64 L. T. N. S. 748; *Southern White Lead Co. v. Cary*, 25 Fed. 125; *Newman v. Alvord*, 51 N. Y. 189, 10 Am. Rep. 588; *Carroll v. Ertheiler*, 1 Fed. 688; *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. 599; *Wotherspoon v. Currie*, L. R. 5 H. L. 508; *N. K. Fairbank Co. v. Central Lard Co.* 64 Fed. 133.

The name "Remington-Sholes Company" did not differentiate the products of appellee and appellants, but confused their identity and led purchasers to take appellants' machines as and for appellee's. Nor is it any defense to this action that the appellants placed their address or place of manufacture upon the machines.

Gray v. Taper-Sleeve Pulley Works, 16 Fed. 436; *N. K. Fairbank Co. v. R. W. Bell Mfg. Co.* 23 C. C. A. 554, 45 U. S. App. 190, 77 Fed. 869.

The printing of the words, "Not the Remington Standard," did not repair the wrong in the case at bar.

Pillsbury v. Pillsbury-Washburn Flour Mills Co. 12 C. C. A. 432, 24 U. S. App. 395, 64 Fed. 849; *McCann v. Anthony*, American Trade Mark Cas. 1055; *Dunlop P. Tire Co. v. Dunlop, T. C. & T. Mfg. Co.* 12 Times L. R. 434; *Bissell Chilled Plow Works v. T. M. Bissell Plow Co.* 121 Fed. 357; *Garrett v. T. H. Garrett & Co.* 24 C. C. A. 173, 47 U. S. App. 250, 78 Fed. 472; *Walter Baker & Co. v. Sanders*, 77 Fed. 181.

It is undoubtedly true that appellee has used the word "Standard," its red seal trademark, and its corporate name upon its machines and in its advertising media, but it never did so except in connection with the name "Remington," and by so doing it has not in any manner created an estoppel whereby it is concluded as to the broader and more generic right to be protected against the unfair competition in the bill of complaint described.

Ewing v. Johnston, L. R. 13 Ch. Div. 434.

Appellants' denial of any fraudulent purpose to market and sell their writing machines upon the established reputation of appellee and its predecessor's business and as their product, etc., cannot avail in this case;

(1) Because they knew the facts in respect to appellee's business and product, and had due notice of appellee's rights and claims in the premises, and after such notice continued to use its trade name.

Chas. S. Higgins Co. v. Higgins Soap Co. 144 N. Y. 471, 27 L. R. A. 42, 43 Am. St. Rep. 769, 39 N. E. 490; *Holmes, B. & H. v. Holmes, B. & A. Mfg. Co.* 37 Conn. 278, 9 Am. Rep. 324; *Fuller v. Huff*, 51 L. R. A. 332, 43 C. C. A. 453, 104 Fed. 145; *Saxlehner v. Eisner & M. Co.* 179 U. S. 41, 45 L. 198 U. S.

ed. 76, 21 Sup. Ct. Rep. 7; *Ewing v. Johnston*, L. R. 13 Ch. Div. 454.

(2) The appellants acted in a manner that naturally tended to deceive the public, and the public was deceived by their acts, and hence they are presumed to have contemplated the natural consequences of them.

R. Heinisch's Sons Co. v. Boker, 86 Fed. 765; *Gray v. Taper-Sleeve Pulley Works*, 16 Fed. 436.

"A Remington" means a writing machine possessing certain excellent qualities and made by the successors of the old Remington concern.

International Silver Co. v. Simeon L. & Geo. H. Rogers Co. 110 Fed. 955; *Chickering v. Chickering & Sons*, 56 C. C. A. 475, 120 Fed. 69; *Reddaway v. Banham* [1896] A. C. 212.

Appellants' efforts to pirate the good will of appellee's business were successful, and the use of the name "Remington," both in the corporate name and as a designation or a part of a designation for appellants' machines, was properly enjoined.

Pillsbury v. Pillsbury-Washburn Flour Mills Co. 12 C. C. A. 432, 24 U. S. App. 395, 64 Fed. 841; *Reddaway v. Bentham Hemp-Spinning Co.* [1892] 2 Q. B. 639; *Rahtjen's American Composition Co. v. Holzappel's Composition Co.* 41 C. C. A. 329, 101 Fed. Rep. 257; *Oxford University v. Wilmore-Andrews Pub. Co.* 101 Fed. 443.

Messrs. Edmund Wetmore, Henry D. Donnelly, William W. Dodge, and Paul Armistage filed a supplemental brief for appellee:

Where a corporation begins a new business, and selects a name under which to introduce itself and its products to the public, the case is one where a person has adopted a name not his own as his business name, and has marked his goods with it, and is to be so treated, even though one or more of its incorporators, stockholders, or officers may be of that name.

Chas. S. Higgins Co. v. Higgins Soap Co. 144 N. Y. 462, 27 L. R. A. 42, 43 Am. St. Rep. 769, 39 N. E. 490; *Valentine Meat Juice Co. v. Valentine Extract Co.* 17 R. P. C. 673, 83 L. T. N. S. 271; *Le Page Co. v. Russia Cement Co.* 17 L. R. A. 354, 2 C. C. A. 555, 5 U. S. App. 112, 51 Fed. 941; *Royal Baking Powder Co. v. Royal*, 58 C. C. A. 499, 122 Fed. 337; *Bissell Chilled Plow Works v. T. M. Bissell Plow Co.* 121 Fed. 357.

And the same distinction between the name of an individual and the name of a corporation is expressed in the decrees which have been formulated in such cases.

Valentine Meat Juice Co. v. Valentine Extract Co. 17 R. P. C. 688.

The decree in this case is not more broad than the form of decree which is sanctioned

in relevant cases where the defendant has used a word which it had a right to use as a word, but, because as a name it had come to be a "trade denomination," could not truthfully use as a name. It is less broad than the form of injunction usually issued in cases where defendant has no right to use the word in any form, and, if anything, less broad than that to which the complainant was entitled.

Pinet v. Pinet, 15 R. P. C. 65; *Shaver v. Heller & M. Co.* 65 L. R. A. 878, 48 C. C. A. 48, 108 Fed. 821; *Royal Baking Powder Co. v. Royal*, 58 C. C. A. 499, 122 Fed. 337.

While a surname which has ceased to indicate to the public a man's personality, and has come to indicate his business, may be transferred with that business, a surname which indicates to the public only a man's personality is, in the nature of things, incapable of being transferred to another so that the transferee will derive any rights from the transfer.

Manhattan Medicine Co. v. Wood, 108 U. S. 218, 27 L. ed. 706, 2 Sup. Ct. Rep. 436.

A technical trademark cannot be divorced or transferred apart from the good will of the business in which it has acquired its meaning, and a man's name which has identified only his personality cannot be divorced therefrom and used to identify another. Such transfers simply amount to permission to practice misrepresentation or false personation, and have no foundation in reason or law.

Rendle v. Rendle, 63 L. T. N. S. 94; *Sawyer v. Kellogg*, 7 Fed. 720; *Morrall v. Heslin*, 19 R. P. C. 557, 20 R. P. C. 429.

The long line of authorities touching the ordinary inherent right of every person to the honest use of his own surname has not been extended to corporations which have appropriated surnames for use in connection with proprietary articles, while they uphold with a firm hand the fundamental doctrines of honesty and good faith as applied to this branch of the law, and have been vigilant in searching out and punishing evasions and artifices, even in connection with this primitive right.

Le Page Co. v. Russia Cement Co. 17 L. R. A. 354, 2 C. C. A. 555, 5 U. S. App. 112, 51 Fed. 941; *Valentine Meat Juice Co. v. Valentine Extract Co.* 17 R. P. C. 693; *Chas. S. Higgins Co. v. Higgins Soap Co.* 144 N. Y. 462, 27 L. R. A. 42, 43 Am. St. Rep. 769, 39 N. E. 490; *De Long v. De Long Hook & Eye Co.* 10 Misc. 577, 32 N. Y. Supp. 203; *Garrett v. T. H. Garrett & Co.* 24 C. C. A. 173, 47 U. S. App. 250, 78 Fed. 472; *William Rogers Mfg. Co. v. Rogers & S. Mfg. Co.* 11 Fed. 495; *William Rogers Mfg. Co. v. R. W. Rogers Co.* 66 Fed. 56, 17 C. C. A. 576, 35 U. S. App. 843, 70 Fed. 1017; *Inter-*

national Silver Co. v. Simeon L. & George H. Rogers Co. 110 Fed. 955; *Bissell Chilled Plow Works v. T. M. Bissell Plow Co.* 121 Fed. 357; *Tussaud v. Tussaud*, L. R. 44 Ch. Div. 678.

When used by the corporation *E. Remington & Sons*, the designation "Remington" gave notice of the painstaking industry embodied in the typewriters produced by the organization, and in the business owned, not by any individual, but by the corporation. The value of the name depended, not on individual effort, but on the combined result of all which many individuals had created. And every particle of that value was the property, not of any individual, but of the corporation.

Le Page Co. v. Russia Cement Co. 17 L. R. A. 354, 2 C. C. A. 555, 5 U. S. App. 112, 51 Fed. 941; *Clark Thread Co. v. Armitage*, 21 C. C. A. 178, 45 U. S. App. 62, 74 Fed. 936; *Walter Baker & Co. v. Sanders*, 26 C. C. A. 220, 51 U. S. App. 421, 80 Fed. 889; *Kidd v. Johnson*, 100 U. S. 617-620, 25 L. ed. 769, 770; *Dr. S. A. Richmond Nervine Co. v. Richmond*, 159 U. S. 293, 40 L. ed. 155, 16 Sup. Ct. Rep. 30; *Feder v. Benkert*, 18 C. C. A. 549, 44 U. S. App. 99, 70 Fed. 613.

And when the complainant acquired the business and establishment in which the typewriters were produced, the designation "Remington" continued to give notice that the typewriters in connection with which it was used embodied the skill, knowledge, and probity peculiar to that business and establishment; and, as the business expanded, the designation "Remington" in connection with typewriters came to have everywhere and to everyone, here and abroad, this definite secondary meaning of origin, and therefore excellence, to the exclusion of everything else.

A word may acquire in a trade a secondary significance differing from its primary one; and if it is used to persons in the trade, who will understand it and be known and intended to understand it in its secondary sense, it will none the less be a falsehood that in its primary sense it may be true.

Reddaway v. Banham [1896] A. C. 199; *Elgin Nat. Watch Co. v. Illinois Watch Case Co.* 179 U. S. 665-676, 45 L. ed. 365-382, 21 Sup. Ct. Rep. 270.

When you are dealing with the question of people being deceived, that negatives the idea of their having certain knowledge; else they could not be deceived.

North Cheshire Brewery Co. v. Manchester Brewery Co. [1899] A. C. 83.

There had resulted a probability which included the whole world, that persons desiring a typewriter would look for and be

attracted by the name "Remington," and discriminate in favor of typewriters with which that name might be connected. This probability, connected with the name, was the complainant's good will and property.

Menendez v. Holt, 128 U. S. 514, 32 L. ed. 526, 9 Sup. Ct. Rep. 143.

If one case of actual deception is proved, there is no more to be said on either side. The case is at an end. Argument really only takes place where there is no proved case of actual deception.

Liebig Co. v. Chemists Co. 13 R. P. C. 635.

Prudent and thrifty people, and those knowing and remembering distinctly all the details concerning the article they seek and its manufacturer, take care of themselves. It is the ordinary lack of precise information or recollection of the ordinary unsuspecting customer, which it is important to consider in the endeavor to check unfair competition and protect and encourage enterprise and excellence in the production of distributed commodities.

Wotherspoon v. Currie, L. R. 5 H. L. 510; *Celluloid Mfg. Co. v. Cellonite Mfg. Co.* 32 Fed. 94; *Singer Mfg. Co. v. Loog*, L. R. 8 App. Cas. 18; *Powell v. Birmingham Vinegar Brewery Co.* [1896] 2 Ch. 68; *McLean v. Fleming*, 96 U. S. 245, 24 L. ed. 828; *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. 599; *N. K. Fairbank Co. v. Luckel, K. & C. Soap Co.* 42 C. C. A. 376, 102 Fed. 327; *Saxlehner v. Eisner & M. Co.* 179 U. S. 19, 45 L. ed. 60, 21 Sup. Ct. Rep. 7.

Cases which emphasize the fact that, where the symbol which embodies a good will consists of a name, the appearance or "get up" of the article is of practically no value in preventing the evil which the law aims to correct, are:

Wotherspoon v. Currie, L. R. 5 H. L. 510; *Read v. Richardson*, 45 L. T. N. S. 54; *N. K. Fairbank Co. v. Luckel, K. & C. Soap Co.* 88 Fed. 695, 42 C. C. A. 376, 102 Fed. 331; *Cochrane v. Macnish* [1896] A. C. 225; *Johnson & Johnson v. Bauer & B.* 79 Fed. 954, 27 C. C. A. 374, 53 U. S. App. 437, 82 Fed. 662; *Saxlehner v. Apollinaris Co.* 13 Times L. R. 258; *Hier v. Abrahams*, 82 N. Y. 521, 37 Am. Rep. 589; *Shaver v. Heller & M. Co.* 65 L. R. A. 878, 48 C. C. A. 48, 108 Fed. 821; *Thompson v. Montgomery*, L. R. 41 Ch. Div. 35; *Laurence Mfg. Co. v. Tennessee Mfg. Co.* 138 U. S. 550, 34 L. ed. 1004, 11 Sup. Ct. Rep. 396; *Selchow v. Baker*, 93 N. Y. 59, 45 Am. Rep. 169; *Morse v. Worrell*, 10 Phila. 168; *Reddaway v. Banham* [1896] A. C. 214; *Apollinaris Co. v. Norrish*, 33 L. T. N. S. 242; *N. K. Fairbank Co. v. Central Lard Co.* 64 Fed. 134; *Seixo v. Provezende*, L. R. 1 Ch. 192; *Congress & E. Spring Co. v.*

High Rock Congress Spring Co. 45 N. Y. 291, 6 Am. Rep. 82; *Anheuser-Busch Brewing Asso. v. Piza*, 23 Blatchf. 245, 24 Fed. 149; *Colgate v. Adams*, 88 Fed. 899; *Clark Thread Co. v. Armitage*, 21 C. C. A. 178, 45 U. S. App. 62, 74 Fed. 936; *Chas. S. Higgins Co. v. Higgins Soap Co.* 144 N. Y. 462, 27 L. R. A. 42, 43 Am. St. Rep. 769, 39 N. E. 490; *Raymond v. Royal Baking Powder Co.* 29 C. C. A. 245, 55 U. S. App. 575, 85 Fed. 231; *Enoch Morgan's Sons Co. v. Wendoover*, 43 Fed. 420; *Metzler v. Wood*, L. R. 8 Ch. Div. 606; *Carlsbad v. Kutnow*, 18 C. C. A. 24, 35 U. S. App. 750, 71 Fed. 168; *Fuller v. Huff*, 51 L. R. A. 332, 43 C. C. A. 453, 104 Fed. 141.

Among other cases which emphasize the fact that a qualifying word by way of prefix or suffix to a designation which embodies a good will should be disregarded are:

Thomas G. Plant Co. v. May Co. 44 C. C. A. 534, 105 Fed. 377; *Congress & E. Spring Co. v. High Rock Congress Spring Co.* 45 N. Y. 291, 6 Am. Rep. 82; *Carlsbad v. Kutnow*, 18 C. C. A. 24, 35 U. S. App. 750, 71 Fed. 168; *New Home Sewing Mach. Co. v. Bloomingdale*, 59 Fed. 284; *Apollinaris v. Norrish*, 33 L. T. N. S. 242; *Wotherspoon v. Currie*, L. R. 5 H. L. 508; *Anheuser-Busch Brewing Asso. v. Fred Miller Brewing Co.* 87 Fed. 864; *Lever Bros. v. Pasfield*, 88 Fed. 485; *Raymond v. Royal Baking Powder Co.* 22 C. C. A. 276, 46 U. S. App. 494, 76 Fed. 465; *Fuller v. Huff*, 51 L. R. A. 332, 43 C. C. A. 453, 104 Fed. 141; *Gannert v. Rupert*, 62 C. C. A. 594, 127 Fed. 962; *Sanitas v. Condry*, 56 L. T. N. S. 621, 4 R. P. C. 195; *Van Horn v. Coogan*, 52 N. J. Eq. 380, 28 Atl. 788; *Roy Watch Case Co. v. Camm-Roy Watch Case Co.* 28 Misc. 45, 58 N. Y. Supp. 979; *Hutchinson v. Covert*, 51 Fed. 832; *Colgate v. Adams*, 88 Fed. 899; *Hohner v. Gratz*, 52 Fed. 871; *Hier v. Abrahams*, 82 N. Y. 519, 37 Am. Rep. 589; *Oppermann v. Waterman*, 94 Wis. 583, 69 N. W. 569; *Lee v. Haley*, L. R. 5 Ch. 155; *Russia Cement Co. v. Le Page*, 147 Mass. 206, 9 Am. St. Rep. 685, 17 N. E. 304; *The American Grocer Pub. Asso. v. Grocer Pub. Co.* 25 Hun, 398.

The fact that the machines are sold to middlemen with consciences of varying elasticity, throughout the world, and pass from hand to hand, unaccompanied by the many facts upon which the defendant relies, is an important circumstance to be considered in judging the character of the representation which the defendant is making. And the acts of these distributors demonstrate the accuracy of the conclusion, which necessarily followed from the fact that the name "Remington" had acquired a secondary meaning, that by the use of the name the

goods of the defendant are in fact represented as the goods of somebody else.

New England Awl & Needle Co. v. Marlborough Awl & Needle Co. 163 Mass. 154, 60 Am. St. Rep. 377, 46 N. E. 386; *Powell v. Birmingham Vinegar Brewery Co.* [1896] 2 Ch. 88; *Wotherspoon v. Currie*, L. R. 5 H. L. 510; *Reddaway v. Banham* [1896] A. C. 200; *Le Page Co. v. Russia Cement Co.* 17 L. R. A. 354, 2 C. C. A. 555, 5 U. S. App. 112, 51 Fed. 941; *N. K. Fairbank Co. v. R. W. Bell Mfg. Co.* 23 C. C. A. 554, 45 U. S. App. 205, 77 Fed. 869; *Garrett v. T. H. Garrett & Co.* 24 C. C. A. 173, 47 U. S. App. 250, 78 Fed. 473; *Pillsbury v. Pillsbury-Washburn Flour Mills Co.* 12 C. C. A. 432, 24 U. S. App. 395, 64 Fed. 841; *N. K. Fairbank Co. v. Luckel, K. & C. Soap Co.* 42 C. C. A. 376, 102 Fed. 331; *Von Mumm v. Frash*, 56 Fed. 830; *Hostetter Co. v. Sommers*, 84 Fed. 333; *Saxlehner v. Apollinaris Co.* 13 Times L. R. 258; *Ewing v. Johnston*, L. R. 13 Ch. Div. 434; *Lever v. Goodwin*, L. R. 36 Ch. Div. 1; *Little v. Kellam*, 100 Fed. 353; *Hostetter Co. v. Becker*, 73 Fed. 297; *Collinsplatt v. Finlayson*, 88 Fed. 693; *National Biscuit Co. v. Baker*, 95 Fed. 135.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

Referring to the Remington-Sholes Company, it was unanimously held by the circuit court of appeals: "We do not find in this voluminous record sufficient evidence that defendant has itself done anything to promote confusion in the minds of the public, except to use the name 'Remington' on its machines and in its literature."

Accepting that conclusion, it follows that complainant's case must stand or fall on the possession of the exclusive right to the use of the name "Remington."

But it is well settled that a personal name cannot be exclusively appropriated by any one as against others having a right to use it; and as the name "Remington" is an ordinary family surname, it was manifestly incapable of exclusive appropriation as a valid trademark, and its registration as such

[135] *could not in itself give it validity. *Brown Chemical Co. v. Meyer*, 139 U. S. 540, 35 L. ed. 247, 11 Sup. Ct. Rep. 625; *Singer Mfg. Co. v. June Mfg. Co.* 163 U. S. 169, 41 L. ed. 118, 16 Sup. Ct. Rep. 1002; *Elgin Nat. Watch Co. v. Illinois Watch Case Co.* 179 U. S. 665, 45 L. ed. 365, 21 Sup. Ct. Rep. 270.

The general rule and the restrictions upon it are thus stated in *Brown Chemical Co. v. Meyer*. There plaintiff had adopted as a trademark for its medicine the words "Brown's Iron Bitters," and the defendants used upon their medicine the words "Brown's Iron Tonic." This court, after commenting upon the descriptive character of the words

"Iron Tonic," and confirming the defendants' right to the use of these, said:

"It is hardly necessary to say that an ordinary surname cannot be appropriated as a trademark by any one person as against others of the same name who are using it for a legitimate purpose; although cases are not wanting of injunctions to restrain the use, even of one's own name, where a fraud upon another is manifestly intended, or where he has assigned or parted with his right to use it."

And, after citing numerous authorities, Mr. Justice Brown, delivering the opinion, continued:

"These cases obviously apply only where the defendant adds to his own name imitations of the plaintiff's labels, boxes, or packages, and thereby induces the public to believe that his goods are those of the plaintiff. A man's name is his own property, and he has the same right to its use and enjoyment as he has to that of any other species of property. If such use be a reasonable, honest, and fair exercise of such right, he is no more liable for the incidental damages he may do a rival in trade than he would be for an injury to his neighbor's property by the smoke issuing from his chimney, or for the fall of his neighbor's house by reason of necessary excavations upon his own land. These and similar instances are cases of *damnum absque injuria*."

In *Singer Mfg. Co. v. June Mfg. Co.* 163 U. S. 169, 41 L. ed. 118, 16 Sup. Ct. Rep. 1002, the rule is thus laid down by Mr. Justice White:

**"Although 'every one has the absolute [136] right to use his own name honestly in his own business, even though he may thereby incidentally interfere with and injure the business of another having the same name. In such case the inconvenience or loss to which those having a common right are subjected is *damnum absque injuria*. But although he may thus use his name, he cannot resort to any artifice, or do any act calculated to mislead the public as to the identity of the business, firm, or establishment, or of the article produced by them, and thus produce injury to the other beyond that which results from the similarity of name.'"

In the present case, the decree enjoined the use, "in any manner whatsoever," "of the designation 'Remington' as the name, or part of the name, of any typewriting machine whatsoever manufactured by the Remington-Sholes Company, or by defendant or any person or concern, and from selling, offering, exposing or advertising for sale by means of signs, show cards, catalogues, circulars, publications, advertisements, or by word of mouth, or in any manner whatsoever, typewriting machines manufactured by said

Remington-Sholes Company or by defendant, or any person or concern under the name of or as 'Remington-Sholes,' or by any designation of which the word Remington shall constitute a part." This denies the right to use the personal name, rather than aims to correct an abuse of that right, and involves the assertion of the proposition that the use of a family name by a corporation stands on a different footing from its use by individuals or firms. But if every man has the right to use his name reasonably and honestly, in every way, we cannot perceive any practical distinction between the use of the name in a firm and its use in a corporation. It is dishonesty in the use that is condemned, whether in a partnership or corporate name, and not the use itself.

[137] *Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.* 128 U. S. 598, 32 L. ed. 535, 9 Sup. Ct. Rep. 166, was a suit by a corporation of New York against a corporation of Connecticut, *to restrain the use in business of the name "Goodyear's Rubber Manufacturing Company," or any equivalent name. It was held that "Goodyear Rubber" described well-known classes of goods produced by the process known as Goodyear's invention; and that such descriptive names could not be exclusively appropriated. And Mr. Justice Field, delivering the opinion, said: "Names of such articles cannot be adopted as trademarks, and be thereby appropriated to the exclusive right of any one; nor will the incorporation of a company in the name of an article of commerce, without other specifications, create any exclusive right to the use of the name."

The principle that one corporation is not entitled to restrain another from using in its corporate title a name to which others have a common right, is sustained by the discussion in *Columbia Mill Co. v. Aleorn*, 150 U. S. 460, 37 L. ed. 1144, 14 Sup. Ct. Rep. 151, and is, we think, necessarily applicable to all names *publici juris*. *American Cereal Co. v. Eli Pettijohn Cereal Co.* 72 Fed. 903, 22 C. C. A. 236, 46 U. S. App. 188, 76 Fed. 372; *Hazellon Boiler Co. v. Hazellon Tripod Boiler Co.* 142 Ill. 494, 30 N. E. 339; *Monarch v. Rosenfeld*, 19 Ky. L. Rep. 14, 39 S. W. 236.

It is said that the use of the word "Remington" in the name "Remington-Sholes" was unnecessary,—as if necessity were the absolute test of the right to use. But a person is not obliged to abandon the use of his name or to unreasonably restrict it. The question is whether his use is reasonable and honest, or is calculated to deceive.

"It is a question of evidence in each case whether there is false representation or not."

Burgess v. Burgess, 3 De G. M. & G. 896.

198 U. S.

The circuit court of appeals in the present case quotes with approval from the concurring opinion of Wallace, J., in *R. W. Rogers Co. v. William Rogers Mfg. Co.* 17 C. C. A. 576, 35 U. S. App. 843, 70 Fed. 1019, that "a body of associates who organize a corporation for manufacturing and selling a particular product are not lawfully entitled to employ as their corporate name in that business the name of one of their number when it appears that such *name has been intentionally selected in order to compete with an established concern of the same name, engaged in similar business, and divert the latter's trade to themselves by confusing the identity of the products of both, and leading purchasers to buy those of one for those of the other. . . . The incorporators chose the name unnecessarily, and having done so for the purpose of unfair competition, cannot be permitted to use it to the injury of the complainant."

This, of course, assumes not only that the name selected was calculated to deceive, but that the selection was made for that purpose.

In *Turton v. Turton*, L. R. 42 Ch. Div. 128, plaintiffs had carried on the iron business as "Thomas Turton & Sons." Defendant began the same business as John Turton, then traded as John Turton & Co., and finally took in his sons and changed the firm name to "John Turton & Sons." Some confusion had arisen, and plaintiffs contended that there was no necessity for defendants to use their own names.

Lord Esher said: "Therefore the proposition goes to this length: That if one man is in business, and has so carried on his business that his name has become a value in the market, another man must not use his own name. If that other man comes and carries on business he must discard his own name and take a false name. The proposition seems to me so monstrous that the statement of it carries its own refutation."

And Lord Macnaghten said in *Reddaway v. Banham* [1896] A. C. p. 220: "I am quite at a loss to know why *Turton v. Turton* was ever reported. The plaintiff's case there was extravagant and absurd." And see *Meneely v. Meneely*, 62 N. Y. 427, 20 Am. Rep. 489; *Meriden Britannia Co. v. Parker*, 39 Conn. 450, 12 Am. Rep. 406.

In our opinion the Remingtons and Sholes made a reasonable and fair use of their names in adopting the name "Remington-Sholes" for their machine, and in giving that name to the corporation formed for its manufacture and sale.

The formation of a corporation as an effective form of business *enterprise was not [139] only reasonable in itself, but the usual means in the obtaining of needed capital. And as

Wallace, J., said: "It was natural that those who had invented the machine, and given all their time and means in introducing it to the public, when they came to organize the corporation which was to represent the culmination of their hopes and efforts, should choose their own name as the corporate name. In doing so I think they were exercising only the common privilege that every man has to use his own name in his own business, provided it is not chosen as a cover for unfair competition. They did not choose the complainant's name literally, or so closely that those using ordinary discrimination would confuse the identity of the two names, and that differentiation is sufficient to relieve them of any imputation of fraud."

The name "Remington-Sholes Company" is not identical with, or an imitation of, "Remington Standard Typewriter Company," or "Remington Typewriter Company," or "E. Remington & Sons." Defendant's marks "Rem-Sho," "Remington-Sholes Co., Mgrs., Chicago." are not identical with, or an imitation of, complainant's marks "Remington;" Large Red Seal; "Remington Standard Typewriter, manufactured by Wyckoff, Seamans, & Benedict, Ilion, N. Y., U. S. A.;" "Remington Standard Typewriter."

The use of two distinct surnames clearly differentiated the machines of defendant from those of complainant, and when defendant's cards, signs, catalogues, instructions to agents, etc., are considered, it seems to us that the record discloses, to use the language of Mr. Justice Field in the *Goodyear Case*, a persistent effort on defendant's part "to call the attention of the public to its own manufactured goods, and the places where they are to be had, and that it has no connection with the plaintiff." Doubtless the Remington and Sholes, in using the name "Remington-Sholes," desired to avail themselves of the general family reputation attached to the two names; but that does not in itself justify the assumption that their purpose was to confuse their machines with complainant's; or that the use of that name was in itself calculated to deceive. Remington and Sholes were interested in the old company, and Remington continued as general manager of the new company. Neither of them was paid for the use of his name, and neither of them had parted with the right to that use. Having the right to that use, courts will not interfere where the only confusion, if any, results from a similarity of the names, and not from the manner of the use. The essence of the wrong in unfair competition consists in the sale of the goods of one manufacturer or vendor for those of another; and if defendant so conducts its

business as not to palm off its goods as those of complainant, the action fails.

As observed by Mr. Justice Strong in the leading case of *Delaware & H. Canal Co. v. Clark*, 13 Wall. 311, 20 L. ed. 581, "Purchasers may be mistaken, but they are not deceived by false representations, and equity will not enjoin against telling the truth." And by Mr. Justice Clifford, in *McLean v. Fleming*, 96 U. S. 245, 24 L. ed. 828: "A court of equity will not interfere when ordinary attention by the purchaser of an article would enable him at once to discriminate the one from the other." And by Mr. Justice Jackson in *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 37 L. ed. 1144, 14 Sup. Ct. Rep. 151: "Even in the case of a valid trademark the similarity of brands must be such as to mislead the ordinary observer." And see *Coats v. Merrick Thread Co.* 149 U. S. 562, 37 L. ed. 847, 13 Sup. Ct. Rep. 966; *Liggett & M. Tobacco Co. v. Finzer*, 128 U. S. 182, 32 L. ed. 395, 9 Sup. Ct. Rep. 60.

We hold that, in the absence of contract, fraud, or estoppel, any man may use his own name, in all legitimate ways, and as the whole or a part of a corporate name. And, in our view, defendant's name and trademark were not intended or likely to deceive, and there was nothing of substance shown in defendant's conduct in their use constituting unfair competition, or calling for the imposition of restrictions lest actionable injury might result, as may confessedly be done in a proper case.

Decree of Circuit Court of Appeals reversed; decree of Circuit Court also reversed, and cause remanded to that court, with a direction to dismiss the bill.

*NICHOLAS J. STEIGLEDER and Chris- [141]
tina Steigleder, His Wife, *Appls.*,
v.

KATHERINE AUGUSTE McQUESTEN.

(See S. C. Reporter's ed. 141-143.)

Federal courts—jurisdiction—diverse citizenship.

1. The question of the jurisdiction of a Federal circuit court, invoked on the ground of diversity of citizenship, may be raised by a motion to dismiss based upon the proofs tak-

NOTE.—As to diverse citizenship as ground of Federal jurisdiction—see *Shipp v. Williams*, 10 C. C. A. 247, and note; *Mason v. Dullaghan*, 27 C. C. A. 296, and note; *Seddon v. Virginia, T. & C. Steel & I. Co.* 1 L. R. A. 108, and note; and *Myers v. Murray, N. & Co.* 11 L. R. A. 216, and note. And see note to *Roberts v. Lewis*, 36 L. ed. U. S. 579.

en by the master to whom the cause has been referred.

2. Evidence bearing on the question of the citizenship of the respective parties to a suit in a Federal circuit court must be examined on appeal by the Supreme Court of the United States, although the motion to dismiss for lack of jurisdiction in the court below did not distinctly aver the absence of diverse citizenship, but merely charged that the parties were residents of the same state, where the circuit court treated the question of jurisdiction as raised, and passed upon it.

[No. 227.]

Submitted April 14, 1905. Decided April 24, 1905.

A PPEAL from the Circuit Court of the United States for the District of Washington, certifying the question of the jurisdiction of that court, invoked on the ground of diversity of citizenship. Jurisdiction of the Circuit Court *sustained*.

The facts are stated in the opinion.

Mr. John E. Humphries submitted the cause for appellants. **Mr. George B. Cole** was on the brief.

Mr. James B. Howe submitted the cause for appellee. **Mr. George McKay** was on the brief.

Mr. Justice Harlan delivered the opinion of the court:

The bill filed in the circuit court by the plaintiff, McQuesten, alleged her to be "a citizen of the United States and of the state of Massachusetts, and residing at Turner's Falls, in said state," while the defendants, Steigleder and wife, were alleged to be "citizens of the state of Washington, and residing at the city of Seattle, in said state."

The object of the suit was to obtain a decree adjudging defendants to be trustees for the plaintiff in respect of certain real estate in King county, state of Washington. The defendants demurred to the bill for want of equity. The demurrer was overruled, and the defendants answered, without making any issue as to the citizenship of the parties, but denying the alleged trust, and averring that there had been a final settlement between the parties before the institution of the suit in respect of all the matters in dispute.

The cause was referred to a master, and, [142] after proof was *taken, the defendants moved the court to dismiss the suit for want of jurisdiction, the reason assigned in the motion being only that the plaintiff was, and for a long time prior to the commencement of the suit had been, a "resident" of the state of Washington, while the defendants were "residents" of the same state.

The motion to dismiss was denied, and the
198 U. S.

case went to a decree in favor of the plaintiff upon the merits.

The defendants were granted an appeal directly to this court, the question of jurisdiction being certified.

The averment in the bill that the parties were citizens of different states was sufficient to make a prima facie case of jurisdiction, so far as it depended on citizenship. While under the judiciary act of 1789 an issue as to the fact of citizenship could only be made by plea in abatement when the pleadings properly averred citizenship, the act of March 3d, 1875 (18 Stat. at L. 472, chap. 137, U. S. Comp. Stat. 1901, p. 508), made it the duty of the circuit court, at any time in the progress of a cause, to dismiss the suit if it was satisfied either that it did not really and substantially involve a dispute or controversy properly within the jurisdiction of the court, or that the parties were improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under the act of Congress. *Shepard v. Graves*, 14 How. 505, 14 L. ed. 521; *Williams v. Nottawa*, 104 U. S. 209, 211, 26 L. ed. 719, 720; *Farmington v. Pillsbury*, 114 U. S. 138, 143, 29 L. ed. 114, 116, 5 Sup. Ct. Rep. 807; *Little v. Giles*, 118 U. S. 596, 602, 30 L. ed. 269, 271, 7 Sup. Ct. Rep. 32; *Morris v. Gilmer*, 129 U. S. 315, 326, 32 L. ed. 690, 694, 9 Sup. Ct. Rep. 289. This provision of the act of 1875 was not superseded by the judiciary acts of 1887, 1888, and is *still in force. *Lchigh Min. & Mfg. Co. v.* [143] *Kelly*, 160 U. S. 327, 339, 40 L. ed. 444, 449, 16 Sup. Ct. Rep. 307; *Lake County v. Dudley*, 173 U. S. 243, 251, 43 L. ed. 684, 688, 19 Sup. Ct. Rep. 398; *Defiance Water Co. v. Defiance*, 191 U. S. 184, 194, 195, 48 L. ed. 140, 144, 145, 24 Sup. Ct. Rep. 63; *Minnesota v. Northern Securities Co.* 194 U. S. 48, 66, 48 L. ed. 870, 879, 24 Sup. Ct. Rep. 598. The motion, based upon the proofs taken by the master, to dismiss the cause, was, therefore, an appropriate mode in which to raise the question of the jurisdiction of the circuit court.

It is to be observed that the grounds assigned for the motion to dismiss the cause, taken alone, did not distinctly raise any question concerning the absence of diverse citizenship; for the motion only stated that the plaintiff and the defendants were, respectively, residents of the state of Washington. But it has long been settled that residence and citizenship were wholly different things within the meaning of the Constitution and the laws defining and regulating the jurisdiction of the circuit courts of the United States; and that a mere averment of residence in a particular state is not an averment of citizenship in that state

for the purposes of jurisdiction. *Parker v. Overman*, 18 How. 137, 15 L. ed. 318; *Robertson v. Cease*, 97 U. S. 646, 24 L. ed. 1057; *Everhart v. Huntsville Female College*, 120 U. S. 223, 30 L. ed. 623, 7 Sup. Ct. Rep. 555; *Timmons v. Elyton Land Co.* 139 U. S. 378, 35 L. ed. 195, 11 Sup. Ct. Rep. 585; *Denny v. Pironi*, 141 U. S. 121, 123, 35 L. ed. 657, 658, 11 Sup. Ct. Rep. 966; *Wolfe v. Hartford Life & Annuity Ins. Co.* 148 U. S. 389, 37 L. ed. 493, 13 Sup. Ct. Rep. 602.

But the circuit court treated the question of jurisdiction as raised, and passed upon it. We must therefore look at the evidence bearing on that point. *Defiance Water Co. v. Defiance*, 191 U. S. 184, 194, 195, 48 L. ed. 140, 144, 145, 24 Sup. Ct. Rep. 63. The evidence warrants the conclusion reached by that court, namely, that the plaintiff was, for many years prior to the commencement of the action, a citizen of Massachusetts, and that her residence in the state of Washington, at and before the suit was brought, is not shown to be otherwise than temporary, without any fixed purpose to abandon citizenship in Massachusetts. So far as appears from the record, she was, when the suit was brought, a citizen of Massachusetts.

The Circuit Court did not err in taking jurisdiction of the cause, and it will be so certified.

[144]*EDWARD JASTER, Senior, Plff. in Err.,
v.

F. M. CURRIE.

(See S. C. Reporter's ed. 144-149.)

Judgment—full faith and credit.

The refusal of the Nebraska courts to permit an action to be maintained on an Ohio judgment denies the full faith and credit guaranteed by U. S. Const. art. 4, § 1, when based on the alleged fraud in acquiring jurisdiction of the defendant in the Ohio suit, in that the service of process therein was only made possible by giving defendant notice in Nebraska that plaintiff's deposition would be taken in Ohio for use in an action for the same cause then pending in Nebraska, in the hope that defendant would attend, and would delay his return to Nebraska after the deposition was taken long enough to permit service.

[No. 205.]

NOTE.—As to full faith and credit to be given to state records and judicial proceedings—see *Lindley v. O'Reilly*, 1 L. R. A. 79, and note; *Cumington v. Belchertown*, 4 L. R. A. 131, and note; and *Rand v. Hanson*, 12 L. R. A. 574, and note. And see notes to *Wiese v. San Francisco Musical Fund Soc.* 7 L. R. A. 578; *Darby v. Mayer*, 6 L. ed. U. S. 367; and *Mills v. Duryee*, 3 L. ed. U. S. 411.

Argued April 7, 10, 1905. Decided April 24, 1905.

IN ERROR to the Supreme Court of the State of Nebraska to review a judgment which affirmed a judgment of the District Court of Custer County, in that state, in favor of defendant in an action on a judgment of an Ohio Court. *Reversed.*

See same case below (Neb.) 94 N. W. 995.

The facts are stated in the opinion.

Mr. O. A. Abbott argued the cause, and, with Mr. J. R. Webster, filed a brief for plaintiff in error:

So long as the judgment of a sister state stands unimpeached in the state where rendered, it is unimpeachable in every other state.

Christmas v. Russell, 5 Wall. 290, 18 L. ed. 475; *Maxwell v. Stewart*, 22 Wall. 77, 22 L. ed. 564; *Anderson v. Anderson*, 8 Ohio, 109; *M'Rae v. Mattoon*, 13 Pick. 53; *Hanna v. Read*, 102 Ill. 596, 40 Am. Rep. 608; *Davis v. Hagler*, 40 Kan. 187, 19 Pac. 628; *Engstrom v. Sherburne*, 137 Mass. 153.

It cannot be true that attending the taking of depositions in Ohio grants defendant eternal immunity from service in Ohio. A reasonable time to return is all he can ask.

Smythe v. Banks, 4 Dall. 329, 1 L. ed. 854, Fed. Cas. No. 13,134; *Chaffee v. Jones*, 19 Pick. 260.

Mr. E. J. Clements argued the cause, and, with Mr. Halleck F. Rose, filed a brief for defendant in error.

Plaintiff's acts constituted fraud, not only upon the defendant, but upon the jurisdiction of the Ohio court.

Peel v. January, 35 Ark. 331, 37 Am. Rep. 27.

The Federal Constitution requires nothing more than that the judgment of a sister state be given the same effect that it has in the state where it was pronounced. Whatever pleas would be good in a suit thereon in such state can be pleaded in any other courts of the United States.

Mills v. Duryee, 7 Cranch, 481, 3 L. ed. 411; *Hampton v. McConnell*, 3 Wheat. 235, 4 L. ed. 379.

If the plaintiff in the case at bar had brought his action on the Ohio judgment in question in a court of that state, it would have been competent and proper for defendant to plead fraud in obtaining the same, as a defense to said action.

Conway v. Duncan, 28 Ohio St. 102; *Kingsborough v. Tousley*, 56 Ohio St. 450, 47 N. E. 541; *Pilcher v. Graham*, 18 Ohio, C. C. 5.

In code states, where law and equity are administered by the same tribunals, and

the disposition of the entire controversy between parties in one action is intended to be encouraged, such fraud as would entitle the party to relief from a judgment upon application to chancery constitutes a good defense to an action on such judgment.

1 Enc. of Pl. & Pr. 837; 2 Freeman, Judgm. 435; *Dobson v. Pearce*, 12 N. Y. 156, 62 Am. Dec. 152; *Mandeville v. Reynolds*, 68 N. Y. 544; *White v. Reid*, 70 Hun, 197, 24 N. Y. Supp. 290; *Eaton v. Hasty*, 6 Neb. 419, 29 Am. Rep. 365; *Keeler v. Elston*, 22 Neb. 310, 34 N. W. 891; *Snyder v. Critchfield*, 44 Neb. 69, 62 N. W. 306; *Fletcher v. Rapp*, Smedes & M. Ch. 374; *Holt v. Alloway*, 2 Blackf. 108; *Duringer v. Moschino*, 93 Ind. 495; *Davis v. Smith*, 5 Ga. 274, 48 Am. Dec. 279; *Wood v. Wood*, 78 Ky. 628; *Dunlap v. Cody*, 31 Iowa, 260, 7 Am. Rep. 129; *Pilcher v. Graham*, 18 Ohio, C. C. 5; *Ward v. Quinlin*, 57 Mo. 425; *Gray v. Richmond Bicycle Co.* 167 N. Y. 348, 82 Am. St. Rep. 720, 60 N. E. 663; *Bank of Chadron v. Anderson*, 6 Wyo. 518, 48 Pac. 197, 49 Pac. 406; *Toof v. Foley*, 87 Iowa, 8, 54 N. W. 59; *Abercrombie v. Abercrombie*, 64 Kan. 29, 67 Pac. 539.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an action brought by the plaintiff in error in Nebraska upon a judgment recovered by him against the defendant in error in Ohio. To this the defendant pleads that the plaintiff had brought a previous action in Nebraska for the same cause, and afterwards served notice upon the defendant's attorney that the plaintiff's deposition would be taken in Ohio at a certain place on September 5, 1899, for use in the cause; that defendant was advised by his attorney to be present, and went to Ohio for that purpose only; that the deposition was taken and the defendant then went to his father's house in the same county for the night of September 5, and that on September 8, in the early morning, being the earliest time convenient for leaving his father's for Nebraska, he took the train back. The writ in the Ohio suit was received and served on September 7. It is alleged that the notice to take the deposition was simply a ruse, and was given for the purpose of enticing the defendant into Ohio, and for no other reason. There was a motion to set aside the service in the Ohio court, [147] which was overruled * (66 Ohio St. 661, 65 N. E. 1127), but the defendant alleges that at that time he had not discovered what he styles the fraud perpetrated upon him. There was a general demurrer to this answer, which was overruled, and judgment was given for the defendant. This judgment was affirmed by the supreme court of Nebraska

(94 N. W. 995), and thereupon the case was brought here on the ground that due faith and credit had not been given to the Ohio record, as required by art 4, § 1, of the Constitution of the United States. *Huntington v. Attrill*, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224; *Jacobs v. Marks*, 182 U. S. 583, 45 L. ed. 1241, 21 Sup. Ct. Rep. 865.

The supreme court of Nebraska affirmed the judgment on the ground that in that state the distinction between actions at law and suits in equity had been abolished, that the decision in *Christmas v. Russell*, 5 Wall. 290, 18 L. ed. 475, was limited to legal defenses (5 Wall. 304, 306, 18 L. ed. 479, 480), and that fraud would have been an equitable defense to the judgment in Ohio, and therefore was in Nebraska. We take up the question on this footing, without stopping to discuss the premises, which we find it unnecessary to do, and we will assume that, on general demurrer, a plea that the judgment was obtained by fraud would be a good equitable plea. See 5 Wall. 303, 18 L. ed. 479.

It is assumed that the service of the writ in Ohio would have been good but for the alleged fraud. *Smythe v. Banks*, 4 Dall. 329, 1 L. ed. 854, Fed. Cas. No. 13,134; *Chaffee v. Jones*, 19 Pick. 260. That point must have been decided by the Ohio courts. Moreover, the facts constituting the fraud are set forth and gain no new force from the vituperative epithet. If the inducement to enter the state of Ohio furnished by the notice to take a deposition there was made fraudulent by the motive with which the notice was given, then there was fraud; otherwise there was not. On the face of the answer fraud is simply the pleader's conclusion from the specific facts. The question is whether the motive alleged can have the effect supposed.

It will be observed that there was no misrepresentation, express or implied, with regard to anything, even the motives of the plaintiff. The parties were at arm's length. The plaintiff *did not say or imply that he [148] had one motive rather than another. He simply did a lawful act by all the powers enabling him to do it, and that was all. Therefore the word "fraud" may be discarded as inappropriate. The question is whether the service of a writ, otherwise lawful, becomes unlawful because the hope for a chance to make it was the sole motive for other acts tending to create the chance, which other acts would themselves have been lawful but for that hope. We assume that motives may make a difference in liability. But the usual cases where they have been held to do so have been cases where the immediate and expected effect of the act done was to inflict damage, and where therefore, as a matter of substantive law, if not of

pleading, the act was thought to need a justification (see *Aikens v. Wisconsin*, 195 U. S. 194, 204, *ante*, 154, 159, 25 Sup. Ct. Rep. 3), or else where the intent was to do a further and unlawful act to which the act done was the means. *Swift v. United States*, 196 U. S. 375, 396, *ante*, 518, 524, 25 Sup. Ct. Rep. 276.

It is hard to exhaust the possibilities of a general proposition. Therefore it may be dangerous to say that doing an act lawful in itself as a means of doing another act lawful in itself cannot make a wrong by the combination. It is enough to say that it does not usually have that result, and that the case at bar is not an exception to the general rule. We must take the allegations of the answer to be true, although they are manifestly absurd. The plaintiff could not have known that the defendant's lawyer would advise him to go to Ohio, and that the defendant would go to his father's house, instead of to Nebraska, when his business was over. But we assume, as far as possible, that the anticipation of these things was the sole inducement for giving the notice and taking the deposition. Still the notice was true, and the taking of the deposition needed no justification. It could be taken arbitrarily, because the plaintiff chose. On the other hand, the defendant could be served with process if he saw fit to linger in Ohio. That also the plaintiff could do arbitrarily, because he chose, if he thought he had a case.

[149] He arbitrarily could unite the *two acts, and do the first because he hoped it would give him a chance to do the last.

Judgment reversed.

Mr. Justice **McKenna** and Mr. Justice **Day** concur in the result.

GEORGE W. ALLEN, Administrator of the Estate of John J. Philbrick, Deceased,
Plff. in Err.,

v.

FRANK M. ARGUIMBAU, as Surviving Partner of the Copartnership Composed of Frederick A. Schroeder, Edwin A. Schroeder, and Frank M. Arguimbau, Doing Business under the Firm Name and Style of Schroeder & Bon.

(See S. C. Reporter's ed. 149-156.)

Error to state court—Federal question—decision on non-Federal ground—right or immunity claimed under Federal statute—effect of certificate of state court.

1. The Supreme Court of the United States

will not take jurisdiction of a writ of error directed to a state court, where the judgment of that court rests on two grounds, one of which does not involve a Federal question, or where it does not appear on which of the two grounds the judgment was based, and the non-Federal ground is sufficient in itself to sustain the judgment.

2. The defense in an action against the maker of a promissory note given in consideration of a promise to have the cigars called for by a certain contract manufactured in Key West, that it was contemplated that such cigars were to be removed from the factory without compliance with the regulations prescribed by U. S. Rev. Stat. §§ 3390, 3393, 3397 (U. S. Comp. Stat. 1901, pp. 2218, 2220, 2222), does not amount to the special assertion of a right, title, privilege, or immunity under a Federal statute, within the meaning of § 709, authorizing writs of error from the Supreme Court of the United States to state courts, since defendant could derive no personal rights under those sections to enforce the repudiation of his note, even though, on grounds of public policy, it was illegal and void.
3. The certificate of the chief justice of the highest state court that the judgment of that court denied a title, right, privilege, or immunity specially set up and claimed under a Federal statute is not in itself sufficient to confer jurisdiction on the Supreme Court of the United States of a writ of error to that court.

[No. 523.]

Submitted April 3, 1905. Decided May 1, 1905.

IN ERROR to the Supreme Court of the State of Florida to review a judgment which affirmed a judgment of the Circuit Court of Monroe County, in that state, sustaining demurrers to the pleas in an action against the maker of certain promissory notes. *Dismissed for want of jurisdiction.*

Statement by Mr. Chief Justice **Fuller**:

This was an action upon two promissory notes for \$2,500 each, payable to Horace R. Kelly, indorsed to the Horace R. Kelly & Company, Limited, and by that company indorsed to the firm of which Arguimbau was survivor.

Many pleas were interposed in defense, and, among them, several filed March 24, 1900, and several filed February 2, 1903. By the first of these pleas, defendant below, plaintiff in error here, averred "that on or about the 18th day of *March, A. D. 1893, [150] Horace R. Kelly, claiming to be a manufacturer of cigars, agreed with John Jay Philbrick, during his lifetime, that if he, the

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Kliple v. Illinois*, 42 990

L. ed. U. S. 998; and *Re Buchanan*, 39 L. ed. U. S. 884.

On what adjudications of state courts can be brought up for review in the Supreme Court of 198 U. S.

said John Jay Philbrick, together with George W. Allen and Charles B. Pendleton, would give to him their four joint and several promissory notes for \$2,500 each, two of the said notes payable in one year from the date thereof, and two payable in two years from the date thereof, he, the said Horace R. Kelly, would have cigars manufactured in Key West, Florida, and in no other place, according to the terms of his contract with the Havana & Key West Cigar Company, Limited; that the said contract referred to was a contract between the said Horace R. Kelly and one Max T. Rosen, the president of the Havana & Key West Cigar Company, Limited, and in said contract the said Horace R. Kelly bound himself to have the said Horace R. Kelly Company, Limited, a corporation then existing, judicially dissolved, and after said dissolution, together with himself and others, to organize a company under the laws of the state of West Virginia, to be known as the Horace R. Kelly Company; that the said Horace R. Kelly Company, when so formed, was to enter into an agreement with the Havana & Key West Cigar Company, Limited, whereby it, in its factory at Key West, Florida, was to manufacture cigars and to fill all orders for cigars secured by the said Horace R. Kelly Company, provided such orders should be approved by the president or manager of the Havana & Key West Cigar Company, Limited. And it was then and there understood and agreed by and between the said Horace R. Kelly and the said Max T. Rosen, the president of the Havana & Key West Cigar Company, Limited, that the cigars so manufactured as aforesaid by the Havana & Key West Cigar Company, Limited, at its factory at Key West, Florida, to fill the orders for cigars secured by the said Horace R. Kelly Company, were to be removed from said factory or place where said cigars were made without being packed in boxes on which should be stamped, indented, burned, or impressed into each box, in a [151] *legible and durable manner, the number of cigars contained therein, and the number of the manufactory in which the said cigars had been manufactured. That at the time of the making of said contract and understand-

ing and agreement between the said Horace R. Kelly and the said Max T. Rosen, president of the Havana & Key West Cigar Company, Limited, the laws of the United States regulating the manufacture, removal, and sale of cigars provided that, before any cigars were removed from any manufactory or place where cigars were made, they should be packed in boxes, and that there should be stamped, indented, burned, or impressed into each box in a legible and durable manner, the number of cigars contained therein and the number of the manufactory where said cigars were made, and affixed a penalty for the noncompliance therewith; and the said promissory notes sued on are two of the notes made and delivered to the said Horace R. Kelly in consideration of the promises and understandings and agreements aforesaid and are wholly void; all of which the said plaintiffs well knew at the time of the alleged transfer of the said notes to them; and this the defendant is ready to verify."

The second and third pleas were so nearly identical with the first that they need not be set forth. The pleas of February 2, 1903, set up the same defenses in substance, coupled with the allegation that at the time of the indorsement each of the indorsees had notice of the contract alleged to have formed the consideration of the notes. All these pleas were separately demurred to, special grounds being assigned to this effect; that neither of the pleas stated facts constituting any defense; that the consideration of the notes sued on was the promise of Horace R. Kelly to have cigars manufactured in Key West, and neither of the pleas alleged a breach of the promise; that neither of the pleas averred that the alleged proposed contract between the two companies in the pleas stated, and alleged to be illegal, was ever consummated or executed or anything done thereunder; that if cigars were manufactured in Key West, under the said contract between *the said two companies in the said [152] pleas stated, the defendant and his intestate derived the same benefit, and received the same consideration for the said notes, whether said contract was legal or illegal.

The demurrers were severally sustained,

the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L. R. A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L. R. A. 33.

On what the record must show respecting the presentation and decision of a Federal question in order to confer jurisdiction on the Supreme Court of the United States on a writ of error
198 U. S.

to a state court—see note to Hooker v. Los Angeles, 63 L. R. A. 471.

As to what is the record for this purpose—see note to Home for Incurables v. New York, 63 L. R. A. 329.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to State ex rel. Hill v. Dockery, 63 L. R. A. 571.

On the practice and procedure governing the transfer of causes to the Federal Supreme Court on writ of error or appeal—see note to Wedding v. Meyler, 66 L. R. A. 833.

the case went to judgment in favor of plaintiff, and was taken on error to the supreme court of Florida. The errors assigned there, so far as these pleas were concerned, were simply that the trial court erred in sustaining the demurrer in each instance. The supreme court affirmed the judgment, whereupon a writ of error from this court was allowed by the chief justice of that court, who certified, in substance, that the judgment denied "a title, right, privilege, or immunity specially set up and claimed by the plaintiff in error under the statutes of the United States of America."

Six errors were assigned in this court; namely, that the state court erred in holding that the demurrer to the first plea of March 24, 1900, was properly sustained, and that the plea constituted no defense under § 3397 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 2222), and as to the second plea and § 3393, Revised Statutes (U. S. Comp. Stat. 1901, p. 2220), and as to the third plea and § 3390, Revised Statutes (U. S. Comp. Stat. 1901, p. 2218); and in so holding as to the fourth plea, filed February 2, 1903, and § 3397, Revised Statutes; and as to the fifth plea of that date, and § 3393, Revised Statutes; and as to the sixth plea of that date, and § 3390, Revised Statutes.

The case was submitted on motion to dismiss or affirm.

Mr. Richard H. Liggett submitted the cause for plaintiff in error. *Messrs. Macfarlane & Glen* were on the brief.

There are many decisions in this court which sustain the jurisdiction in this case, and it will be sufficient to cite a few of them in which the analogy is perfect.

Dubuque & S. C. R. Co. v. Richmond, 15 Wall. 3, 21 L. ed. 118; *Davenport & N. W. R. Co. v. Renwick*, 102 U. S. 180, 26 L. ed. 51; *Anderson v. Carkins*, 135 U. S. 483, 34 L. ed. 272, 10 Sup. Ct. Rep. 905; *McCormick v. Market Nat. Bank*, 165 U. S. 545, 546, 41 L. ed. 820, 17 Sup. Ct. Rep. 433.

While the certificate of the state court could not give jurisdiction to this court, it may be resorted to, in the absence of an opinion, to show that a Federal question, otherwise presented in the record, was actually passed upon by the court.

Gulf & S. I. R. Co. v. Hewes, 183 U. S. 66, 46 L. ed. 86, 22 Sup. Ct. Rep. 26.

Messrs. H. Bisbee and George C. Be- dell submitted the cause for defendant in error:

If the case may have been decided on the form of the remedy which the practice in the state court required the plaintiff to adopt, or on the technical insufficiency of

the pleadings, this court has no jurisdiction.

Commercial Bank v. Rochester, 15 Wall. 639-642, 21 L. ed. 117.

It was not necessary for the state court to pass upon the supposed Federal question, for the reason that it was not raised or specified in the assignment of error, which was so defective that the court was not obliged to consider it at all.

Harding v. Illinois, 196 U. S. 78, ante, 394, 25 Sup. Ct. Rep. 176.

The state court might have decided that the plea as drawn did not call for a decision whether or not the notes were void, because that question was not before it.

Solary v. Stultz, 22 Fla. 263.

This court is without jurisdiction for the further reason that the plea does not set up any personal right, or personal right of property under any act of Congress, but sets up a right of a third party, to wit, the United States, to have the revenue laws enforced.

Hale v. Gaines, 22 How. 160, 16 L. ed. 269; *Austin v. Boston*, 7 Wall. 694, 19 L. ed. 224; *Long v. Converse*, 91 U. S. 114, 23 L. ed. 235; *Conde v. York*, 168 U. S. 648, 42 L. ed. 613, 18 Sup. Ct. Rep. 234.

It is not every misconstruction of an act of Congress which can be re-examined; the decision must have been against some right claimed under such act.

Montgomery v. Hernandez, 12 Wheat. 129, 6 L. ed. 575.

A defense founded on the allegation that the defendant's conduct was in fraud of an act of Congress is not a matter which this court can examine, at his instance, on a writ of error to a state court.

Udell v. Davidson, 7 How. 769, 12 L. ed. 907.

A party cannot come to this court because the state court has refused to allow his defense that the contract sued on was made by him and the plaintiff in fraud of an act of Congress. This is not a right or title under an act of Congress.

Walworth v. Kneeland, 15 How. 348, 14 L. ed. 724; *Conde v. York*, 168 U. S. 642, 42 L. ed. 611, 18 Sup. Ct. Rep. 234; *Jersey City & B. R. Co. v. Morgan*, 160 U. S. 288, 40 L. ed. 430, 16 Sup. Ct. Rep. 276; *Missouri P. R. Co. v. Fitzgerald*, 160 U. S. 557, 40 L. ed. 536, 16 Sup. Ct. Rep. 389; *Gill v. Oliver*, 11 How. 529, 13 L. ed. 799.

The mere abstract right, if any, in the makers of the notes to have the Federal statute complied with, without alleging any injury to them, is unimportant, and a moot question.

Hooker v. Burr, 194 U. S. 419, 48 L. ed. 1050, 24 Sup. Ct. Rep. 706.

Even if the makers of the notes could

raise the question of the contemplated fraud on the statute, the decision of the state court could legally be based on the ground that the promise of Kelly to make cigars was the consideration of the notes. Such promise was legal; and the contemplated future fraud on the statutes was too remote from such promise to make the latter illegal.

Dibble v. Bellingham Bay Land Co. 163 U. S. 69, 41 L. ed. 74, 16 Sup. Ct. Rep. 939; *Eustis v. Bolles*, 150 U. S. 361-366, 37 L. ed. 1111, 1112, 14 Sup. Ct. Rep. 131; *Klinger v. Missouri*, 13 Wall. 257, 20 L. ed. 635.

The asserted Federal element was too remote, and has been so often decided that it should now be treated as frivolous, and the motion to affirm the judgment should be granted.

Blythe v. Hinckley, 180 U. S. 333-338, 45 L. ed. 557-561, 21 Sup. Ct. Rep. 390.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The only ground on which our jurisdiction can be maintained is that defendant specially set up or claimed some title, right, privilege, or immunity under a statute of the United States, which was denied by the state court. The supreme court of Florida gave no opinion, and, therefore, we are left to conjecture as to the grounds on which the pleas were held to be bad; but if the judgment rested on two grounds, one involving a Federal question and the other not, or if it does not appear on which of two grounds the judgment was based, and the ground independent of a Federal question is sufficient *in itself to sustain it, this court will not take jurisdiction. *Dibble v. Bellingham Bay Land Co.* 163 U. S. 63, 41 L. ed. 72, 16 Sup. Ct. Rep. 939; *Klinger v. Missouri*, 13 Wall. 257, 20 L. ed. 635; *Johnson v. Risk*, 137 U. S. 300, 34 L. ed. 683, 11 Sup. Ct. Rep. 111. And we are not inclined to hold that if, in the view of the state court, the promise of Kelly to manufacture cigars at Key West was the consideration of the notes, and had been performed, and the makers could not defend on the ground that it was contemplated between Kelly and Rosen that the cigars should be removed without compliance with the revenue laws, a Federal question was decided in sustaining the demurrers to the pleas.

But, apart from that, no title, right, privilege, or immunity under a statute of the United States, within the intent and meaning of § 709 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 575), was specially set up or claimed by defendant, and decided against.

198 U. S.

Sections 3390, 3393, and 3397 of the Revised Statutes are regulations to secure the collection of the taxes imposed by chapter 7, title 35, and defendant could derive no personal right under those sections to enforce the repudiation of his notes, even although, on grounds of public policy, they were illegal and void.

In *Walworth v. Kneeland*, 15 How. 348, 14 L. ed. 724, it was held, as correctly stated in the headnotes:

"Where a case was decided in a state court against a party, who was ordered to convey certain land, and he brought the case up to this court upon the ground that the contract for the conveyance of the land was contrary to the laws of the United States, this is not enough to give jurisdiction to this court under the 25th section of the judiciary act.

"The state court decided against him upon the ground that the opposite party was innocent of all design to contravene the laws of the United States.

"But even if the state court had enforced a contract, which was fraudulent and void, the losing party has no right which he can enforce in this court, which cannot therefore take jurisdiction over the case."

*And Mr. Chief Justice Taney said: "But [156] if it had been otherwise, and the state court had committed so gross an error as to say that a contract forbidden by an act of Congress, or against its policy, was not fraudulent and void, and that it might be enforced in a court of justice, it would not follow that this writ of error could be maintained. In order to bring himself within the 25th section of the act of 1789 [1 Stat. at L. 85, chap. 20], he must show that he claimed some right, some interest, which the law recognizes and protects, and which was denied to him in the state court. But this act of Congress certainly gives him no right to protection from the consequences of a contract made in violation of law. Such a contract, it is true, would not be enforced against him in a court of justice; not on account of his own rights or merits, but from the want of merits and good conscience in the party asking the aid of the court. But to support this writ of error, he must claim a right which, if well founded, he would be able to assert in a court of justice, upon its own merits, and by its own strength." p. 353, L. ed. p. 726.

The certificate on the allowance of the writ of error could not, in itself, confer jurisdiction on this court (*Fullerton v. Texas*, 196 U. S. 192, 194, ante, 443, 444, 25 Sup. Ct. Rep. 221), and the result is that the writ of error must be dismissed.

RAFAEL RODRIGUEZ and Euripides Rodriguez, *Plffs. in Err.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 156-165.)

Error to Federal district court for the district of Porto Rico—denial of right claimed under Federal statute by motion in arrest—objections to selection of grand jurors—waiver by failure to except.

1. The overruling of a motion in arrest of judgment, in which the accused asserted that the grand jurors were not selected or drawn as required by the Federal statutes, presents a case in which "an act of Congress is brought in question and the right claimed thereunder is denied," within the meaning of the act of April 12, 1900 (31 Stat. at L. 85, chap. 191), § 35, providing for a review in the Supreme Court of the United States of the final decisions of the district court of the United States for the district of Porto Rico.
2. Failure to except to the overruling of a motion in arrest of judgment waives the objection that the grand jurors were selected by an unauthorized official, even assuming that such objection was raised in time by such a motion.

[No. 183.]

Submitted March 15, 1905. Decided May 1, 1905.

IN ERROR to the District Court of the United States for the District of Porto Rico, to review a conviction of conspiracy. *Affirmed.*

The facts are stated in the opinion.

Messrs. Francis H. Dexter, Frederic D. McKenney, and John Spalding Flannery submitted the cause for plaintiffs in error:

The accused claimed a right under certain acts of Congress, which was denied to him by the trial court. This court therefore has jurisdiction to inquire whether there is anything of substance in the claim.

Crowley v. United States, 194 U. S. 461, 467, 48 L. ed. 1075, 1079, 24 Sup. Ct. Rep. 731.

The grand jury having been selected by a person having no authority whatever to select them, the whole proceeding of forming the panel was void. The objection to the jury was in time.

United States v. Gale, 109 U. S. 65, 27 L. ed. 857, 3 Sup. Ct. Rep. 1; *Sanders v. State*, 55 Ala. 186; *Miller v. State*, 33 Miss. 357, 69 Am. Dec. 351; *Curtis v. Com.* 87 Va. 590, 13 S. E. 73; *Yelm Jim v. Territory*, 1 Wash. Terr. 63.

NOTE.—As to when and how objections to grand jurors must be taken—see note to *United States v. Gale*, 27 L. ed. U. S. 857.

Assistant Attorney General **Robb** and Mr. **Glenn E. Husted** submitted the cause for defendant in error:

No act of Congress was brought in question and a right claimed thereunder denied. Two distinct events must occur, *viz.*, an act of Congress must be brought in question, and the right claimed thereunder denied. These two elements must unite.

Snow v. United States, 118 U. S. 352, 30 L. ed. 209, 6 Sup. Ct. Rep. 1059.

The word "and" signifies an addition to what has gone before.

O'Brien v. Carson, 42 Iowa, 554.

It has been held, for instance, that the obligation to account for and pay over moneys is but a single liability (*Franklin v. Kirby*, 25 Wis. 498), and that the word "and" in the phrase, "All persons in office at the time of the adoption of this Constitution and at the first election under it shall hold their respective offices," etc., is used in a conjunctive sense.

Com. ex rel. Atty. Gen. v. Kilgore, 82 Pa. 396;

Other like instances are numerous.

Washington v. Corinth, 55 Vt. 468; *Jones v. Com.* 80 Va. 18; *Leftwich v. Neal*, 7 W. Va. 569; *United States v. Ten Cases of Shawls*, 2 Paine, 162, Fed. Cas. No. 16,448; *Buck v. Danzenbacker*, 37 N. J. L. 361.

The overruling of the motion in arrest is not a denial of a right claimed under an act of Congress.

(a) It was not made until after defendants had pleaded not guilty to the indictment, and had been tried, convicted, and sentenced. Such motions come too late if made after verdict.

United States v. Gale, 109 U. S. 65, 69, 27 L. ed. 857, 858, 3 Sup. Ct. Rep. 1; *Wharton, Crim. Pl. & Pr.* §§ 344, 350, 426; *Agnew v. United States*, 165 U. S. 36, 41 L. ed. 624, 17 Sup. Ct. Rep. 235; *Crowley v. United States*, 194 U. S. 461, 472, 48 L. ed. 1075, 1081, 24 Sup. Ct. Rep. 731; *State v. Swift*, 14 La. Ann. 839; *State v. White*, 35 La. Ann. 96; *State v. Jackson*, 36 La. Ann. 96; *People v. Ah Lee Doon*, 97 Cal. 171, 31 Pac. 933; *Brown v. State*, 12 Ark. 623; *Com. v. Freeman*, 166 Pa. 332, 31 Atl. 115; *Brill v. State*, 1 Tex. App. 572.

(b) No exception was taken to the order of the court overruling the motion.

Alexander v. United States, 138 U. S. 353, 34 L. ed. 954, 11 Sup. Ct. Rep. 350.

(c) Even if the facts were as stated in the motions to quash the panel and in arrest, the action of the court in the premises was proper.

United States v. Eagan, 30 Fed. 608; *United States v. Richardson*, 28 Fed. 61; *United States v. Ambrose*, 3 Fed. 283; *United States v. Tuska*, 14 Blatchf. 5, Fed. Cas. No.

16,550; *United States v. Greene*, 113 Fed. 683; Wharton, Crim. Pl. & Pr. §§ 350, 388.

The objections relate to matters of form cured by statute.

United States v. Molloy, 31 Fed. 19; *United States v. Benson*, 31 Fed. 896; *United States v. Ewan*, 40 Fed. 451; *Wolfsen v. United States*, 41 C. C. A. 422, 101 Fed. 430.

Motions in arrest or to quash raise only such objections as appear upon the face of the record. Extrinsic matters must be brought up by the plea in abatement.

State v. Jackson, 36 La. Ann. 96; *Wickwire v. State*, 19 Conn. 477; *United States v. Kilpatrick*, 16 Fed. 765; *United States v. Pond*, 2 Curt. C. C. 265, Fed. Cas. No. 16,067; *State v. Hensley*, 7 Blackf. 324; *Com. v. Church*, 1 Pa. St. 105, 44 Am. Dec. 112; *Com. v. Donahue*, 126 Mass. 51; *Thomp. & M. Juries*, § 687, and cases cited; Wharton, Crim. Pl. & Pr. § 388, and cases cited.

To warrant the exercise of appellate jurisdiction the right claimed must be such as the law recognizes. If it be not proved to be such claim, then there is not a right claimed within the meaning of this statute, and the court is without jurisdiction. That the word "claim" in a statute or deed contemplates lawful claims only is well established.

Folliard v. Wallace, 2 Johns. 395; *Ludington v. Pulver*, 6 Wend. 404; *Fellowes v. Clay*, 4 Q. B. 311.

Mr. Justice **Harlan** delivered the opinion of the court:

This writ of error brings up for review a final decree of the district court of the United States for the district of Porto Rico, by which, in conformity with the verdict of a jury, the plaintiffs in error, Rafael Rodriguez and Euripides Rodriguez, were sentenced to confinement in the penitentiary,—the former, for three years at hard labor; the latter, for two years,—and to pay a fine of \$500.

The indictment contained two counts. The first count charged that on the first day of November, 1902, in the district of Porto Rico, the defendants unlawfully conspired together to steal, embezzle, and purloin the moneys of the United States; and that, to effect the object of such conspiracy, Rafael Rodriguez, on the above date, being a postmaster of the United States, did feloniously steal, embezzle, and purloin out of certain letters which came to his possession as postmaster, and which had not then been delivered to the party to whom they were directed, divers bank notes and United States notes, the property of the United States, of the value of \$560. The second count charged that the defendants (Rafael Rod-

riguez being postmaster, as aforesaid) on the above date, and within the said district, feloniously stole, embezzled, and purloined bank notes and United States notes, the property of the United States, of the value of \$560, out of certain letters addressed to the postmaster of the United States at San Juan, Porto Rico, and intended to be conveyed by mail, which letters had previously come into the possession of Rafael Rodriguez, as postmaster, and had not then been delivered to the party to whom they were directed.

*The defendants jointly moved to quash [158] the indictment upon grounds substantially involving its sufficiency. The motion was overruled, the court observing: "The indictment charges the defendants with conspiring to commit an offense, and that, in pursuance to that, one of them did certain acts which, owing to the alleged conspiracy, were the acts of both. The use of the word 'embezzle' in the indictment is surplusage. The charge is a larceny as described in the indictment." The defendants took an exception.

The defendants then moved to quash the panel of petit jurors, on the ground, among others, that the jurors had not been selected and drawn in the mode required by the Revised Statute of the United States. On this motion evidence was heard, but the evidence was not made a part of the record by bill of exceptions or otherwise. The motion to quash was denied.

Thereupon the defendants were arraigned, and pleaded not guilty. Bystanders were summoned to serve on the panel, and from them a jury was selected. No objection was made to the jury so selected.

The result of the trial was a verdict of guilty on the first count.

After the return of the verdict the accused moved in arrest of judgment upon the following grounds: That the grand jury was not selected or drawn according to the requirements of the statute in such cases made and provided; that the clerk of the court took no part in the selection of the names to be placed in the jury box, but the other jury commissioner of the court, after directing a deputy clerk to prepare lists and tickets of persons, placed all the tickets with names in the box himself; that from the tickets and names so placed in the box by the commissioner the grand jury was subsequently drawn; that the deputy clerk was not and is not a person authorized under the law to take part in the selection or drawing the grand and petit juries of the court; that he had not been theretofore appointed by the court for that purpose; that he *was not shown to be of a different political affiliation from the jury commission-

er theretofore appointed by the court; and that said names were not placed in the box alternately by the commissioner and the clerk. 21 Stat. at L. 43, chap. 52, U. S. Comp. Stat. 1901, p. 624.

The motion in arrest of judgment was overruled, the court making an order which contained the following recitals: "It appears the regular jury commissioner, Andres Crosas, and the deputy clerk, Frank Anton-santi, acted in doing so, the clerk of the court being absent on sick leave. There is no charge of corruption or that the selection was not by impartial persons. The general rule as to provisions of law for the selection of jurors is, that they are only directory. There appear to have been some irregularities, and not an exact compliance with the terms of the statute; but both the commissioner Crosas and the deputy clerk made the selection, and both were present all the time during the selection, and no one else took part in it. It is not shown they are not of opposite politics, and this is to be presumed. There was no such material irregularity as vitiated the panel, but a substantial compliance with the statute upon the subject. The motion in arrest of judgment is overruled."

Subsequently the defendant moved for a new trial upon various grounds. That motion was overruled, and this writ of error was brought.

The first question is one of the jurisdiction of this court to re-examine the judgment below,—the government insisting that we are without jurisdiction.

We are of opinion that this question is settled by *Crowley v. United States*, 194 U. S. 461, 462, 48 L. ed. 1075, 1077, 24 Sup. Ct. Rep. 731, which was a criminal prosecution for the violation of certain statutes of the United States relating to the postal service.

By the act of April 12th, 1900 (31 Stat. at L. 85, chap. 191), establishing a civil government for Porto Rico, it was provided that, except as otherwise provided, the statutory laws of the United States shall have the same force and effect in Porto Rico as [162] in the United States; also, that writs of error and appeals may be prosecuted from the final decisions of the district court of the United States for Porto Rico "in all cases where . . . an act of Congress is brought in question and the right claimed thereunder is denied." § 35. The same act provided that the United States court for Porto Rico shall have jurisdiction "of all cases cognizant in the circuit courts of the United States, and shall proceed therein in the same manner as a circuit court." § 34. In *Crowley's Case* the contention of the accused, based upon a plea in abatement, was

that certain members of the jury finding the indictment were disqualified under the local law to serve as grand jurors, and that the statutes of the United States made it the duty of the district court to follow the local law in that respect. Referring to the above act, we said: "In this case that act was brought in question by the contention of the parties,—the contention of the accused being, in substance, that, pursuant to that act of Congress, the court below, in the matter of the qualifications of grand jurors, should have been controlled by the provisions of the local law relating to jurors, in connection with the statutes of the United States relating to the organization of grand juries and the trial and disposition of criminal causes; and the court below deciding that, notwithstanding the Foraker act, the local act of January 31st, 1901, referred to in the plea, was not applicable to this prosecution, and that the grand jury finding the indictment, if a grand jury was necessary, was organized consistently with the laws of the United States under which the court proceeded. It thus appears that the accused claimed a right under the act of Congress and under the Revised Statutes of the United States, which, it is alleged, was denied to him in the court below. This court has, therefore, jurisdiction to inquire whether there is anything of substance in that claim."

As the Porto Rican statutes contain no provisions relating to the selection, drawing, or impaneling of grand jurors, it was, as the accused contends in this case, the duty of the district *court of the United States [163] for Porto Rico, in criminal prosecutions for crimes against the United States, to keep in view § 800 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 623), which provides: "Jurors to serve in the courts of the United States, in each state respectively, shall have the same qualifications, subject to the provisions hereinafter contained, and be entitled to the same exemptions, as jurors of the highest court of law in such state may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned; and they shall be designated by ballot, lot, or otherwise, according to the mode of forming such juries then practised in such state court, so far as such mode may be practicable by the courts of the United States or the officers thereof. And for this purpose the said courts may, by rule or order, conform the designation and impaneling of juries, in substance, to the laws and usages relating to jurors in the state courts, from time to time in force in such state."

It was also its duty, in such prosecutions, to conform to the act of Congress of June

30th, 1879 (21 Stat. at L. 43, chap. 52, U. S. Comp. Stat. 1901, p. 624), which provides that jurors to serve in the courts of the United States "shall be publicly drawn from a box containing, at the time of each drawing, the names of not less than three hundred persons, possessing the qualifications prescribed in § 800 of the Revised Statutes, which names shall have been placed therein by the clerk of such court and a commissioner, to be appointed by the judge thereof, which commissioner shall be a citizen of good standing, residing in the district in which such court is held, and a well-known member of the principal political party in the district in which the court is held opposing that to which the clerk may belong, the clerk and said commissioner each to place one name in said box alternately, without reference to party affiliations, until the whole number required shall be placed therein, . . . and all juries to serve in courts after the passage of this act shall be drawn in conformity herewith."

[164] When, therefore, the accused in this case, by their motion *in arrest of judgment, claimed the benefit of the above statutes, the acts of Congress referred to were brought in question within the meaning of the act of April 12th, 1900, as interpreted in the *Crowley Case*; and the rights asserted by the accused under those statutes having been denied when the motion in arrest of judgment was overruled, the case could be brought here. The words "brought in question" in that act do not mean that the accused, in order to bring the final judgment here, must have disputed the validity of the acts of Congress which were alleged to have been violated to their prejudice. It was quite sufficient that they should assert rights under those acts, and that the rights so claimed were denied to them. *Crowley v. United States*, 194 U. S. 461, 462, 48 L. ed. 1075, 1077, 24 Sup. Ct. Rep. 731.

The government, however, contends that the motion in arrest of judgment came too late, and in support of that view cites the following language from *United States v. Gale*, 109 U. S. 65, 69, 27 L. ed. 857, 858, 3 Sup. Ct. Rep. 1, 4: "Much more would it seem to be requisite that all ordinary objections, based upon the disqualification of particular jurors, or upon informalities in summoning or impaneling the jury, where no statute makes proceedings utterly void, should be taken *in limine*, either by challenge, by motion to quash, or by plea in abatement. Neglecting to do this, the defendant should be deemed to have waived the irregularity." Wharton, Crim. Pl. & Pr. §§ 344, 350, 426. But, in the same case, 198 U. S.

the court said what is pertinent to the present discussion: "There are cases, undoubtedly, which admit of a different consideration, and in which the objection to the grand jury may be taken at any time. These are where the whole proceeding of forming the panel is void, as where the jury is not a jury of the court or term in which the indictment is found; or has been selected by persons having no authority whatever to select them; or where they have not been sworn; or where some other fundamental requisite has not been complied with."

Here the objection to the grand jury was, in substance, that it was not such a body as could legally find an indictment. This view rests upon the ground that the names were placed *in the box by a jury commis-[165] sioner and by a deputy clerk, the latter, it is contended, having no authority to act at all in such a matter in place of the clerk, because the statute required the joint action of a commissioner and the clerk of the court. If, therefore, the requirement that the grand jurors should be selected by the commissioner and the clerk was a fundamental requisite, that is, if the deputy clerk, in the absence of the clerk, had no authority, under any circumstances, to act, then the motion in arrest of judgment did not come too late. There are authorities which give some support to the view that this requirement is of substance, and not a mere "defect or imperfection in matter of form only." Rev. Stat. § 1025, U. S. Comp. Stat. 1901, p. 720; *Hulse v. State*, 35 Ohio St. 421. Whether this position be well taken or not we do not stop to consider; for, assuming that the motion in arrest of judgment was made in time, and assuming even that the court, as matter of law, erred in its interpretation of the statute, still the accused cannot avail themselves here of that error, for the record does not show any exception taken to the overruling of the motion in arrest of judgment. By not excepting to the ruling of the court the accused must be held to have acquiesced in it, and to have waived the objection made to the grand jury. We perceive no reason why they could not have legally waived an objection based upon the grounds stated in the motion.

This disposes of the case; for the assignments of error present no other question that needs to be noticed. Besides, counsel for the accused have properly confined their discussion of the case to the question of the jurisdiction of this court, and to the action of the court below in overruling the motion in arrest of judgment. *The judgment is affirmed.*

[166] *R. R. DUNBAR, *et al.*, *Plffs. in Err.*,
v.

LUCRETIA L. GREEN *et al.*

(See S. C. Reporter's ed. 166-170.)

Ejectment — plaintiff must recover on strength of his own title—effect of cross-petition.

Plaintiffs in ejectment who have neither a valid title nor prior possession cannot recover because of the laches of the defendant in not sooner taking possession of the property under a patent issued to his ancestor under the treaty of May 10, 1854 (10 Stat. at L. 1053), with the Shawnee Indians, although a demand is made by a cross-petition that the title be quieted, and that plaintiffs be enjoined from setting up or making any claim to the property.

[No. 200.]

Submitted April 6, 1905. Decided May 1, 1905.

IN ERROR to the Supreme Court of the State of Kansas to review a judgment which affirmed a judgment of the District Court of Wyandotte County, in that state, in favor of plaintiffs in an action of ejectment. *Reversed* and remanded for further proceedings.

See same case below, 66 Kan. 557, 72 Pac. 243.

Statement by Mr. Justice **Brown**:

This was an action of ejectment brought September 22, 1900, in the district court of Wyandotte county by defendants in error, who were plaintiffs below, to recover possession of certain lots of land in the city of Argentine. The case was tried upon an agreed statement of facts, substantially as follows:

The land was patented December 28, 1859, to Susan Whitefeather, as the head of a family, consisting of herself and her son, George Washington, who were members of the Shawnee tribe of Indians. The patent was issued under the treaty of May 10, 1854 (Indian Treaties, p. 792 [10 Stat. at L. 1053]), with the Shawnees. Whitefeather died prior to July 10, 1862, and her son, George Washington, inherited the land. On November 27, 1867, he being then fourteen years of age, the probate court of Johnson county appointed Jonathan Gore as his guardian, though the land was in Wyandotte county. In these proceedings Wash-

[167] George and Judy *Washington. Under such appointment the guardian sold the land to one Joel F. Kinney for \$2,000, executing to him a guardian's deed, which was approved

by the Secretary of the Interior May 21, 1869, and the title so acquired by Kinney passed by a series of conveyances to the plaintiffs Green. In these proceedings for a sale Gore described himself as guardian of George Washington, the minor heir of Susan Whitefeather, deceased. Washington remained a member of the Shawnee tribe until September 26, 1900, when he was made a citizen of the United States. He took no steps to impugn the validity of the guardian's deed until June 25, 1895, when, according to the agreed statement of facts, the defendant Dunbar took possession of the land as his agent. Up to this time it had remained vacant and unimproved. Plaintiffs recovered judgment, which was affirmed by the supreme court. 66 Kan. 557, 72 Pac. 243.

Mr. L. F. Bird submitted the cause for plaintiffs in error. Mr. H. G. Pope was on the brief.

No brief was filed for defendants in error.

Mr. Justice **Brown** delivered the opinion of the court:

The deed of Jonathan Gore, guardian, to Joel F. Kinney, dated October 14, 1868, of property situated in Wyandotte county, was attacked upon the ground—

1. That Gore was never appointed guardian of the defendant, George Washington, who was the son of Susan Whitefeather, but was appointed by the probate court of Johnson county as the guardian of George Washington, while another person, named Elizabeth Longtail, was, on July 9, 1862, appointed by the probate court of Wyandotte county the guardian of apparently another George Washington, the minor son of George and Judy Washington, who lived and owned land in that county. Indeed, the records are in a hopeless state of confusion.

*2. Because the guardian's deed was executed and delivered five months before he had obtained authority from the probate court to make it.

3. Because the petition of the guardian to sell the land did not describe the property, and because it was void on its face.

Not only did this not involve a Federal question, but, in its opinion, the court assumed, for the purposes of the case, that the guardian's deed was void for want of jurisdiction, and placed its decision solely upon the ground that Washington had been guilty of such laches as would bar recovery.

The only Federal question turns upon the right of George Washington, a Shawnee Indian, and one of that class of persons who are aptly described as "wards of the na-

tion," to avail himself of the Whitefeather patent, notwithstanding his assumed laches in taking possession thereunder. We are much embarrassed by the failure of the defendants in error to file a brief. But we do not understand how the defense of laches is pertinent to the case. The action is ejectment. The plaintiffs must recover on the strength of their own title, and not upon the weakness of the defendants'. The only title set up by the plaintiffs is that derived from the deed of Jonathan Gore, guardian of the defendant Washington, which is assumed by the supreme court to be void. The plaintiffs did not show that they were ever in possession of the land, which appears to have been vacant and unoccupied until Dunbar took possession for the defendant Washington, in June, 1895. The plaintiffs are not shown to have exercised acts of ownership, or even to have paid taxes. We do not understand the materiality of the suggestion that the defendants have lost their rights to the land by the laches of George Washington, the Indian. Laches is a defense often set up in courts of equity in bar of plaintiffs' claim, but here it is set up by the plaintiffs, as a weapon of attack, although the defendants are the only parties who are or have been in possession of the land. They have shown plaintiffs' title to be void, and that they have been in possession of the land for five years.

[169] They are entitled to *stand upon their rights. As the deed was void, no affirmative action on the part of George Washington was necessary. Indeed, as plaintiffs took no action under the guardian's deed to Kinney for over thirty years, it would appear that they were guilty of greater and more inexcusable delay than the defendants.

The only difficulty arises from the cross-petition of the defendants, incorporated with their answer, in which they demand that their title be quieted, and that plaintiffs be enjoined from setting up or making any claim to the property. If this were an original petition by defendants in possession, to remove a cloud from their title, it is entirely possible that the court might find that they had been guilty of such laches as would disentitle them to recover; but the petition of plaintiffs in the case is an ordinary petition in ejectment, praying for possession of the land as against the defendants, for damages, and for an injunction pending trial. The case was tried by the court without a jury, as an ordinary action of ejectment, and recovery decreed in favor of the plaintiffs for possession of the property, with costs. No mention was made in the opinion or judgment of the cross-petition of the defendants.

We do not see how the case can be treat-

ed other than as an ordinary action of ejectment. In the case of *Cheesebrough v. Parker*, 25 Kan. 566, it was held that where, under the practice in Kansas, an action is commenced for the recovery of real estate, the right of the plaintiff to demand a second trial under the statute is not taken away by the addition to the petition of a claim for mesne profits, nor by the fact that the defendants set up an equitable defense and claimed equitable relief in the answer. In delivering the opinion of the court, Mr. Justice Brewer, now of this court, observed: "Under a general denial" (in an action of ejectment) "every possible defense may be interposed. If, instead of such general denial, the defendant sets out in detail an equitable defense, this does not change the character of the action or abridge the rights of the plaintiff. It is a grand mistake to suppose that by setting *up in an answer an equitable defense to an[170] action for the recovery of real estate, either the plaintiffs' right to a jury trial, or a second trial, under the statute, can be abridged. Whatever effect such defense may have upon defendants' rights, the plaintiffs' are unchanged. They have commenced an action under the statute for the recovery of real property, and no rights given by such statute can be taken away by the character or form of the defense." The substance of the opinion is that an action of ejectment must be tried as at law, notwithstanding that an equitable claim or defense is set up by one of the parties.

Had the plaintiffs taken possession of the land under their guardian's deed, and an action been brought by the Indian, they might perhaps have pleaded in defense laches or the statute of limitations; but as the property remained vacant and unimproved for over twenty years, we do not see why the defendants do not stand in a position to avail themselves of the fact that the plaintiffs' only title is derived from a void deed, especially in view of the fact that the defendant Washington shows a patent to the land to his mother, Susan Whitefeather, and that he is her only heir. The record presents the curious anomaly of a recovery by plaintiffs, who have neither title nor prior possession, against defendants, who have both.

Had the defendants, after taking possession, filed a bill to quiet their title and remove the cloud created by the guardian's deed, a different question would have been presented.

The judgment of the Supreme Court of Kansas is, therefore, reversed, and the cause remanded to that court for further proceedings not inconsistent with this opinion.

[171] *Ex parte: In re* GERTRUDE GLASER,
Administratrix, Petitioner.

(See S. C. Reporter's ed. 171-173.)

Mandamus—power of Supreme Court to grant when without appellate jurisdiction.

The Supreme Court of the United States cannot grant a writ of mandamus to compel the judges of a Federal circuit court to take jurisdiction of an action alleged to be pending in that court, where the cause was not of such a character that a final judgment therein could be directly reviewed, under the act of March 3, 1891 (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 547), in the Supreme Court.

[No. 16, Original.]

Submitted April 20, 1905. Decided May 8, 1905.

ORIGINAL petition for mandamus to require the judges of the Circuit Court of the United States for the Eastern District of New York to take jurisdiction of a suit alleged to be pending and undetermined in that court. *Denied.*

The facts are stated in the opinion.

Mr. Richard A. Irving submitted the cause for petitioner. Mr. Lewis E. Carr, Jr., was on the brief.

Mr. Alvin Cushing Cass submitted the cause for respondent.

Mr. Chief Justice Fuller delivered the opinion of the court:

This is a petition by Gertrude Glaser, as [172] administratrix, *for mandamus, requiring the judges of the circuit court of the United States for the eastern district of New York to take jurisdiction and proceed against Anthony P. Langer in a certain suit alleged by petitioner to be pending and undetermined in that court, wherein Gertrude Glaser, as administratrix, is plaintiff, and Anthony P. Langer is defendant, and to strike from the records of the court a certain order made on the 14th day of November, 1904, entitled: "In the Matter of the Application of Gertrude Glaser, Administratrix, etc., to compel the filing of an answer, or other relief, in an action alleged to be pending between Gertrude Glaser, as Administratrix, etc., of Isador Glaser, deceased, Plaintiff, and Anthony P. Langer, Defendant," whereby petitioner's application to compel the filing of said answer was denied, on the ground that no such action was pending, and to make

such disposition of said suit as ought to have been made had said order not been made and entered therein. . . ."

The petition alleged the commencement in the circuit court of a common-law action by petitioner, as administratrix, against Langer, to recover damages for negligence causing the death of petitioner's husband, and rested the jurisdiction on diversity of citizenship. The circumstances in respect of a mistake, by reason of which no summons was issued, though service of copy was made, are set forth in detail, and the fact alleged of notice of appearance and answer, and the assertion by defendant's attorney that this was in ignorance of the defect in the summons.

Leave to file the petition was granted, and this having been done, a rule was entered thereon, to which the judge presiding in the circuit court, and before whom all the proceedings referred to in the petition were had, and by whom the decision was made, made due return submitting his action in the premises, and certifying that his reasons for denying the motion were set forth in the order, which is given at length. It appears therefrom that the motion was denied "upon the sole ground that no action of Gertrude Glaser, as administratrix of *the goods, chattels, and credits of Isador [173] Glaser, deceased, plaintiff, against Anthony P. Langer, defendant, is nor ever has been pending in this court."

In cases over which we possess neither original nor appellate jurisdiction, we cannot grant mandamus. Rev. Stat. § 716, U. S. Comp. Stat. 1901, p. 580; *Re Massachusetts*, 197 U. S. 482, ante, 845, 25 Sup. Ct. Rep. 512.

Of course there is no pretense of original jurisdiction here, and since the passage of the act of March 3, 1891 (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 547), we have no jurisdiction to review the judgments or decrees of the district and circuit courts directly by appeal or writ of error in cases such as this case, if pending in the circuit court.

Rule discharged. Petition denied.

GEORGE SCHLOSSER, Plff. in Err.,
v.

W. L. HEMPHILL, Richard Ryan, and Palo Alto County, Iowa.

(See S. C. Reporter's ed. 173-176.)

Error to state court—final judgment.

A judgment of the highest state court reversing

NOTE.—On original jurisdiction of court of last resort in mandamus cases—see note to *People ex rel. Kocourek v. Chicago*, 58 L. R. A. 833.

On superintending control and supervisory jurisdiction of the superior over the inferior or subordinate tribunal—see note to *State ex rel. Fourth Nat. Bank v. Johnson*, 51 L. R. A. 83.

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Kliple v. Illinois*, 42

the decree of the trial court in an equity cause, and remanding the cause for further proceedings in harmony with its opinion, is not final in such a sense as will sustain a writ of error from the Supreme Court of the United States, although equity causes are heard on appeal *de novo* in the state court, and the successful party is entitled to a decree in that court if he moves for it, where no such decree was applied for or rendered, and, under the state practice, newly discovered evidence may be introduced in the court below, and the pleadings amended after the cause is remanded.

[No. 175.]

Argued March 13, 14, 1905. Decided May 8, 1905.

IN ERROR to the Supreme Court of the State of Iowa to review a judgment reversing the decree of the District Court of

Palo Alto County, in that state, in an equity cause, and remanding the cause for further proceedings in harmony with its opinion. *Dismissed* for want of jurisdiction.

See same case below, 118 Iowa, 452, 90 N. W. 842.

Statement by Mr. Chief Justice **Fuller**:

The case is thus stated by the supreme court of Iowa, to which it had been carried by appeal from the district court of Palo Alto county:

"This is an action in equity to quiet title to a tract of some 290 acres of land in the south half of section 30, township 97, range 34, in Palo Alto county. Plaintiff is the admitted owner of lots 2 and 3, forming a part of said tract, and containing about 99 acres. According to the *original govern-[174]ment survey, made in 1857, this land was

L. ed. U. S. 998; *Re Buchanan*, 39 L. ed. U. S. 884.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to *Mutual L. Ins. Co. v. McGrew*, 63 L. R. A. 33.

On what the record must show respecting the presentation and decision of a Federal question in order to confer jurisdiction on the Supreme Court of the United States on a writ of error to a state court—see note to *Hooker v. Los Angeles*, 63 L. R. A. 471.

As to what is the record for the purpose of showing the jurisdiction of the Supreme Court of the United States on a writ of error to a state court—see note to *Home for Incurables v. New York*, 63 L. R. A. 329.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to *Missouri ex rel. Hill v. Dockery*, 63 L. R. A. 571.

On the practice and procedure governing the transfer of causes to the Federal Supreme Court on writ of error or appeal—see note to *Wedding v. Meyler*, 66 L. R. A. 833.

What judgments of state courts are final for the purpose of a review in the Supreme Court of the United States.

The question as to what judgments of state courts are final within the meaning of the rule that only final adjudications of those courts can be brought into the Supreme Court of the United States (*Goodenough Horseshoe Mfg. Co. v. Rhode Island Horseshoe Co.* 154 U. S. 635 Appx., and 24 L. ed. 368, 14 Sup. Ct. Rep. 1180) is considered in division III. a, of note to *Apex Transp. Co. v. Garbade*, 62 L. R. A. 513, on *What adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts.*

Summarizing the results of the investigation of this question as disclosed by the note to which reference has just been made, it may be said:

All judgments and decrees of the highest court of a state, which determine the particular cause, are final for this purpose. *Weston v. Charleston*, 2 Pet. 449, 7 L. ed. 481; *O'Dowd v.* 198 U. S.

Russell, 14 Wall. 402, 20 L. ed. 857; *Martin v. Hunter*, 1 Wheat. 304, 4 L. ed. 97; *Hartman v. Greenhow*, 102 U. S. 672, 26 L. ed. 271; *Holmes v. Jennison*, 14 Pet. 540, 10 L. ed. 579; *Wheeling & B. Bridge Co. v. Wheeling Bridge Co.* 138 U. S. 287, 34 L. ed. 967, 11 Sup. Ct. Rep. 301; *Lessieur v. Price*, 12 How. 59, 13 L. ed. 893.

An affirmance of an interlocutory order of a lower court lacks the requisite finality. *Meagher v. Minnesota Thresher Mfg. Co.* 145 U. S. 608, 36 L. ed. 834, 12 Sup. Ct. Rep. 876; *Werner v. Charleston*, 151 U. S. 360, 38 L. ed. 192, 14 Sup. Ct. Rep. 356; *Verden v. Coleman*, 18 How. 86, 15 L. ed. 272; *Reddall v. Bryan*, 24 How. 420, 16 L. ed. 740; *Gibbons v. Ogden*, 6 Wheat. 448, 5 L. ed. 302.

A decree of the highest court of a state dissolving a preliminary injunction which had been granted by a lower court is not final for the purpose of review in the Supreme Court of the United States. *Moses v. Moblle*, 15 Wall. 387, 21 L. ed. 176.

A judgment which affirms an order of the lower court overruling a motion to quash an execution (*Loeber v. Schroeder*, 149 U. S. 580, 37 L. ed. 856, 13 Sup. Ct. Rep. 934), or refusing a new trial, is not final for this purpose (*Beaupre v. Noyes*, 138 U. S. 397, 34 L. ed. 991, 11 Sup. Ct. Rep. 296; *National L. Ins. Co. v. Scheffer*, 131 U. S. 603 Appx., and 26 L. ed. 1110).

A judgment or decree, to be final for this purpose, must so terminate the litigation between the parties on the merits that, if there should be an affirmance in the Federal court, the court below would have nothing to do but to execute the judgment or decree which it had already rendered. Judgments or decrees which do not measure up to this standard are those which award a new trial (*Tracy v. Holcombe*, 24 How. 426, 16 L. ed. 742; *Houston v. Moore*, 3 Wheat. 433, 4 L. ed. 428; *Rankin v. Tennessee*, 11 Wall. 380, 20 L. ed. 175; *Johnson v. Keith*, 117 U. S. 199, 29 L. ed. 888, 6 Sup. Ct. Rep. 669; *Hart v. Burnett*, 20 Cal. 169) or remand the cause for further proceedings (*Kimball v. Evans*, 93 U. S. 320, 23 L. ed. 920; *McComb v. Knox County*, 91 U. S. 1, 23 L. ed. 185; *Moore v. Robbins*, 18 Wall. 588, 21 L. ed. 758; *St. Clair County v. Livingston*, 18 Wall. 628, 21 L. ed. 813; *Zeller v. Switzer*, 91 U. S.

adjacent to a lake, which was meandered, and the meander lines were run along the north side of the said two lots. The remainder of the land claimed lies between this meander line and the alleged shore of the lake, and is the subject of the controversy. The half section in question—that is, such part of it as lies beyond the original meander line—was resurveyed by the government in the year 1898, and platted into five lots, of which lots 11, 14, and 16 are claimed by defendant Hemphill, and lots 12 and 13 by defendant Ryan. These claims are founded upon conveyances from Palo Alto county, under a patent issued to the state, under the swamp land grant of 1850, and which is based upon the resurvey of 1898. Schlosser insists that the meander line is not his boundary, it not marking the edge of the lake, but that he is entitled to claim up to the east and west half-section line of said section. There was a decree for plaintiff, and defendants appeal.” 118 Iowa, 452, 90 N. W. 842.

The supreme court ruled that “where a body of water is meandered, such lines are not boundary lines, and the adjacent owner will usually take title to the actual shore; but where there is no adjacent body of water proper to be meandered, such line becomes a boundary, and the purchaser from the government cannot claim title beyond it;” and held upon the facts that there was no body of water in section 30 necessary to be meandered, and that plaintiff could not claim title beyond the meandered line. The court said, in concluding: “In our opinion the plaintiff has no right to any other than the land patented to his grantor, and the decree of the trial court must therefore be reversed.” And entered judgment as follows:

“In this cause, the court, being fully advised in the premises, file their written opinion reversing the judgment of the district court.

“It is therefore considered by the court that the judgment of the court below be and it is hereby reversed and set aside, and the cause is remanded for further proceedings in harmony *with the opinion of this [175] court, and that a writ of *procedendo* issue accordingly.

“It is further considered by the court that the appellee pay the costs of this appeal, taxed at \$227.70, and that execution issue therefor.”

This writ of error was thereupon brought.

Messrs. Charles A. Clark and George E. Clark argued the cause and filed a brief for plaintiff in error.

Mr. E. B. Evans argued the cause, and, with *Mr. H. C. Evans*, filed a brief for defendants in error.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

By its judgment the supreme court of Iowa reversed the decree of the trial court, and remanded the cause “for further proceedings in harmony with the opinion of this court.”

We have heretofore held that a judgment couched in such terms is not final in such a sense as to sustain a writ of error from this court. *Haseltine v. Central Nat. Bank*, 183 U. S. 130, 46 L. ed. 117, 22 Sup. Ct. Rep. 49. It was there ruled that the face of the judgment is the test of its finality, and that this court cannot be called on to inquire whether, when a cause is sent back, the defeated party might or might not make a better case.

487, 23 L. ed. 366; *Bostwick v. Brinkerhoff*, 106 U. S. 3, 27 L. ed. 73, 1 Sup. Ct. Rep. 15; *Cincinnati Street R. Co. v. Snell*, 179 U. S. 395, 45 L. ed. 248, 21 Sup. Ct. Rep. 205; *Great Western Teleg. Co. v. Burnham*, 162 U. S. 339, 40 L. ed. 991, 16 Sup. Ct. Rep. 850; *Brown v. Baxter* [Brown v. Marlon Nat. Bank] 146 U. S. 619, 36 L. ed. 1106, 13 Sup. Ct. Rep. 260; *Winn v. Jackson*, 12 Wheat. 135, 6 L. ed. 577; *Pepper v. Dunlap*, 5 How. 51, 12 L. ed. 46; *Parcels v. Johnson*, 20 Wall. 653, 22 L. ed. 410; *Davis v. Crouch*, 94 U. S. 514, 24 L. ed. 281; *Rice v. Sanger*, 144 U. S. 197, 36 L. ed. 403, 12 Sup. Ct. Rep. 664; *Haseltine v. Central Nat. Bank*, 183 U. S. 130, 46 L. ed. 117, 22 Sup. Ct. Rep. 49; *Union Mut. L. Ins. Co. v. Kirchoff*, 160 U. S. 374, 40 L. ed. 461, 16 Sup. Ct. Rep. 318).

If by any direction of the highest court of a state the entire cause is determined, the decision constitutes a final judgment for the purpose of a review by the Supreme Court of the United States. *Tippencanoe County v. Lucas*, 93 U. S. 108, 23 L. ed. 822; *Mower v. Fletcher*, 114 U. S. 127, 29 L. ed. 117, 5 Sup. Ct. Rep. 799; *Atherton v. Fowler*, 91 U. S. 143, 23 L. ed. 265.

But if the lower court has power to make a new case by amending the pleadings (*Clark v. Kansas City*, 172 U. S. 334, 43 L. ed. 467, 19 Sup. Ct. Rep. 207), or if the highest state court, though fixing the rights and liabilities of the parties, refers the case to a master or subordinate court for a judicial purpose, there is no final decree (*California Nat. Bank v. Stahler*, 171 U. S. 447, 43 L. ed. 233, 19 Sup. Ct. Rep. 6; *Drake v. Kochersperger*, 170 U. S. 303, 42 L. ed. 1046, 18 Sup. Ct. Rep. 942).

The decision of the highest court of a state, ordering a lower state court to discharge a rule for contempt, cannot be so reviewed. *Newport Light Co. v. Newport*, 151 U. S. 527, 38 L. ed. 259, 14 Sup. Ct. Rep. 429.

A judgment of the highest state court, which is simply a direction to transfer the possession of a railroad in the hands of a receiver to the comptroller general of the state, subject to such orders as the lower court shall deem necessary for the protection of the rights of the parties in the principal suit, is not a final judgment in the cause, which can be reviewed by the Supreme Court of the United States. *Hand v. Hagood*, 131 U. S. clxxxi Appx., and 26 L. ed. 301.

It is true that in Iowa the supreme court hears equity cases on appeal *de novo*, and the successful party is entitled to a decree in that court, if he moves for it (*First Nat. Bank v. Baker*, 60 Iowa, 132, 14 N. W. 125), but in the present case no such decree was applied for or rendered. Nor did the supreme court direct the court below to dismiss plaintiff's petition, or in terms direct the specific decree to be entered.

And it has been repeatedly held by that court that when a case triable *de novo* is remanded for judgment in the court below, the parties may be permitted to introduce [176] material evidence *discovered since the original trial, and may amend the pleadings for the purpose of setting up matters materially affecting the merits, subsequently occurring. *Sanzey v. Iowa City Glass Co.* 68 Iowa, 542, 27 N. W. 747; *Adams County v. Burlington & M. R. Co.* 44 Iowa, 335; *Shorthill v. Ferguson*, 47 Iowa, 284; *Jones v. Clark*, 31 Iowa, 497. In the latter case, the court below, the district court, refused to permit amendments, holding, "as a matter of law, that when a chancery case has been appealed to the supreme court, and has been there heard upon its merits, and is remanded to the district court, with instructions as set forth in the *procedendo* in this cause, the district court has no power to grant leave to amend." But the supreme court reversed the district court, and held that that court might, "at any time, in furtherance of justice, and on such terms as may be proper, permit a party to amend any pleadings or proceedings. Rev. § 2977."

Doubtless the conclusions arrived at by the state supreme court, and expressed in its opinion, furnish the grounds on which the court below must proceed when the case goes to a decree there, if no change in pleadings or proof takes place, but we cannot say what action might nevertheless be taken, and as no decree was entered in the supreme court, and no specific instruction was given to the court below, we think the writ of error cannot be maintained. Assuming, without deciding, that a Federal question was so raised as otherwise to have justified the exercise of our jurisdiction, we can but repeat what we said in *Haseltine's Case*: "The plaintiffs in the case under consideration could have secured an immediate review by this court if the court, as a part of its judgment of reversal, had ordered the circuit court to dismiss their petition; when, under *Mower v. Fletcher*, 114 U. S. 127, 29 L. ed. 117, 5 Sup. Ct. Rep. 799, they might have sued out a writ of error at once."

Writ of error dismissed.

198 U. S.

*W. L. WELLS COMPANY, *Petitioner*. [177]
v.

GASTONIA COTTON MANUFACTURING
COMPANY.

(See S. C. Reporter's ed. 177-188.)

*Corporations—creation—citizenship for the
purpose of Federal jurisdiction.*

Incorporators under a charter which declares that they "are hereby created a body politic and corporate" become a corporation under the laws of Mississippi for the purpose of suing and being sued in the Federal courts as a citizen of that state upon the approval of such charter by the governor, and the certification of such approval by the secretary of state, under the great seal of the state, although there has been no compliance with the subsequent provision of the charter conferring the power to commence business when a certain proportion of the capital stock shall be subscribed and paid for.

[No. 237.]

*Argued April 28, 1905. Decided May 8,
1905.*

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit to review a judgment which reversed the judgment of the Circuit Court for the Western District of North Carolina on the ground that the incorporation of the plaintiff under the laws of Mississippi was not established so as to entitle it to sue in its alleged corporate name, and remanded the cause, with liberty to amend by inserting the individual names of those constituting the company in whose name the action was brought. *Reversed* and remanded for further proceedings.

See same case below, 63 C. C. A. 111, 128 Fed. 369.

The facts are stated in the opinion.

Messrs. Joseph Hirsh and Charles W. Tillett argued the cause, and, with *Mr. Murray F. Smith*, filed a brief for petitioner:

Where the charter of incorporation provides that the persons therein named be, and they are thereby, created a body politic and corporate under the name and style of the proposed corporation, it is in itself the creation of a corporation, requiring no other act to be performed by the incorporators than their acceptance of the charter; and the corporation is in existence, for all purposes of its creation, from the beginning.

Perkins v. Sanders, 56 Miss. 733; *St*

NOTE.—On citizenship of corporation for purpose of Federal jurisdiction in state other than that of incorporation—see note to *Stephens v. St. Louis & S. F. R. Co.* 14 L. R. A. 184.

Joseph & I. R. Co. v. Shambaugh, 106 Mo. 567, 17 S. W. 581; *Hammond v. Straus*, 53 Md. 1.

Plaintiff was at least a corporation *de facto*.

Tulare Irrig. District v. Shepard, 185 U. S. 1, 13, 46 L. ed. 773, 779, 22 Sup. Ct. Rep. 531; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 137 U. S. 568-571, 34 L. ed. 784-786, 11 Sup. Ct. Rep. 185; *Whitney v. Wyman*, 101 U. S. 392, 25 L. ed. 1050; *Close v. Glenwood Cemetery*, 107 U. S. 466, 27 L. ed. 408, 2 Sup. Ct. Rep. 267; *Gartside Coal Co. v. Maxwell*, 22 Fed. 197; *Farmers' Loan & T. Co. v. Toledo, A. A. & N. M. R. Co.* 67 Fed. 49; *Andrews v. National Foundry & Pipe Works*, 36 L. R. A. 153, 23 C. C. A. 454, 46 U. S. App. 619, 77 Fed. 774; *Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.* 82 Fed. 642; *Louisville Trust Co. v. Louisville, N. A. & C. R. Co.* 28 C. C. A. 202, 56 U. S. App. 208, 84 Fed. 539; *Venner v. Farmers' Loan & T. Co.* 33 C. C. A. 95, 62 U. S. App. 141, 90 Fed. 348; *Deitch v. Staub*, 53 C. C. A. 137, 115 Fed. 309; *Snider's Sons' Co. v. Troy*, 91 Ala. 224, 11 L. R. A. 515, 24 Am. St. Rep. 887, 8 So. 658; *Fay v. Noble*, 7 Cush. 188; *Martin v. Deetz*, 102 Cal. 55, 41 Am. St. Rep. 151, 36 Pac. 368; *Burns v. Beck & G. Hardware Co.* 83 Ga. 471, 10 S. E. 121; *Swartwout v. Michigan Air Line R. Co.* 24 Mich. 389; *Finnegan v. Noerenberg*, 52 Minn. 239, 18 L. R. A. 778, 38 Am. St. Rep. 552, 53 N. W. 1150; *State ex rel. Atty-Gen. v. Simonton*, 78 N. C. 57; *Hackensack Water Co. v. De Kay*, 36 N. J. Eq. 548; *Eaton v. Aspinwall*, 19 N. Y. 121; *American Salt Co. v. Heidenheimer*, 80 Tex. 344, 26 Am. St. Rep. 743, 15 S. W. 1038; 1 Clark & M. Priv. Corp. pp. 257, 259; *Stokes v. Findlay*, 4 McCrary, 205, Fed. Cas. No. 13,478; *Duke v. Cahawba Nav. Co.* 10 Ala. 82, 44 Am. Dec. 472; *Bibb v. Hall*, 101 Ala. 79, 14 So. 98; *Lehman v. Warner*, 61 Ala. 455; *Canfield v. Gregory*, 66 Conn. 9, 33 Atl. 536; *Union Water Co. v. Kean*, 52 N. J. Eq. 111, 27 Atl. 1015, 1 Cook, Corp. 5th ed. (1903) § 13; *Pietsch v. Krause*, 116 Wis. 344, 93 N. W. 9; *Taylor, Corp.* 4th ed. § 146.

There may be a corporation *de facto*, the existence of which cannot be attacked collaterally, though the capital stock, or a certain percentage thereof, was not subscribed or paid, as required by the statute.

1 Clark & M. Priv. Corp. 257-259; *Stokes v. Findlay*, 4 McCrary, 205, Fed. Cas. No. 13,478; *Bibb v. Hall*, 101 Ala. 79, 14 So. 98; *Canfield v. Gregory*, 66 Conn. 9, 33 Atl. 536; *Union Water Co. v. Kean*, 52 N. J. Eq. 111, 27 Atl. 1015; *Merchants & M. Bank v. Stone*, 38 Mich. 779; *State ex rel. Atty. Gen. v. Simonton*, 78 N. C. 57; *Hackensack Water Co. v. De Kay*, 36 N. J. Eq. 548;

Eaton v. Aspinwall, 19 N. Y. 121; *Rice v. Rock Island & A. R. Co.* 21 Ill. 93; *Burns v. Beck & G. Hardware Co.* 83 Ga. 471, 10 S. E. 121; *McCandless v. Inland Acid Co.* 115 Ga. 968, 42 S. E. 449; *First Nat. Bank v. Almy*, 117 Mass. 476; *Fargason v. Oxford Mercantile Co.* 78 Miss. 65, 27 So. 877; *Oregonian R. Co. v. Oregon R. & Nav. Co.* 10 Sawy. 472, 23 Fed. 232; *Armour v. E. Bement's Sons*, 62 C. C. A. 142, 123 Fed. 56; *Andes v. Ely*, 158 U. S. 312, 39 L. ed. 996, 15 Sup. Ct. Rep. 954; *Hammond v. Straus*, 53 Md. 1.

A failure to pay for the capital stock of a corporation cannot be made the basis of defense by a debtor of said corporation; the question can only be raised by the state.

Smith v. Mississippi & A. R. Co. 6 Smedes & M. 179.

The failure to issue capital stock is immaterial.

Close v. Glenwood Cemetery, 107 U. S. 466, 27 L. ed. 408, 2 Sup. Ct. Rep. 267.

Mr. Augustus H. Price argued the cause, and, with Messrs. Charles Price, Armistead Burwell, and Edwin Cansler, filed a brief for respondent:

A shareholder in a corporation has no legal title to the property or profits of the corporation until a division is made. He has no inchoate or other right until the dividends have been declared.

Queen v. Arnaud, 9 Q. B. 806; *Browne v. Collins*, L. R. 12 Eq. Cas. 594; *Van Allen v. Assessors (Churchill v. Utica)* 3 Wall. 573, 18 L. ed. 229; *Hyatt v. Allen*, 56 N. Y. 557, 15 Am. Rep. 449; *Minot v. Paine*, 99 Mass. 101, 96 Am. Dec. 705; *Utica v. Churchill*, 33 N. Y. 237.

Profits, until a division is made, are assets of the corporation, and not income due the stockholders.

Waterman v. Alden, 42 Ill. App. 294.

It is not pretended that any of the members of the company paid anything on the stock subscriptions out of their own pockets. The only contention that can be made is that, by reason of accumulation of the profits of the business during the first year, there were sufficient assets to pay the required amount on the subscriptions for stock. But this fund belonged to the company, and could not be applied to the payment of stock subscriptions without its consent and without some formal action taken by it. Unless this was done, the incorporation of the company could not be effected.

Lake Ontario, A. & N. Y. R. Co. v. Mason, 16 N. Y. 451; *Jersey City Gas Co. v. Dwight*, 29 N. J. Eq. 242.

If there was no payment for the subscriptions for stock, there was necessarily no proper organization of the corporation.

Morawetz, Priv. Corp. 1st ed. § 267; *Fiscer v. Mississippi & T. R. Co.* 32 Miss. 359; *Barrington v. Mississippi C. R. Co.* 32 Miss. 370.

In forming a corporation under a general enabling act, it is necessary that all the mandatory provisions of the statute should be substantially complied with.

1 Beach, Priv. Corp. p. 18, § 12; p. 26, § 16; *Bigelow v. Gregory*, 73 Ill. 197; *Kaiser v. Lawrence Sav. Bank*, 56 Iowa, 104, 41 Am. Rep. 85, 8 N. W. 772.

A corporation defectively organized can pass no title to property held by it as its own.

Hincks v. Converse, 37 La. Ann. 484.

The Federal courts have only limited jurisdiction, their authority and powers are strictly statutory. They can acquire jurisdiction of a case only in the manner pointed out by the statute.

Farmington v. Pillsbury, 114 U. S. 138, 29 L. ed. 114, 5 Sup. Ct. Rep. 807.

Mr. Justice **Harlan** delivered the opinion of the court:

The plaintiff, the W. L. Wells Company, seeks in this action to recover a balance alleged to be due from the defendant, the Gastonia Cotton Manufacturing Company, on account of certain sales of cotton in the years 1899 and 1900.

The complaint averred that the plaintiff and defendant were, respectively, created and duly organized as corporations,—the former, under the laws of Mississippi; the latter, under the laws of North Carolina.

[178] *The defendant admitted that it was a corporation, duly organized under the laws of North Carolina, and a citizen and resident of that state, but averred that it had “no knowledge or information sufficient to form a belief as to the truth of the allegation contained in the 1st section of the complaint, to wit, that the plaintiff is a corporation organized under the laws of the state of Mississippi, and a citizen and resident of that state, and, therefore, it denies the said allegation.” The other paragraphs of the answer put in issue the allegations of the complaint touching the plaintiff’s claim against the defendant.

There was another action in the same court brought by the W. L. Wells Company against the Avon mills on account of transactions like those involved in the other case.

By consent of the parties, and pursuant to an order of court, the two cases were consolidated and tried together. In answer to questions propounded by the court the jury found that the W. L. Wells Company was, as alleged in the complaint, a corporation and a citizen and resident of Mississippi, and entitled to recover the sum of \$39,313-

88. A judgment was rendered for that amount against the Gastonia Cotton Manufacturing Company; the circuit court holding, upon a review of the evidence in connection with the findings of the jury, that the W. L. Wells Company was a corporation of Mississippi, and as such entitled to invoke the jurisdiction of that court as against the defendant corporation of North Carolina. 118 Fed. 190.

The case was then carried to the circuit court of appeals, which adjudged that the plaintiff had failed to establish the allegations of the complaint as to its corporate capacity, and, therefore, was not entitled to sue in the circuit court in its alleged corporate name. Without considering the merits of the case, that court reversed the judgment for want of jurisdiction in the circuit court, and the cause was remanded, with liberty to the plaintiffs, if it was so advised, to amend the complaint by inserting the individual names of those constituting the company in whose name the action was brought, which *being done a new trial should be [179] granted; and if the plaintiff declined to amend, then the case was to be dismissed without prejudice. 63 C. C. A. 111, 128 Fed. 369. Subsequently, the present writ of certiorari was granted.

As the plaintiff was not entitled to maintain its action in the circuit court unless it was a corporation of Mississippi (*Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S. 449, 454, 456, 44 L. ed. 842, 844, 845, 20 Sup. Ct. Rep. 690, and the authorities there cited), the denial in the answer of knowledge or information sufficient to form a belief on that point put in issue the plaintiff’s corporate character, within the meaning of the rule, no longer to be questioned, that for purposes of suing and of being sued in the courts of the United States the members of a corporation are to be deemed citizens of the state by whose laws it was created; and as the jurisdiction of the courts of the United States must always appear affirmatively, of record, it became necessary, under existing statutes, and under the rules of practice and pleading in North Carolina, for the plaintiff to prove that it was a corporation of Mississippi. *Roberts v. Lewis*, 144 U. S. 653, 656, 36 L. ed. 579, 582, 12 Sup. Ct. Rep. 781; act of June 1st, 1872 (17 Stat. at L. 197, chap. 255, Rev. Stat. § 914, U. S. Comp. Stat. 1901, p. 684); act of March, 1875 (18 Stat. at L. 470, chap. 137, U. S. Comp. Stat. 1901, p. 508); N. C. Code Civ. Proc. §§ 133, 243, 260, 276; *Southern P. Co. v. Denton*, 146 U. S. 202, 36 L. ed. 943, 13 Sup. Ct. Rep. 44. It was so held, and correctly, by the circuit court of appeals. 63 C. C. A. 111, 128 Fed. 369.

Was the plaintiff a corporation of Missis-

Mississippi within the meaning of the above rule? In that state individuals may become incorporated for certain purposes under general laws. The first step there towards incorporation is to apply to the governor for a charter, stating the purposes for which the corporation is to be created. That officer then takes the advice of the attorney general as to the constitutionality and legality of the provisions of the proposed charter. If the

[183] governor *approves the charter, and causes the great seal of the state to be affixed thereto by the secretary of state, it would seem that the process of incorporation then becomes complete. Charters of incorporation in that state are required to be recorded in the office of the secretary of state and in the office of the clerk of the chancery court of the county in which the corporation does business. Miss. Anno. Code 1892, chap. 25.

It appeared in evidence that W. L. Wells, John T. Wells, and George Butterworth submitted to the governor of Mississippi, to be referred to the attorney general of the state, the following form of charter:

"§ 1. Be it known and remembered that W. L. Wells, John T. Wells, and George Butterworth, their associates and assigns, are hereby created a body politic and corporate, under the name and style of W. L. Wells Company, and by that name shall have succession for fifty years, shall have power to sue and be sued, contract and be contracted with, may have a corporate seal, and break and alter the same at pleasure. § 2. The capital stock of said corporation shall be \$50,000, divided into shares of \$500 each, and as soon as \$10,000 of said stock is subscribed and paid for, said corporation shall have power to commence business. § 3. Said corporation is formed for the purpose of conducting a general cotton business, and may buy and sell cotton, and may transact a cotton factorage business, may advance money or supplies for the purpose of controlling shipments of cotton, may take and receive mortgages or deeds of trust upon property to secure said advances, and generally may have all powers conferred by chapter 25 of the Annotated Code of 1892 necessary and requisite to carry out the purpose of said corporation. § 4. The board of directors of said corporation shall consist of three persons, whose numbers may be increased at any time by a majority vote of the stockholders, and said directors shall have power to elect all necessary officers, and prescribe the duties, salaries, and tenure of such officers."

[184] *The attorney general having certified that the proposed charter of incorporation was not repugnant to the Constitution or laws of the state, it was approved by the governor, and such approval was attested by the sec-

retary of state, the great seal of the state being thereto affixed. The secretary thereupon certified under the great seal that the charter "incorporating the W. L. Wells Company was, pursuant to the provisions of chapter 25 of the Annotated Code, 1892, recorded in the book of incorporations in this office." It was also recorded in the office of the clerk of the proper chancery court.

The contention of the defendants in the court below was—and their contention here is—that the subscription of \$10,000 to the capital stock of the W. L. Wells Company, and the payment thereof, was a condition precedent to the company's becoming a corporation; that is, it could not become a corporation *de jure* until such subscription and payment. And this view was sustained by the circuit court of appeals, which said in its opinion: "It is very clear from this that having a charter like this, conditioned upon the payment of \$10,000 in subscriptions, then these men undertook to exercise powers in the charter without fulfilling or attempting to fulfil the conditions precedent in the charter; that even when they had made money in the business they ignored the corporation altogether, and drew the money out of the business as if it belonged to them, and not to the corporation. The charter never went into operation, and the corporation never became a legal entity. More than this, these assumed corporators went on in business, and contracted obligations in the name of the so-called corporation which did not possess a dollar of property, or have any mode of meeting a debt, thus seeking to cloak their transactions under an assumed corporate name, and avoid in this way all personal responsibility. At the same time two of them were, in a business sense, irresponsible. It would seem that this transaction was an abuse of, and in fraud of, the law, and that the Wells Company had never and *could not have any legal existence. [185] When a corporation is formed under an enabling act, all the mandatory provisions of the statute must be complied with." 63 C. C. A. 111, 114, 128 Fed. 369, 372.

We are of opinion that the circuit court of appeals erred in holding that the charter of the W. L. Wells Company made it a condition of its becoming a corporation that \$10,000 of capital stock should be subscribed and paid for. The question was not as to the good faith of the incorporators, nor whether the company was organized in fraud of the law. Those were not matters to be inquired into in ordinary suits between the company and individuals or corporations. If the organization of the company as a corporation was tainted with fraud, it was for the state, by some appropriate proceeding, to annul its charter. The question before the

court below was whether the company was, technically, a corporation, and that depended upon the legal effect of the words of its charter. The 1st section of that charter expressly declares that the incorporators, their associates and assigns, "are *hereby created* a body politic and corporate, under the name and style of W. L. Wells Company, and by that name shall have succession for fifty years, shall have power to sue and be sued, contract and be contracted with, may have a corporate seal, and break and alter the same at pleasure." These words can have but one meaning. They manifest the purpose of the legislature to create a corporation. Substantially the same words in a charter granted by Congress were held to create a corporation. *Minor v. Mechanics' Bank*, 1 Pet. 47, 63, 7 L. ed. 47, 54. The 2d section of the company's charter did not modify the provisions of the 1st section. It did not *require* the payment of a given amount of stock subscriptions before the company should be considered *in esse* as a corporation. It did nothing more than confer the privilege or power of commencing business when a specified amount, less than the whole, of its authorized capital stock was subscribed and paid for. The company was created a [186] corporation by the previous section, *with power in its corporate name to sue and be sued, contract and be contracted with; and, under the general statutes of the state, it came into existence as a corporation immediately upon its charter being approved by the governor of Mississippi, and such approval certified by the secretary of state, under the great seal of the state. If the commencing of the business for which it was incorporated before a certain amount of capital stock was subscribed and paid for was in violation of the company's charter, that was a matter for which it could be called to account by the state, and did not affect the existence in law of the company as a corporation. Of course, if the charter of the company had made it a *condition precedent* to its becoming a corporation that a certain amount of capital stock should be subscribed and paid for, a compliance with that condition would have been necessary before the company would have become a corporation entitled to sue and be sued in the courts of the United States. But, as we have seen, the charter in question prescribed no such condition. If the legislature had intended to withhold corporate existence until a given amount of capital stock was subscribed and paid for, that intention, we may assume, would have been manifested by clear language. We do not feel at liberty, by mere construction, to qualify the explicit declaration in the 1st section of plaintiff's charter as to the corporate existence thereby creat-

ed. We therefore hold that under the statutes of Mississippi the only conditions precedent to the existence of the corporation was the approval by the governor of the state of its proposed charter, and the certification of that approval under the great seal of the state.

It is said that the interpretation we have given to the charter of the W. L. Wells Company is not in harmony with the principles announced by the supreme court of Mississippi. We are referred in support of this view to *Perkins v. Sanders*, 56 Miss. 733, 738, 739, which was a suit by a creditor to enforce the personal liability of stockholders for the debts of a certain company. But there is nothing in that case clearly indicating *that the supreme court of Missis-[187] sippi would, if this question were before it, hold the requirement of the subscription of \$10,000 of stock, and its payment before commencing business, to have been a condition precedent to the plaintiff's becoming a corporation. That court, in the case cited, referred to a section of the charter of the company there in question, providing that the persons named in it, and all others who then were or might thereafter become associated with them, and their successors and assigns, "be and they are hereby created a body politic and corporate, under the name," etc.—a provision like that found in the plaintiff's charter. The court said: "This was no proposition to create a corporation upon the performance of precedent conditions, but it was itself the creation of a corporation, requiring no other act to be performed by the corporators than their acceptance of the charter, and this even was unnecessary, if, as it is probable, the corporators had applied for the grant of the charter, and thus accepted it in advance. . . . The distinction between the two classes of charters is thus seen to be that in the first class the charter is mere permission on the part of the legislature for the formation of a corporation upon the doing of certain acts prescribed in the charter as precedent conditions, and, as a necessary result, no corporate act can be done until those conditions have been performed, except such as may be expressly permitted by the charter; and, as to those acts, it would be considered that the corporation had an existence before its full investiture with its corporate franchises. In the latter class, in which is this company, the corporation is in existence for all the purposes of its creation from the beginning, except so far as there may be restraints placed on it by the charter, either expressly or by plain implication."

It thus appears that the supreme court of Mississippi, in the case referred to, decided that where acts are required to be performed

before the corporation comes into existence, no corporation is created or can exist until those acts are performed. In this general [188] view we entirely concur. But the *question remains whether the particular charter here in question made it a condition precedent to the existence of the W. L. Wells Company as a corporation, that a certain amount of its capital stock should be subscribed and paid for. As already indicated, we are of opinion that no such condition precedent was prescribed, and that under the statutes of Mississippi, and independently of the subscription of a certain amount of stock and its payment, the plaintiff became, in law, a corporation when the governor approved its charter, and the fact of such approval was certified by the secretary of state under the great seal of Mississippi. It could not thereafter dispute its liability for acts done by it in its corporate name, nor be denied the right to sue in that name.

As the Circuit Court of Appeals proceeded on different grounds as to the jurisdiction of the Circuit Court, its judgment must be reversed, and the case remanded, with directions to that court to set aside its own judgment, and for such further proceedings touching the merits of the case as may be consistent with this opinion and with law.
Reversed.

RIVERDALE COTTON MILLS, *Petitioner*,
v.

ALABAMA & GEORGIA MANUFACTURING COMPANY and Huguley Manufacturing Company.

(See S. C. Reporter's ed. 188-202.)

Federal courts—conclusiveness of judgments in state courts—ancillary jurisdiction—enjoining proceedings in state court.

1. Judgments or decrees of a Federal court whose jurisdiction is invoked on the ground of diverse citizenship, which is alleged and admitted, cannot be collaterally assailed in a state court on the ground that there was in fact no diverse citizenship.
2. A Federal court which has decreed a foreclosure in a suit in which diverse citizenship was alleged and admitted, and the property

NOTE.—As to conclusiveness and effect of judgments as between Federal and state courts—see notes to *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 478, and *Union & Planters' Bank v. Memphis*, 49 C. C. A. 468.

On the ancillary jurisdiction of the Federal courts—see note to *Rosenbaum Bros. v. Council Bluffs Ins. Co.* 3 L. R. A. 190.

On enjoining proceedings in state courts—see notes to *Garner v. Second Nat. Bank*, 16 C. C. A. 90; *Central Trust Co. v. Grantham*, 27 C. C. A. 575; and *Copeland v. Bruning*, 63 C. C. A. 437.

was described as lying partly in the state, may, by an ancillary suit, restrain any attack on the title of the purchaser under the decree by a suit in a state court, brought by a party to the original suit, which proceeds on the theory that, by reason of his own untruthful admission of citizenship, the Federal court assumed a jurisdiction which in fact it did not have.

3. One of two corporations bearing the same name, but incorporated in different states, will be restrained by an ancillary suit from assailing the title of a purchaser under a decree of a Federal court, foreclosing a trust deed executed under the common corporate name and describing the property as lying in both states, by a suit in a state court, which proceeds on the theory that the real grantor was the corporation which was a citizen of the same state with the plaintiff, and therefore was not and could not have been made a party defendant without ousting the Federal court of jurisdiction, where the purpose of the double incorporation was the development of a single plant, and all the proceedings were had on the supposition that there was but a single entity, which was indebted, and gave the trust deed as security for such indebtedness.

[No. 194.]

Argued April 5, 6, 1905. Decided May 8, 1905.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, to review a decree which reversed a decree of the Circuit Court for the Northern District of Georgia, enjoining the further prosecution of a suit in the Chancery Court of the First District of the Northeastern Division, State of Alabama, and remanded the cause with instructions to dismiss the bill. Judgment of the Court of Appeals reversed, and that of the Circuit Court affirmed.

See same case below, 62 C. C. A. 295, 127 Fed. 497.

Statement by Mr. Justice Brewer:

On February 7, 1866, an act passed the Alabama legislature incorporating five persons named, their associates and successors, as "The Alabama & Georgia Manufacturing Company." On March 21, 1866, the Georgia legislature incorporated the same individuals under the same name, "The Alabama & Georgia Manufacturing Company." The purposes of the two corporations were identical. Among others, the use of the water power of the Chattahoochee river, the boundary line between Alabama and Georgia, was contemplated, and the Georgia act specifically authorized the corporation "to carry on any of the business and manufactures, or any branch or branches of the same, in this state, that said charter authorizes them to engage in or carry on in the state of Ala-

bama." On January 2, 1884, the Alabama & Georgia Manufacturing Company executed a trust deed, conveying property, situate partly in Georgia and partly in Alabama, but practically only a single plant, to J. J. Robinson, W. C. Yancey, and W. T. Huguley, as trustees, to secure the payment of sixty-five thousand dollars of the mortgage bonds. There is nothing in the trust deed to indicate whether it was executed by the Alabama corporation or the Georgia corporation, except it be the mention of West Point, Georgia, as the location of the company's office.

[190] *On February 28, 1890, the Huguley Manufacturing Company was incorporated under the laws of the state of Alabama, and subsequently acquired by purchase all the property included within the trust deed. Default having been made in the payment of interest on the bonds, Robinson, one of the trustees, and a citizen of Alabama, on January 21, 1891, filed a bill of foreclosure in the circuit court of the United States for the northern district of Georgia against the Alabama & Georgia Manufacturing Company, the Huguley Manufacturing Company, each of which was alleged to have been created under the laws of the state of Georgia, and a resident and citizen of that state, and against W. T. Huguley, also averred to be a citizen of the state of Georgia, and all three residing within the northern district of Georgia. In the bill the plaintiff alleged that Yancey, one of the trustees, was dead; that Huguley, the other trustee, was interested adversely to the bondholders, and that plaintiff was, therefore, the only one authorized to bring the suit. A vast amount of litigation concerning the property has followed the commencement of this foreclosure suit, as partially appears from the following references: *Robinson v. Alabama & G. Mfg. Co.* (1891) 48 Fed. 12, (1892) 51 Fed. 268, (1893) 6 C. C. A. 79, 13 U. S. App. 359, 56 Fed. 690, (1894) 67 Fed. 189, (1896) 19 C. C. A. 152, 30 U. S. App. 683, 72 Fed. 708, (1898) 89 Fed. 218; *Huguley Mfg. Co. v. Gleton Cotton Mills* (1899) 36 C. C. A. 236, 94 Fed. 269, (1899) 175 U. S. 726, 44 L. ed. 339, 20 Sup. Ct. Rep. 1022; *Riverdale Cotton Mills v. Alabama & G. Mfg. Co.* (1901) 111 Fed. 431; *Huguley Mfg. Co. v. Gleton Cotton Mills* (1902) 184 U. S. 290, 46 L. ed. 546, 22 Sup. Ct. Rep. 452; *Re Huguley Mfg. Co.* (1902) 184 U. S. 297, 46 L. ed. 549, 22 Sup. Ct. Rep. 455; *Alabama & G. Mfg. Co. v. Riverdale Cotton Mills* (1904) 62 C. C. A. 295, 127 Fed. 497.

[191] On May 2, 1901, the Alabama & Georgia Manufacturing Company of Alabama and the Huguley Manufacturing Company *of the same state filed their bill in the chancery court of the first district of the northeastern
198 U. S.

division of the state of Alabama, in which they alleged that the plaintiff the Alabama & Georgia Manufacturing Company was at one time the owner of the property included within the trust deed hereinbefore referred to; that it executed that deed to the parties named as trustees; that a foreclosure suit was commenced by one of the trustees, J. J. Robinson, in the United States circuit court for the northern district of Georgia; that the parties named as defendants therein were the Alabama & Georgia Manufacturing Company, alleged to be a corporation organized under the laws of Georgia, the said Huguley Manufacturing Company, and W. T. Huguley. The bill set out with some detail the proceedings in the circuit court of Georgia, but alleged that they were null and void so far as concerns the title of the plaintiffs in that suit. The bill sought to redeem the property described from the lien of the bonds and trust deed. On June 10, 1901, this petitioner, a corporation which had acquired all the title to the property described in the trust deed, passing under the foreclosure proceedings hereinbefore referred to, filed in the circuit court for the northern district of Georgia an ancillary bill to restrain the further prosecution of the suit in the state court in Alabama. A temporary injunction was issued, which, on final hearing, was made perpetual. Thereupon defendants took an appeal to the circuit court of appeals for the fifth circuit, which reversed the decree of the circuit court, and ordered that the case be remanded to that court with instructions to dismiss the bill. The case was then brought here on certiorari.

Mr. Louis D. Brandeis argued the cause, and, with *Messrs. Thomas H. Watts* and *William H. Dunbar*, filed a brief for petitioner:

A proceeding to prevent a decree from being defeated is ancillary to the proceeding in which the decree was rendered.

Dunn v. Clarke, 8 Pet. 1, 8 L. ed. 845; *Milwaukee & M. R. Co. v. Milwaukee & St. P. R. Co.* (*Milwaukee & M. R. Co. v. Souther*) 2 Wall. 609, 17 L. ed. 886; *Johnson v. Christian*, 125 U. S. 642, 31 L. ed. 820, 8 Sup. Ct. Rep. 989, 1135; *Carey v. Houston & T. C. R. Co.* 161 U. S. 115, 130, 40 L. ed. 638, 643, 16 Sup. Ct. Rep. 537; *Root v. Woolworth*, 150 U. S. 401, 37 L. ed. 1123, 14 Sup. Ct. Rep. 136; *French v. Hay*, (*French v. Stewart*) 22 Wall. 250, 22 L. ed. 857; *Dietzsch v. Huidekoper* (*Kern v. Huidekoper*) 103 U. S. 494, 26 L. ed. 497.

The purchaser at a judicial sale may bring such a suit to protect the title acquired.

Root v. Woolworth, 150 U. S. 401, 37 L.

ed. 1123, 14 Sup. Ct. Rep. 136; *Blossom v. Milwaukee & C. R. Co.* 1 Wall. 655, 17 L. ed. 673; *Kneeland v. American Loan & T. Co.* 136 U. S. 89, 34 L. ed. 379, 10 Sup. Ct. Rep. 950; *Aderholt v. Henry*, 82 Ala. 541, 3 So. 114; *Milwaukee & M. R. Co. v. Milwaukee & St. P. R. Co.* (*Milwaukee & M. R. Co. v. Soutter*) 2 Wall. 609, 17 L. ed. 886; *Julian v. Central Trust Co.* 193 U. S. 93, 112, 48 L. ed. 629, 639, 24 Sup. Ct. Rep. 399.

The present suit was ancillary within the foregoing principles.

1 Bates, Fed. Eq. Proc. § 97; *Julian v. Central Trust Co.* 193 U. S. 93, 113, 114, 48 L. ed. 629, 639, 640, 24 Sup. Ct. Rep. 399; *Root v. Woolworth*, 150 U. S. 401, 37 L. ed. 1123, 14 Sup. Ct. Rep. 136; *Haralson v. George*, 56 Ala. 295.

The circuit court of the United States has jurisdiction, without regard to citizenship or other grounds, of any proceeding ancillary to a suit before it.

Pacific R. Co. v. Missouri P. R. Co. 111 U. S. 505, 522, 28 L. ed. 498, 504, 4 Sup. Ct. Rep. 583; *Dunn v. Clarke*, 8 Pet. 1, 8 L. ed. 845; *Krippendorf v. Hyde*, 110 U. S. 276, 28 L. ed. 145, 4 Sup. Ct. Rep. 27; *Labette County v. United States*, 112 U. S. 217, 28 L. ed. 698, 5 Sup. Ct. Rep. 108; *Dewey v. West Fairmont Gas Coal Co.* 123 U. S. 329, 31 L. ed. 179, 8 Sup. Ct. Rep. 148; *Johnson v. Christian*, 125 U. S. 642, 31 L. ed. 820, 8 Sup. Ct. Rep. 989, 1135; *Root v. Woolworth*, 150 U. S. 401, 37 L. ed. 1123, 14 Sup. Ct. Rep. 136; *White v. Ewing*, 159 U. S. 36, 40 L. ed. 67, 15 Sup. Ct. Rep. 1018; *Carey v. Houston & T. C. R. Co.* 161 U. S. 115, 40 L. ed. 638, 16 Sup. Ct. Rep. 537; *Julian v. Central Trust Co.* 193 U. S. 93, 48 L. ed. 629, 24 Sup. Ct. Rep. 399.

U. S. Rev. Stat. § 720, U. S. Comp. Stat. 1901, p. 581, was no bar to the maintenance of the suit.

French v. Hay (*French v. Stewart*) 22 Wall. 250, 22 L. ed. 857; *Deitzsch v. Huidekoper* (*Kern v. Huidekoper*) 103 U. S. 494, 26 L. ed. 497; *Moran v. Sturges*, 154 U. S. 256, 269, 38 L. ed. 985, 14 Sup. Ct. Rep. 1019; *Julian v. Central Trust Co.* 193 U. S. 93, 48 L. ed. 629, 24 Sup. Ct. Rep. 399; *Bowdoin College v. Merritt*, 59 Fed. 6. See also *Sharon v. Terry*, 1 L. R. A. 572, 13 Sawy. 387, 36 Fed. 337; *Stewart v. Wisconsin C. R. Co.* 117 Fed. 782; *State Trust Co. v. Kansas City, P. & G. R. Co.* 110 Fed. 10.

A suit to foreclose a mortgage is transitory.

Phelps v. McDonald, 99 U. S. 298, 308, 25 L. ed. 473, 476; *Toller v. Carteret*, 2 Vern. 494; *Penn v. Baltimore*, 1 Ves. Sr. 444; *Paget v. Ede*, L. R. 18 Eq. 118; *Mead v. New York, H. & N. R. Co.* 45 Conn. 199; *Reed v. Reed*, 75 Me. 264; *Eaton v. McCall*,

86 Me. 346, 41 Am. St. Rep. 561, 29 Atl. 1103; *Pingree v. Coffin*, 12 Gray, 288; *Union Trust Co. v. Olmsted*, 102 N. Y. 729, 7 N. E. 822.

The circuit court had power effectually to decree the foreclosure of a mortgage covering land outside the district.

Muller v. Dows, 94 U. S. 444, 24 L. ed. 207; *Boston Safe Deposit & T. Co. v. Bankers & M. Teleg. Co.* 36 Fed. 288; *Ford v. Delta & Pine Land Co.* 43 Fed. 181; *Woodbury v. Allegheny & K. R. Co.* 72 Fed. 371; *International Bridge & Tramway Co. v. Holland Trust Co.* 26 C. C. A. 469, 52 U. S. App. 240, 81 Fed. 422; *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 29 Fed. 618; *Farmers' Loan & T. Co. v. Chicago & A. R. Co.* 27 Fed. 146.

It is immaterial that the decree of foreclosure did not require a confirmatory deed from the mortgagor or owner of the equity of redemption.

Muller v. Dows, 94 U. S. 444, 24 L. ed. 207; *Root v. Woolworth*, 150 U. S. 401, 37 L. ed. 1123, 14 Sup. Ct. Rep. 136.

A final decree of the circuit court of the United States cannot be collaterally attacked on the ground that the diversity of citizenship necessary to give jurisdiction was lacking.

McCormick v. Sullivan, 10 Wheat. 192, 6 L. ed. 300; *Ex parte Watkins*, 3 Pet. 193, 207, 7 L. ed. 650, 654; *Cutler v. Huston*, 158 U. S. 423, 39 L. ed. 1040, 15 Sup. Ct. Rep. 868; *Des Moines Nav. & R. Co. v. Iowa Homestead Co.* 123 U. S. 552, 31 L. ed. 202, 8 Sup. Ct. Rep. 217; *Dowell v. Applegate*, 152 U. S. 327, 38 L. ed. 463, 14 Sup. Ct. Rep. 611; *Evers v. Watson*, 156 U. S. 527, 39 L. ed. 520, 15 Sup. Ct. Rep. 430; *Lacassagne v. Chopuis*, 144 U. S. 119, 36 L. ed. 368, 12 Sup. Ct. Rep. 659.

The jurisdiction of the circuit court could not be attacked on the ground that no part of the land was situated in Georgia.

Ritchie v. McMullen, 159 U. S. 242, 40 L. ed. 135, 16 Sup. Ct. Rep. 171; *Rose v. Himely*, 4 Cranch, 241, 269, 2 L. ed. 608, 617; *Scott v. McNeal*, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108; *Thompson v. Whitman*, 18 Wall. 457, 21 L. ed. 897; *United States v. Arredondo*, 6 Pet. 691, 709, 8 L. ed. 547, 554; *Des Moines Nav. & R. Co. v. Iowa Homestead Co.* 123 U. S. 552, 31 L. ed. 202, 8 Sup. Ct. Rep. 217; *Re Sawyer*, 124 U. S. 200, 220, 221, 31 L. ed. 402, 409, 8 Sup. Ct. Rep. 482; *Dowell v. Applegate*, 152 U. S. 327, 340, 38 L. ed. 463, 468, 14 Sup. Ct. Rep. 611; *Mellen v. Moline Malleable Iron Works*, 131 U. S. 352, 367, 33 L. ed. 178, 183, 9 Sup. Ct. Rep. 781; *Hollins v. Brierfield Coal & I. Co.* 150 U. S. 371, 380, 37 L. ed. 1113, 1115, 14 Sup. Ct. Rep. 127.

A final decree against a corporation cannot be impeached for an erroneous allegation, admitted by the defendant, as to the state under the laws of which the corporation exists.

Black, Judgm. § 213; *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. ed. 451; *Guinard v. Heysinger*, 15 Ill. 288; *Pond v. Ennis*, 69 Ill. 341; *Hoffield v. Board of Education*, 33 Kan. 644, 7 Pac. 216; *Cleveland v. Boston Five Cents Sav. Bank*, 129 Mass. 27; *First Nat. Bank v. Huntington Distilling Co.* 41 W. Va. 530, 56 Am. St. Rep. 878, 23 S. E. 792; *Smith v. Bowker*, 1 Mass. 76; *United States Nat. Bank v. Vennor*, 172 Mass. 449, 52 N. E. 543; *Washington County Nat. Bank v. Lee*, 112 Mass. 521; *Thatcher v. West River Nat. Bank*, 19 Mich. 196.

The Alabama & Georgia Company was not a necessary party to a foreclosure of the mortgage.

Jones, Mortg. 6th ed. § 1404; Story, Eq. Pl. 10th ed. 197; *Bigelow v. Bush*, 6 Paige, 343; *Wilkinson v. May*, 69 Ala. 33; *Thomas v. Jones*, 84 Ala. 302, 4 So. 270; *Boulwell v. Steiner*, 84 Ala. 307, 5 Am. St. Rep. 375, 4 So. 184; *Belloc v. Rogers*, 9 Cal. 123; *Gutzeit v. Pennie*, 98 Cal. 327, 33 Pac. 199; *Swift v. Edson*, 5 Conn. 531; *Stevens v. Campbell*, 21 Ind. 471; *West v. Miller*, 125 Ind. 70, 25 N. E. 143; *Johnson v. Monell*, 13 Iowa, 300; *Johnson v. Foster*, 68 Iowa, 140, 26 N. W. 39; *Miller v. Thompson*, 34 Mich. 10; *Osborne v. Crump*, 57 Miss. 622; *Chester v. King*, 2 N. J. Eq. 405; *Root v. Wright*, 21 Hun. 344; *Miner v. Smith*, 53 Vt. 551; *Delaplaine v. Lewis*, 19 Wis. 476; *Ayers v. Wiswall*, 112 U. S. 187, 28 L. ed. 693, 5 Sup. Ct. Rep. 90; *Davis v. Hardy*, 76 Ind. 272.

It is immaterial that the Alabama & Georgia Company was joined as a defendant in the foreclosure suit.

Hollins v. Brierfield Coal & I. Co. 150 U. S. 371, 380, 37 L. ed. 1113, 1115, 14 Sup. Ct. Rep. 127.

The Huguley Manufacturing Company is the only real party in interest in the suit in Alabama and in the present suit.

Tubb v. Fort, 58 Ala. 277.

The suit is therefore maintainable against the Huguley Company, irrespective of the Alabama & Georgia Company.

See *Kitchens v. Hutchins*, 44 Ga. 620; *Newburg v. Munshower*, 29 Ohio St. 617, 23 Am. Rep. 769.

A corporation organized under the laws of two states is a single corporation as to its acts, obligations, and liabilities.

Graham v. Boston, H. & E. R. Co. 118 U. S. 161, 30 L. ed. 196, 6 Sup. Ct. Rep. 1009; *Nashua & L. R. Corp. v. Boston & L. R. Corp.* 136 U. S. 356, 34 L. ed. 363, 10 Sup. Ct. Rep. 1004; *Indianapolis & St. L.* 198 U. S.

R. Co. v. Vance, 96 U. S. 450, 24 L. ed. 752; *Muller v. Dows*, 94 U. S. 444, 24 L. ed. 207; *Uphoff v. Chicago, St. L. & N. O. R. Co.* 5 Fed. 545; *Horne v. Boston & M. R. Co.* 18 Fed. 50; *Nashua & L. R. Corp. v. Boston & L. R. Corp.* 19 Fed. 804; *Burger v. Grand Rapids & I. R. Co.* 22 Fed. 561; *Union Trust Co. v. Rochester P. R. Co.* 29 Fed. 609; *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.* 174 U. S. 552, 43 L. ed. 1081, 19 Sup. Ct. Rep. 817; *Morawetz, Priv. Corp.* 2d ed. §§ 995, 996; *Baltimore & O. R. Co. v. Harris*, 12 Wall. 65, 20 L. ed. 354; *St. Louis & S. F. R. Co. v. James*, 161 U. S. 545, 40 L. ed. 802, 16 Sup. Ct. Rep. 621.

The cases as to the jurisdiction of the Federal court depend upon a wholly distinct question from that here under consideration.

Ohio & M. R. Co. v. Wheeler, 1 Black, 286, 17 L. ed. 130.

Corporations are recognized outside of the state granting the charters.

Baltimore & O. R. Co. v. Harris, 12 Wall. 65, 20 L. ed. 354; *Cowell v. Colorado Springs Co.* 100 U. S. 55, 25 L. ed. 547; *American & Foreign Christian Union v. Yount*, 101 U. S. 352, 25 L. ed. 388.

Cases of corporations organized in one state licensed to do business in another (*Baltimore & O. R. Co. v. Harris*, 12 Wall. 65, 20 L. ed. 354; *Goodlett v. Louisville & N. R. Co.* 122 U. S. 391, 30 L. ed. 1230, 7 Sup. Ct. Rep. 1254; *Martin v. Baltimore & O. R. Co.* [*Gerling v. Baltimore & O. R. Co.*] 151 U. S. 673, 38 L. ed. 311, 14 Sup. Ct. Rep. 533; *St. Louis & S. F. R. Co. v. James*, 161 U. S. 545, 40 L. ed. 802, 16 Sup. Ct. Rep. 621; *St. Joseph & G. I. R. Co. v. Steele*, 167 U. S. 659, 42 L. ed. 315, 17 Sup. Ct. Rep. 925; *Southern R. Co. v. Allison*, 190 U. S. 326, 47 L. ed. 1078, 23 Sup. Ct. Rep. 713) are to be distinguished from cases of dual incorporation.

Chicago & N. W. R. Co. v. Whitton, 13 Wall. 270, 20 L. ed. 571; *Memphis & C. R. Co. v. Alabama*, 107 U. S. 581, 27 L. ed. 518, 2 Sup. Ct. Rep. 432; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* 118 U. S. 290, 30 L. ed. 83, 6 Sup. Ct. Rep. 1094; *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.* 174 U. S. 552, 43 L. ed. 1081, 19 Sup. Ct. Rep. 817; *Nashua & L. R. Corp. v. Boston & L. R. Corp.* 136 U. S. 356, 34 L. ed. 363, 10 Sup. Ct. Rep. 1004.

It is immaterial whether the charter of the Alabama & Georgia Manufacturing Company expired before the foreclosure decree was rendered, or not.

Greeley v. Smith, 3 Story, 657, Fed. Cas. No. 5,748; *First Nat. Bank v. Colby*, 21 Wall. 609, 22 L. ed. 687; *New Orleans v. Gaines (New Orleans v. Whitney)* 138 U. S. 595, 34 L. ed. 1102, 11 Sup. Ct. Rep. 428;

Reid v. Holmes, 127 Mass. 326. See also *Bridges v. Smyth*, 8 Bing. 29; *Yaple v. Titus*, 41 Pa. 195, 80 Am. Dec. 604; *Powell v. Washington*, 15 Ala. 803.

Mr. Marion Erwin argued the cause and filed a brief for respondents:

The intent of the legislature of Georgia was to create a new Georgia corporation, with a new capital required to be paid in, with power to use riparian rights of Georgia in the Chattahoochee river, and to erect needful buildings for factory purposes on the east (Georgia) side only, of the Chattahoochee river, and to have and maintain its principal office in Georgia; and it was neither a license to nor recognition of the pre-existing Alabama corporation, nor authority to either corporation to consolidate or merge itself in the other.

Copeland v. Memphis & C. R. Co. 3 Woods, 662, Fed. Cas. No. 3,209.

The Alabama corporations could not have been made parties defendant to the Robinson suit without ousting the jurisdiction of the court.

Ohio & M. R. Co. v. Wheeler, 1 Black, 286, 17 L. ed. 130; *St. Joseph & G. I. R. Co. v. Steele*, 167 U. S. 663, 42 L. ed. 316, 17 Sup. Ct. Rep. 925; *Memphis & C. R. Co. v. Alabama*, 107 U. S. 581, 27 L. ed. 518, 2 Sup. Ct. Rep. 432; *Chicago & N. W. R. Co. v. Whitton*, 13 Wall. 270, 283, 20 L. ed. 571, 575; *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.* 174 U. S. 552, 43 L. ed. 1081, 19 Sup. Ct. Rep. 817.

The decisions as to the effect of an adjudication in one state on the property rights of a corporation created under the laws of one state and recognized or domesticated under the laws of other states do not touch the question in the case at bar.

Louisville, N. A. & C. R. Co. v. Louisville Trust Co. 174 U. S. 552, 563, 43 L. ed. 1081, 19 Sup. Ct. Rep. 817; *Southern R. Co. v. Allison*, 190 U. S. 326, 47 L. ed. 1078, 23 Sup. Ct. Rep. 713.

Decisions as to the effect of an adjudication in one state on the property rights of a corporation which is the result of a consolidation of several corporations created under the laws of several states do not touch the question in the case at bar.

See *Graham v. Boston, H. & E. R. Co.* 118 U. S. 161, 30 L. ed. 196, 6 Sup. Ct. Rep. 1009; *Nashua & L. R. Corp. v. Boston & L. R. Corp.* 136 U. S. 356, 34 L. ed. 363, 10 Sup. Ct. Rep. 1004.

Even if all the proceedings in the Robinson suit were regular, and if the Riverdale Cotton Mills acquired good title, its bill being that of an alleged purchaser to protect its title against the Alabama corporations not parties to the suit, it cannot be

maintained on ancillary jurisdiction in the Federal court.

Carson v. Dunham, 121 U. S. 421, 429, 30 L. ed. 992, 994, 7 Sup. Ct. Rep. 1030; *Providence Sav. Life Assur. Soc. v. Ford*, 114 U. S. 635, 29 L. ed. 261, 5 Sup. Ct. Rep. 1104; *Ralston v. Sharon*, 51 Fed. 702; *Wood v. New York & N. E. R. Co.* 61 Fed. 236; *Kerr*, 1nj. p. 662; *Pacific R. Co. v. Missouri P. R. Co.* 111 U. S. 505, 28 L. ed. 498, 4 Sup. Ct. Rep. 583; *Peck v. Jenness*, 7 How. 620, 12 L. ed. 844; *Washburn & M. Mfg. Co. v. Scutt*, 22 Fed. 710; *Christmas v. Russell* (*Christmas v. Gaines*) 14 Wall. 69, 20 L. ed. 762.

Neither of the Alabama corporations having been sued in the Georgia court, and that court being without jurisdiction to pass adversely upon their rights, the Alabama corporations were under no obligation, legal or moral, either to break into that court or to assert or defend their rights there.

Wiser v. Lawler, 189 U. S. 271, 47 L. ed. 809, 23 Sup. Ct. Rep. 624; *Brant v. Virginia Coal & I. Co.* 93 U. S. 326, 337, 23 L. ed. 927, 929; *Knouff v. Thompson*, 16 Pa. 357; *Brinckerhoff v. Lansing*, 4 Johns. Ch. 65, 8 Am. Dec. 538; *Rice v. Dewey*, 54 Barb. 455; *Kingman v. Grayham*, 51 Wis. 232, 8 N. W. 181; *Sulphine v. Dunbar*, 55 Miss. 255; *Porter v. Wheeler*, 105 Ala. 451, 17 So. 221.

The authorities recognize a distinction between mere silence and a deceptive silence accompanied by an intention to defraud, which amounts to a positive beguilement.

Sumner v. Seaton, 47 N. J. Eq. 103, 19 Atl. 884; *Hill v. Epley*, 31 Pa. 331; *Markham v. O'Connor*, 52 Ga. 183, 21 Am. Rep. 249.

Since the Alabama corporations were not parties to the Robinson suit, and could not be made parties defendant, and their rights could not be adjudicated therein (*Louisville, N. A. & C. R. Co. v. Louisville Trust Co.* 174 U. S. 552, 43 L. ed. 1081, 19 Sup. Ct. Rep. 817), and since they are not privies in estate, the adjudication in such suit does not conclude strangers.

Pardce v. Aldridge, 189 U. S. 429-432, 47 L. ed. 883-886, 23 Sup. Ct. Rep. 514.

Much less does evidence taken or admissions made by parties in that suit, as to their rights, bind different parties in the other suit.

1 Greenl. Ev. §§ 522, 523, 538, 539.

The circuit court for the northern district of Georgia had no jurisdiction of the subject-matter of the Robinson suit, so far as foreclosure involved the cutting off of the equity of redemption and sale and conveyance of lands in Alabama, even if they belonged to the Georgia corporation.

Watkins v. Holman, 16 Pet. 26, 10 L. ed.

874; *Boyce v. Grundy*, 9 Pet. 275, 9 L. ed. 127; *Northern Indiana R. Co. v. Michigan C. R. Co.* 15 How. 233, 14 L. ed. 674; *Watts v. Waddle*, 6 Pet. 389, 8 L. ed. 437; *Jones, Mortg.* § 1444; *Farmers' Loan & T. Co. v. Postal Teleg. Co.* 55 Conn. 334, 3 Am. St. Rep. 53, 11 Atl. 184; *Lynde v. Columbus, C. & I. C. R. Co.* 57 Fed. 993; 2 Black, Judgm. § 872; *Rorer*, *Interstate Law*, 2d ed. chap. 21, p. 284, note 1; *Davis v. Headley*, 22 N. J. Eq. 115; 12 Enc. Pl. & Pr. 41; *Smith v. Cockrell*, 6 Wall. 756, 18 L. ed. 973; *Wayman v. Southard*, 10 Wheat. 1, 6 L. ed. 253; *Anniston Pipe Works v. Williams*, 106 Ala. 334, 54 Am. St. Rep. 51, 18 So. 111; *Longworthy v. Featherston*, 65 Ga. 165.

Messrs. John T. Morgan, John M. Chilton, William S. Thorington, and Robert Porter Shick, filed a separate brief for respondents:

The two corporations under the name of "The Alabama and Georgia Manufacturing Company" did not in fact constitute one corporation.

St. Louis & S. F. R. Co. v. James, 161 U. S. 545, 40 L. ed. 802, 16 Sup. Ct. Rep. 621; *Noshua & L. R. Corp. v. Boston & L. R. Corp.* 136 U. S. 356, 34 L. ed. 363, 10 Sup. Ct. Rep. 1004; *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.* 174 U. S. 552, 43 L. ed. 1081, 19 Sup. Ct. Rep. 817; *Kahl v. Memphis & C. R. Co.* 95 Ala. 337, 10 So. 661; *Carter*, *Jurisdiction of Federal Courts*, p. 79; *Grangers' Life & Health Ins. Co. v. Kamper*, 73 Ala. 325.

It cannot be successfully contended that the Alabama property involved in the case at bar, acquired by the Alabama company with the money paid into its treasury for its capital stock, could belong to, or be mortgaged by, the Georgia corporation, unless it could be shown that there was a transfer or conveyance by the Alabama corporation to the Georgia corporation; and, so far as the record discloses, there is not even a pretense of such a transfer or conveyance, and as matter of fact there was none.

See also *Missouri P. R. Co. v. Meek*, 30 L. R. A. 250, 16 C. C. A. 510, 32 U. S. App. 691, 69 Fed. 753.

It is impossible to conceive of one joint act performed simultaneously by two sovereign states, which shall bring a single corporation into being, except it be by compact or treaty.

Chicago & N. W. R. Co. v. Auditor General, 53 Mich. 91, 18 N. W. 586.

Two states have no power to unite in passing any legislative act. It is impossible, in the very nature of their organization, that they can so fuse themselves into a single sovereignty, and as such create a body politic which shall be a corporation of

the two states without being a corporation of each state or of either state.

Quincy R. Bridge Co. v. Adams County, 88 Ill. 615.

The adjudication in *Muller v. Dows* is not only not against the contention assumed by respondents, but, to the contrary, is for us, and in harmony with all the other adjudications had in the Supreme Court and those delivered in the other courts, both Federal and state.

Lynde v. Columbus, C. & I. C. R. Co. 57 Fed. 993; *Pittsburgh & S. L. R. Co. v. Rothschild* (Pa.) 4 Cent. Rep. 107, 4 Atl. 385; *Works, Courts and Jurisdiction*, pp. 54, 55; *Guarantee Trust & S. D. Co. v. Delta & P. Land Co.* 43 C. C. A. 396, 104 Fed. 5.

The bill filed in the circuit court of the United States for the northern district of Georgia cannot be supported as an ancillary or supplemental bill, nor as an original bill.

French v. Hay (*French v. Stewart*) 22 Wall. 250, 22 L. ed. 857; *Dietzsch v. Huidekoper* (*Kern v. Huidekoper*) 103 U. S. 494, 26 L. ed. 497; *Root v. Woolworth*, 150 U. S. 401, 37 L. ed. 1123, 14 Sup. Ct. Rep. 136; *Julian v. Central Trust Co.* 193 U. S. 93, 48 L. ed. 629, 24 Sup. Ct. Rep. 399; *Raphael v. Trask*, 194 U. S. 272, 48 L. ed. 973, 24 Sup. Ct. Rep. 647; 1 Bates, *Fed. Eq. Proc.* § 97, note; *Mercantile Trust Co. v. Kanawha & O. R. Co.* 39 Fed. 337; *McWhirter v. Halsted*, 24 Fed. 828; *Gates v. Bucki*, 4 C. C. A. 116, 12 U. S. App. 69, 53 Fed. 961; *Live Stock Dealers & B. Asso. v. Crescent City Live Stock L. & S. H. Co.* 1 Abb. (U. S.) 388, *Fed. Cas.* No. 8,408; *Rensselaer & S. R. Co. v. Bennington & R. R. Co.* 18 Fed. 617; *Yick Wo v. Crowley*, 26 Fed. 207; *Haines v. Carpenter*, 91 U. S. 254, 23 L. ed. 345; *Kerr*, *Inj.* p. 662; 1 Beach, *Inj.* § 75; *Averill v. Southern R. Co.* 75 Fed. 736.

The Alabama & Georgia Company is a necessary party.

Worthington v. Lee, 2 Bland, Ch. 678; *Weldon v. Fritzlen*, 128 Fed. 608; *Story*, *Eq. Pl.* 9th ed. §§ 72, 195; *Ribon v. Chicago, R. I. & P. R. Co.* 16 Wall. 446, 21 L. ed. 367; *Williams v. Bankhead*, 19 Wall. 563-572, 22 L. ed. 184-187; *Nashville & D. R. Co. v. Orr*, 18 Wall. 471, 21 L. ed. 810; *Gregory v. Stetson*, 133 U. S. 579, 33 L. ed. 792, 10 Sup. Ct. Rep. 422; *Swan Land & Cattle Co. v. Frank*, 148 U. S. 603, 37 L. ed. 577, 13 Sup. Ct. Rep. 691; *Marshall v. Beverley*, 5 Wheat. 313, 5 L. ed. 97.

*Mr. Justice Brewer delivered the opinion of the court: [192]

For over ten years from January 21, 1891, the date of the filing of the original bill, litigation was carried on in the circuit court of the United States for the northern dis-

trict of Georgia, and in appellate courts, in the foreclosure of a trust deed executed by the Alabama & Georgia Manufacturing Company. In the course of that litigation decrees were entered and reversed, sales were made and set aside, possession of property was transferred and retransferred, accountings had as to the proceeds of property in possession, and when it seemed that at last litigation was at an end, the foreclosure consummated, and the title established in the purchaser, we are told that it all amounted to nothing; that parties, lawyers, and courts have been spending their time and labor in simply beating the air, the title to the property conveyed by the trust deed being exactly where it was before the litigation commenced, and the party which had acquired possession by that litigation subject to an obligation to account as a mortgagee in possession.

Upon what is this contention based? The respondents say that the property conveyed by the trust deed was all in Alabama, although the deed recites that part of it was in Georgia; that it originally belonged to the Alabama company; that that company executed the trust deed, although the resolution incorporated in the trust deed purports to have been passed at a meeting of the directors, held at the office of the company in West Point, Georgia; that the Alabama company was not made a party to the foreclosure proceedings, and could not have been, because the plaintiff was a citizen of Alabama, and making the Alabama company a defendant would have ousted the court of jurisdiction; that the subsequent owner of the property, another Alabama company, was also not made a party to those proceedings, and that therefore they were *res inter alios acta*, and in no way binding upon either Alabama company. It is also insisted by [193] the respondents that the so-called *ancillary bill filed by the petitioner was not, in any sense of the term, an ancillary, but in fact an original bill, and that under Rev. Stat. § 720, U. S. Comp. Stat. 1901, p. 581, the Federal court had no power to restrain the further proceedings in the state chancery court.

Prima facie, the United States circuit court had jurisdiction of the foreclosure bill. Diverse citizenship was alleged and admitted, and the relief sought was the foreclosure of a trust deed covering property partially in Georgia and partially in Alabama. The bill in the state court challenged the decree in the United States circuit court, denied its efficacy to transfer title, on the ground that the Alabama & Georgia Manufacturing Company (the grantor in the trust deed, and the original owner of the property) and the Huguley Manufacturing Com-

pany (a purchaser and subsequent owner) were both corporations of Alabama, and citizens of the same state with the plaintiff, whereby a case was presented of which the Federal courts could not take jurisdiction. The specific allegations were these:

"That a corporation known as the 'Alabama & Georgia Manufacturing Company,' alleged to be a corporation organized under the laws of Georgia only, and said Huguley Manufacturing Company, together with the said W. T. Huguley, were the sole defendants to said bill, said W. T. Huguley being made defendant as cotrustee, alleged to be interested adversely. The Alabama & Georgia Manufacturing Company, originally chartered and organized as a corporation under said act of the general assembly of the state of Alabama, never has been made a defendant thereto, and never appeared as a party to said cause, the president of said corporation, to wit, W. H. Huguley, himself likewise a citizen and resident of the county of Chambers, state of Alabama, never having been served with notice either of said alleged default of interest, as expressly required under the terms of the trust deed, or notice of said suit of foreclosure against said Alabama & Georgia Manufacturing Company. No attempt was made, by either *direct or ancillary proceedings, to subject [194] the property lying in the state of Alabama to this suit. A portion of the property was erroneously described in the said mortgage as lying within the county of Harris, in the state of Georgia, while the orators aver that all of said property was and is situated within the county of Chambers, in the state of Alabama.

"The property was not advertised in the state of Alabama, nor was any sale or pretense of sale conducted in said state."

And again—

"The Huguley Manufacturing Company, a corporation, avers that it purchased and acquired all the property hereinabove described, subject to said mortgage, and is now the owner of the same, subject to said mortgage."

The answer filed to the ancillary bill alleges that both plaintiffs in the state court were corporations chartered under the laws of Alabama. It further states:

"That while said Alabama & Georgia Manufacturing Co. may have been incorporated in the state of Georgia, it was also incorporated in the state of Alabama prior to the incorporation in the state of Georgia. And these respondents aver that there never was, by the action of the state of Georgia and Alabama, any merger or consolidation of said two corporations. They therefore allege that said Alabama & Georgia Manufacturing Company, incorporated under the

laws of Alabama, was a distinct and separate legal entity from the Alabama & Georgia Manufacturing Company incorporated under the laws of Georgia.

"That while said Huguley Manufacturing Company was alleged in said bill to have been incorporated under the laws of Georgia, the defendants aver that as a matter of fact it was never so incorporated."

It also avers that the property is all in the state of Alabama. The case was submitted on bill and answer.

It thus appears that a party carries on a litigation in a Federal court on its merits, [195] and, when beaten in that court, goes *into a state court, and claims that, by reason of his own untruthful admission of citizenship, the Federal court assumed a jurisdiction which in fact it could not take, and that all the proceedings in that court must go for naught. Under such circumstances there can be no doubt that the Federal court may inquire and determine whether its proceedings were a nullity, and such inquiry is not an original proceeding, but ancillary to those which have already been had. In other words, a Federal court, exercising a jurisdiction apparently belonging to it, may thereafter, by ancillary suit, inquire whether that jurisdiction in fact existed. It may protect the title which it has decreed as against every one a party to the original suit, and prevent that party from relitigating the questions of right which have already been determined. *French v. Hay*, 22 Wall. 250, 22 L. ed. 857; *Cole v. Cunningham*, 133 U. S. 107, 33 L. ed. 538, 10 Sup. Ct. Rep. 269; *Root v. Woolworth*, 150 U. S. 401, 37 L. ed. 1123, 14 Sup. Ct. Rep. 136. In this case, on page 410, L. ed. p. 1125, Sup. Ct. Rep. p. 138, it was said:

"It is well settled that a court of equity has jurisdiction to carry into effect its own orders, decrees, and judgments, which remain unreversed, when the subject-matter and the parties are the same in both proceedings. The general rule upon the subject is thus stated in Story's Equity Pleading, 9th ed. § 338: 'A supplemental bill may also be filed, as well after as before a decree; and the bill, if after a decree, may be either in aid of the decree, that it may be carried fully into execution,' . . . The jurisdiction of courts of equity to interfere and effectuate their own decrees by injunctions or writs of assistance in order to avoid the relitigation of questions once settled between the same parties is well settled. Story, Eq. Jur. § 959; *Kershaw v. Thompson*, 4 Johns. Ch. 609, 612; *Schenck v. Conover*, 13 N. J. Eq. 220, 78 Am. Dec. 95; *Buffum's Case*, 13 N. H. 14; *Shepherd v. Towgood*, Turn. & R. 379; *Davis v. Bluck*, 6 Beav. 393. In *Ker-*
198 U. S.

shaw v. Thompson, the authorities are fully reviewed by Chancellor Kent, and need not be re-examined here."

See also *Julian v. Central Trust Co.* 193 U. S. 93, 48 L. ed. 629, 24 Sup. Ct. Rep. 399, *which is very much in point. There, [196] after a suit in a Federal court for foreclosure of a mortgage, resulting in decree, sale, confirmation, and delivery of possession to the purchaser, a state court attempted to subject the property to a judgment rendered in that court against the mortgagor on a cause of action arising subsequently to the delivery of possession under the foreclosure proceedings. And it was held within the competency of the Federal court to restrain the action in the state court in order to protect the title it had conveyed by the foreclosure proceedings. In the opinion it was said (p. 112, L. ed. p. 639, Sup. Ct. Rep. p. 407):

"If the sheriff is allowed to sell the very property conveyed by the Federal decree, such action has the effect to annul and set it aside, because, in the view of the state court, it was ineffectual to pass the title to the purchaser. In such case we are of opinion that a supplemental bill may be filed in the original suit with a view to protecting the prior jurisdiction of the Federal court, and to render effectual its decree. *Central Trust Co. v. St. Louis, A. & T. R. Co.* 59 Fed. 385; *Fidelity Ins. T. & S. D. Co. v. Norfolk & W. R. Co.* 88 Fed. 815; *State Trust Co. v. Kansas City, P. & G. R. Co.* 110 Fed. 10.

"In such cases where the Federal court acts in aid of its own jurisdiction, and to render its decree effectual, it may, notwithstanding Rev. Stat. § 720, restrain all proceedings in a state court which would have the effect of defeating or impairing its jurisdiction. *Sharon v. Terry*, 13 Sawy. 387, 1 L. R. A. 572, 36 Fed. 337, per Mr. Justice Field; *French v. Hay*, 22 Wall. 250, 22 L. ed. 857; *Deitzsch v. Huidekoper* (*Kern v. Huidekoper*), 103 U. S. 494, 26 L. ed. 497."

It must be borne in mind in this connection that the Huguley Manufacturing Company was made a party defendant, and appeared in the original foreclosure suit, and also that it had purchased the property, and owned it subject to the trust deed. So the bill in the state court specifically avers, and the record of the proceedings in the foreclosure suit shows that it took an active part in the litigation. It admitted in that litigation that it was a citizen of Georgia. It now goes into a state court, *and, averring [197] that it is a citizen of Alabama, the state of which the plaintiff was a citizen, contends that the United States court in Georgia had no jurisdiction; but having been

in that United States court, litigating the case on its merits, and its rights there determined, that court has power to protect its decree as against any action which such litigant may take in any other court.

It must also be remembered that the trust deed described the property conveyed as situated partly in Georgia and partly in Alabama. The Federal court sitting in Georgia had jurisdiction to foreclose that trust deed. *Muller v. Dows*, 94 U. S. 444, 24 L. ed. 207. Even if there were errors or irregularities in the proceedings they would not affect the matter of jurisdiction, and as those proceedings have been sustained on appeal we may assume that they were free from errors.

Where parties litigate in a Federal court, whose jurisdiction is invoked on the ground of diverse citizenship, and that diverse citizenship is alleged and admitted, the judgment or decree which is entered is conclusive, and cannot be upset by either of them in any other tribunal on the mere ground that there was in fact no diverse citizenship. *Skillern v. May*, 6 Cranch, 267, 3 L. ed. 220; *M'Cormick v. Sullivant*, 10 Wheat. 192, 6 L. ed. 300; *Hancock v. Holbrook*, 119 U. S. 586, 30 L. ed. 538, 7 Sup. Ct. Rep. 341. In *Des Moines Nav. & R. Co. v. Iowa Homestead Co.* 123 U. S. 552, 557, 31 L. ed. 202, 204, 8 Sup. Ct. Rep. 217, 219, we said:

"It was settled by this court, at a very early day, that, although the judgments and decrees of the circuit courts might be erroneous, if the records failed to show the facts on which the jurisdiction of the court rested, such as that the plaintiffs were citizens of different states from the defendants, yet that they were not nullities, and would bind the parties until reversed or otherwise set aside."

In *Dowell v. Applegate*, 152 U. S. 327, 38 L. ed. 463, 14 Sup. Ct. Rep. 611, the validity of a decree rendered by a Federal court was challenged on the ground of a want of jurisdiction. In the opinion the question was thus stated (p. 337, L. ed. p. 467, Sup. Ct. Rep. p. 615):

[198] *"If the Federal court erred in assuming or retaining jurisdiction of Dowell's suit,—a question not necessary to be examined,—would it follow that its final decree, being unmodified and unreversed, can be treated as a nullity when assailed collaterally by one who was a party to the suit in which it was rendered?"

And after quotations from several authorities the conclusion was reached (p. 340, L. ed. p. 468, Sup. Ct. Rep. p. 616):

"This disposes of the first objection urged against the decree in the Federal court under which Dowell purchased. That decree can-

not be treated, in this suit, as void for want of jurisdiction."

See also *Evers v. Watson*, 156 U. S. 527, 39 L. ed. 520, 15 Sup. Ct. Rep. 430.

Some of these cases, as appears from the quotations, go to the extent of holding that, although on the face of the record, jurisdiction does not appear, yet the judgments or decrees are binding upon the parties thereto, and cannot be assailed collaterally. *A fortiori* must it be true that when, on the face of the record, jurisdiction appears, the judgment or decree must be held conclusive against a collateral attack by either of the parties thereto. The Huguley Manufacturing Company was, as is conceded in these ancillary proceedings, a party to the original litigation, and cannot now be permitted to challenge the jurisdiction of the Federal court on the ground that its admission of citizenship was an error, and that a correct statement would have disclosed a lack of jurisdiction.

As appears from the record, the Huguley Manufacturing Company was the owner of the equity of redemption at the time the foreclosure suit was instituted. It, therefore, was unnecessary to make the original grantor in the trust deed a party to the litigation. All that could be accomplished by its presence would be a decree putting at an end all question of its interest, and, possibly, if a sale did not pay the debt, a judgment over for the deficiency. But neither of these results would affect the jurisdiction of the court, so far as the owner of the equity of redemption is concerned, or impede *the[199] transfer of the title by foreclosure and sale to the purchaser.

Under the averments of the ancillary bill and answer it must be accepted that there were two corporations under the same name,—the Alabama & Georgia Manufacturing Company,—one chartered in Alabama, and the other in Georgia. It is doubtless true that, for the purposes of jurisdiction in the Federal courts, these corporations are deemed to be citizens of the states in which they were organized. It is also true that there was no formal merger of the two corporations into one; that they remained in law two separate legal persons, and that each was entitled to corresponding rights. But courts will sometimes look beyond the formal and corporate differences. Especially is this true of courts of equity. Substantial rights will be regarded rather than the mere matter of organization. *Lehigh Min. & Mfg. Co. v. Kelly*, 160 U. S. 327, 40 L. ed. 444, 16 Sup. Ct. Rep. 307, illustrates this. There it appeared that the Virginia Coal & Iron Company was a corporation organized under the laws of Virginia, and therefore a citizen of that state; that it claimed title

to certain lands in Virginia in the possession of the defendant, also a citizen of Virginia. There being no diversity of citizenship, an action could be maintained only in a court of the state. To avoid this, and to place the litigation in the Federal court, the stockholders of the coal and iron company organized, under the laws of Pennsylvania, the Lehigh Mining & Manufacturing Company. The former company thereupon conveyed all its rights to the latter, which brought its action for the recovery of the property in the United States circuit court for the district of Virginia. While it was conceded that the purpose with which a party makes a conveyance does not affect the title of his grantee, and while it was not doubted that the two corporations were separate entities, yet it was also held that, inasmuch as the stockholders in each were the same, and the organization of the Pennsylvania company was only for the purpose of getting the litigation into the Federal court, it was a fraud on the jurisdiction of that [200] *court, and its order dismissing the action for want of jurisdiction was affirmed. It was said in the opinion (p. 339, L. ed. p. 449, Sup. Ct. Rep. p. 612):

"The arrangement by which, without any valuable consideration, the stockholders of the Virginia corporation organized a Pennsylvania corporation, and conveyed these lands to the new corporation for the express purpose—and no other purpose is stated or suggested—of creating a case for the Federal court, must be regarded as a mere device to give jurisdiction to a circuit court of the United States, and as being, in law, a fraud upon that court, as well as a wrong to the defendants. Such a device cannot receive our sanction. The court below properly declined to take cognizance of the case."

In the case before us there were also two corporations, distinct legal entities, yet bearing the same name,—the Alabama & Georgia Manufacturing Company. It may well be doubted whether any injustice has been done to the Alabama company by the long litigation. In the brief of one of the counsel for respondents, after stating the organization of the Alabama company, it is said:

"In order to carry out the general plans and purposes of the incorporators and organizers of the said *Alabama* company, thus already organized and established, it was deemed necessary and important that these same original incorporators and organizers of the said Alabama corporation and their successors should control the water rights of the Chattahoochee river, not only through the riparian rights already granted them on the western, or Alabama, side of the river by the state of Alabama, but through those of the state of Georgia on the eastern side of

the river as well, i. e., at the point on the eastern bank opposite where their manufacturing plant in Alabama had already been located. These incorporators had in view the then purpose of utilizing, if not immediately, at least at some future time, the recognized fine water power of the intervening Chattahoochee river, by the proposed acquisition of other lands on the eastern, or Georgia, side of the river, and the erection thereon of another *independent* manufacturing plant, and, *in such event, of using Co-[201] lumbus, or La Grange, Georgia, for its offices and shipping points. To that end the said incorporators did not elect to ask the legislature of Georgia for any express statutory license authorizing the *pre-existing Alabama* company to exercise in Georgia the same powers and rights which had been given it by the parent state of its creation (Alabama), i. e., that it be '*domesticated*' in Georgia by the laws of that state, but the application was for the creation of a *separate and independent* corporation under the same name; and on March 21, 1866, 'The Alabama & Georgia Manufacturing Company,' as a second, distinctly independent corporation, was granted a charter by the legislature of the state of Georgia."

Whatever may have been within the scope of the ulterior purpose of the Georgia incorporation, the immediate purpose was the development of a single plant, and that purpose was carried into effect. By the charters the office of the Alabama company was located in Alabama, and that of the Georgia company in Georgia. When the trust deed was executed, it was executed in the name which was common to both corporations, but in pursuance of resolutions passed at an office in Georgia. It would be unjust to impute to these incorporators a design to mislead the holders of the indebtedness of the company by giving to them a security which rested alone upon the inconsiderable fraction of property then located in Georgia, when, on the face of the instrument, it purported to convey the entire plant. Evidently the proceedings were had on the supposition that there was but a single entity. That entity was indebted, and it gave the trust deed as security therefor. When the foreclosure suit was filed it would be also an unjust imputation to suppose that the owners of the property carried on the litigation for years, knowing that the proper parties were not present in court, and that the outcome of that litigation meant nothing. Evidently this defense, springing from the existence of two corporations, was an afterthought, when all other resources had failed, and equity may well say that to *sus-[202] tain the present contention would give judicial sanction to inexcusable trifling with

courts. It is always to be understood that Federal tribunals are not moot courts, and that parties having substantial rights must, when brought before those tribunals, present those rights, or may lose them.

The judgment of the Court of Appeals is reversed, and that of the Circuit Court is affirmed.

DANIEL L. HOLDEN and Lizzie Holden,
Bankrupts, *Petitioners*,

v.

J. A. STRATTON.

(See S. C. Reporter's ed. 202-215.)

Execution—exemptions—proceeds of life insurance—bankruptcy.

1. The exemption of the proceeds or avails of life insurance from all liability for any debt, which is made by Wash. Laws 1895, p. 336, Laws 1897, p. 70, was not forbidden by the provision of the Constitution of that state that the legislature "shall protect by law from forced sale a certain portion of the homestead and other property of all heads of families."
2. The general exemption from liability for debt of the proceeds or avails of all life insurance which is made by Wash. Laws 1895, p. 336, Laws 1897, p. 70, includes two policies of life insurance, both payable to the wife of the insured in the event of her surviving her husband, otherwise to his estate or assigns, and one of which the husband, if surviving the designated period, may surrender, and recover its full cash value.
3. The exemption of policies of life insurance under the bankrupt act of July 1, 1898 (30 Stat. at L. 548, chap. 541, U. S. Comp. Stat. 1901, p. 3424), § 6, where they are exempted from execution by the state law, is not qualified by the proviso in § 70a of that act (which vests the trustee with the title of the bankrupt, "except in so far as it is to property which is exempt," to certain enumerated classes of property), that a bankrupt having an insurance policy which has a cash surrender value payable to himself, his estate, or his personal representatives may prevent the policy from passing to the trustee by paying such surrender value.

[No. 209.]

Submitted April 6, 1905. Decided May 8, 1905.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment which revised an order of the District Court for the Northern Division of the District of Washington, in proceedings in bankruptcy, by adjudging that the bankrupt must pay

the cash surrender value of certain policies of life insurance as a condition precedent to an exemption of such policies. Judgment of the Circuit Court of Appeals reversed and that of the District Court affirmed.

See same case below, 51 C. C. A. 97, 113 Fed. 141.

Statement by Mr. Justice **White**:

Separate proceedings in bankruptcy were begun in the district court of the United States for the district of Washington, northern division, against Daniel N. Holden and *Lizzie Holden, his wife. They were consolidated. Both the parties were adjudicated to be bankrupt, and J. A. Stratton became the trustee of both estates.

All the liabilities of the bankrupts were contracted between the first day of September and the first day of December, 1900, and the creditors of each were the same. There were two policies upon the life of Daniel N. Holden, one for \$2,000, the other for \$5,000, issued by the same company. Both bore date June 15, 1894, having been issued as the result of an arrangement by which the insured and his wife, as the beneficiary, surrendered a policy for \$10,000, dated May 21, 1890.

The policy for \$2,000 was a full-paid, nonparticipating one, and the amount became due only upon the death of the insured, and was then payable to the wife, or, in the event she did not survive her husband, to his executors, administrators, or assigns. The policy for \$5,000 was on what was termed the semitontine plan. An annual premium of \$233.80 was required to be paid for ten years from the date of the previous policy, which, had been surrendered, that is, until May 21, 1900, and therefore, at the date when the bankrupts contracted the debts set forth in their schedules, and at the date of the adjudications in bankruptcy, this period had expired, and no further payment of premiums was necessary. Upon the death of the insured the amount of the policy was to be paid to the wife, as the beneficiary, or, in the contingency of her prior decease, to the executors, administrators, or assigns of the insured. It was provided, however, that upon the completion of the tontine dividend period of twenty years,—on May 21, 1910,—if the insured was then alive, he or his assigns, if creditors, might surrender the policy, and receive its full cash value, or a nonparticipating policy, payable to the original beneficiary, or if she was not alive, to the executors, administrators, or assigns of the insured, or the option was given to keep the policy in force, and to withdraw the surplus to the credit of the policy in cash, or use the same to purchase additional insurance.

NOTE.—On life insurance as assets of bankrupt or insolvent—see note to Morris v. Dodd, 50 L. R. A. 33.

The bankrupts made application to have [204] these policies set aside to them, because, it was asserted, they were exempt by the law of the state of Washington. This was resisted by the trustee upon the ground that the policies had a cash surrender value of \$2,200, which it was the duty of the bankrupts to pay to the trustee as a condition precedent to the exemption of the policies. The referee sustained the claim of the trustee. His ruling was reversed by the district court. On a petition for revision the circuit court of appeals held that the bankrupts were obliged to pay the cash surrender value as asserted by the trustee. 51 C. C. A. 97, 113 Fed. 141. An appeal was prosecuted to this court, and was dismissed. 191 U. S. 115, 48 L. ed. 116, 24 Sup. Ct. Rep. 45. This writ of certiorari was then allowed. 193 U. S. 672, 48 L. ed. 841, 24 Sup. Ct. Rep. 854.

Mr. P. P. Carroll submitted the cause for petitioners. **Mr. John E. Carroll** was on the brief:

The absolute and unqualified rule of exemption as declared in § 6 of the bankruptcy act of July 1, 1898, is not negatived by the proviso in § 70, and the Holden policies are exempt.

Steele v. Buel, 44 C. C. A. 287, 104 Fed. 968; *Pulsifer v. Hussey*, 97 Me. 434, 54 Atl. 1076.

The rule of exemption in § 6 pervades the whole act.

Lockwood v. Exchange Bank, 190 U. S. 294, 47 L. ed. 1061, 23 Sup. Ct. Rep. 751.

Instead of enlarging the rights to property in the trustee, the proviso further qualifies and limits them.

Pulsifer v. Hussey, 97 Me. 434, 54 Atl. 1076.

It has always been the policy of Congress to exempt to debtors and bankrupts the property exempt to them by the state law. From the organization of the Federal courts under the judiciary act of 1789, the law has been that creditors suing in those courts could not subject to execution property of their debtor exempt to him by the law of the state.

Steele v. Buel, 44 C. C. A. 287, 104 Fed. 968.

Exemption statutes should be liberally construed.

Puget Sound Dressed Beef & Packing Co. v. Jeffs, 11 Wash. 466, 27 L. R. A. 808, 48 Am. St. Rep. 885, 39 Pac. 962; *Re Kane*, 62 C. C. A. 616, 127 Fed. 552.

A court of bankruptcy is a court of equity seeking to administer the law according to its spirit, and not merely by its letter.

Ibid.

The state law must, independently of

other authority, control the decision in this case.

Re Wilson, 59 C. C. A. 100, 123 Fed. 20.

Mr. Frederick Bausman submitted the cause for respondent. **Mr. Hugh E. Garland** was on the brief:

All property having value was to pass to the trustee in bankruptcy.

Pace v. Edmunds, 187 U. S. 596, 47 L. ed. 318, 23 Sup. Ct. Rep. 200; *Fuller v. New York F. Ins. Co.* 184 Mass. 12, 67 N. E. 879.

The collective judgment of the courts is entirely in favor of trustees having property in policies like those involved in the present case.

Re Slingsluff, 106 Fed. 154; *Re Welling*, 51 C. C. A. 151, 113 Fed. 189; *Re Diack*, 100 Fed. 770; *Ladd v. Union Mut. L. Ins. Co.* 116 Fed. 878; *Re Boardman*, 103 Fed. 783; *Re Mertens*, 131 Fed. 972; *Gould v. New York L. Ins. Co.* 132 Fed. 927.

This Washington exemption must be read in the light of such legislation generally as preceded it throughout the country.

Church of Holy Trinity v. United States, 143 U. S. 457, 36 L. ed. 227, 12 Sup. Ct. Rep. 511; *United States v. Kirby*, 7 Wall. 482, 19 L. ed. 278; *Heydenfeldt v. Daney Gold & S. Min. Co.* 93 U. S. 634, 23 L. ed. 995; *Scott v. Deweese*, 181 U. S. 202, 45 L. ed. 822, 21 Sup. Ct. Rep. 585; *Lee Kan v. United States*, 10 C. C. A. 669, 15 U. S. App. 516, 62 Fed. 914; *Chinese Merchant's Case*, 7 Sawy. 546, 13 Fed. 605; *Lau Ow Bew v. United States*, 144 U. S. 47, 36 L. ed. 340, 12 Sup. Ct. Rep. 517.

The words "life insurance" must be given their popular acceptance of a sum realizable by death.

Talcott v. Field, 34 Neb. 611, 33 Am. St. Rep. 662, 52 N. W. 400.

A technical meaning ought not to be given a law, to make it work a plain injustice.

Maillard v. Lawrence, 16 How. 251, 14 L. ed. 925; *Levy v. M'Cartee*, 6 Pet. 102, 8 L. ed. 334.

The Constitution of Washington provides that the legislature shall protect by law from forced sale a certain portion of the homestead and other property of all heads of families. If "a certain portion" means a reasonable amount only, then an unlimited exemption would be void.

Re How, 59 Minn. 415, 61 N. W. 456; *Skinner v. Holt*, 9 S. D. 427, 62 Am. St. Rep. 878, 69 N. W. 595.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court:

The law of the state of Washington upon which the bankrupts relied to sustain the exemption of the policies was originally en-

acted in 1895 (Wash. Laws 1895, p. 336), and was re-enacted in 1897. Laws 1897, p. 70. The original act provided "that the proceeds or avails of all life insurance shall be exempt from all liability for any debt," and the amendment of 1897 enlarged this act by making it also applicable to accident insurance.

The circuit court of appeals held that the policies were not exempt, even although embraced by the state exemption, because of the requirements of § 70 of the bankrupt act of 1898 [30 Stat. at L. 565, chap. 541, U. S. Comp. Stat. 1901, p. 3451]. This was sustained upon the theory that § 6 of the bankrupt act, adopting the exemption laws of the several states, was modified, as to life insurance policies, by a proviso found in § 70a. In addition, in this court it is insisted, on behalf of the trustee, that, even although the construction of the bankrupt act adopted by the circuit court of appeals was a mistaken one, nevertheless the policies were not exempt, first, because the law of Washington making the exemption was in conflict with the Constitution of that state; and, second, because the law, even if valid, did not authorize the exemption of policies of the character of those here involved.

As § 6 of the bankrupt act gives effect to the exemptions allowed by the state law, it follows that the contentions that there was no valid state law exempting insurance policies, or that the exemption here claimed is not embraced within the state law, if such law be valid, lie at the threshold of the case, and must be disposed of before we come to consider the true interpretation of the bankrupt law.

[208] *To decide the contentions involves purely state, and not Federal, considerations. No decision of the supreme court of the state of Washington holding the exemption law to be invalid because repugnant to the state Constitution has been referred to. On the contrary, in *Re Heilbron*. 14 Wash. 536, 35 L. R. A. 602, 45 Pac. 153, the exemption law in question was considered and upheld by the supreme court of Washington. In that case the court maintained the contention that to cause the provisions of the statute to retrospectively apply to debts which had been contracted prior to the passage of the act would render the act unconstitutional, both from the point of view of the Federal as well as the state Constitution, and therefore that the law must be construed as having only a prospective operation. All the reasoning, however, of the opinion of the court by which the conclusion referred to was reached, assumed, as a matter of course, that the law, if operating prospectively, was not an unconstitutional exercise of power by

the legislature. And it is also worthy of remark that the amendment including accident insurance was adopted by the legislature of Washington subsequent to the decision in *Re Heilbron*. Of course, as the question of the repugnancy of the statute to the Constitution of Washington upon the grounds now asserted was not presented in that case, the decision cannot be said to be conclusive of the question. But it has its due persuasive force.

Considering the contention, however, as an original question, we think its unsoundness is quite clear. The fallacy which the proposition embodies consists in presupposing that because the Constitution of the state of Washington provides that the legislature "shall protect by law from forced sale a certain portion of the homestead and other property of all heads of families," thereby a limitation was imposed upon the general power of the legislature to determine the amount and character of property which should be exempt. Two cases are referred to as supporting the contention. *How v. How*, 59 Minn. 415, 61 N. W. 456; *Skinner v. Holt*, 9 S. D. 427, 62 Am. St. Rep. 878, 69 N. W. 595. But those *cases were based [209] upon constitutional provisions widely different from the one here relied upon. To the contrary, in California, where a constitutional provision obtains identical with the one we are considering (Cal. Const. art. 17, § 1), it has been decided that the character and amount of property which shall be exempt from execution is "purely a question of legislative policy." *Spence v. Smith*, 121 Cal. 536, 66 Am. St. Rep. 62, 53 Pac. 653. And it is further to be observed that the legislature of California has acted under that assumption, and has in effect exempted life insurance policies from execution. Thus it is provided in the Civil Code of California as follows:

"Sec. 3470. Property exempt.—Property exempt from execution, and insurances upon the life of the assignor, do not pass to the assignee by a general assignment for the benefit of creditors, unless the instrument specially mentions them, and declares an intention that they should pass thereby. En. March 21, 1872."

Conceding the constitutionality of the statute, it is next insisted that it does not embrace an exemption of the avails of the policies in question. The arguments supporting this contention are somewhat involved, but are all embraced in the following propositions: First, life insurance, it is said, in its strictest and technical sense, relates only to a fund realizable by death, and therefore the words "all life insurance," in the Washington statute, must be given that restricted meaning; hence the statute

is inapplicable to one of the policies which partakes of the nature of an endowment. Second, exemptions of life insurance policies, it is asserted, do not generally protect the avails of insurance from pursuit by creditors of the insured where the proceeds of the policies are payable to his estate, nor do they protect the avails of insurance from pursuit by the creditors of the wife of the insured, or other beneficiary. The application of these propositions is based upon the fact that in both of the policies the wife—

[210] one of the bankrupts—was named as a beneficiary in the event of surviving her husband, *and in one of the policies the husband was entitled, if he survived the twenty-years' period, to surrender the policy, and receive its cash value.

To support the propositions the laws of many states, limiting the exemption of the proceeds of life insurance policies to the cases specified, are referred to, and the argument is that, because in such states there are such statutes, a similar limitation should be read, by construction, into the Washington statute. But the error in the argument is manifest. It is not to be doubted that the broad terms of the statute, as ordinarily understood, embrace both of the policies, and it would not be construction, but legislation, to restrict the meaning of the statute in accord with narrower legislation in other states, because, in the judgment of a court, it might be deemed equitable to do so. The wide departure from the legislation of many of the other states, shown by the unrestricted terms of the Washington statute, instead of manifesting the intention of the legislature of that state to narrow the exemption to conform to the statutes of other states, on the contrary, conclusively shows the intention of the Washington legislature to adopt a broader and more comprehensive exemption. And light upon the intention to give a broad and popular meaning to the term "life insurance" is shown by the amendment exempting the avails of accident policies, which ordinarily, in the event death does not result, is payable to the insured. And it may also be observed in this connection that the policies considered by the supreme court of Washington in *Re Heilbron*, 14 Wash. 536, 35 L. R. A. 602, 45 Pac. 153, were payable on the death of the insured to his executors, and no intimation was given in the opinion that policies of that character were not within the terms of the exempting statute.

The policies, then, being exempt by the state law, we are brought to consider the question whether they were exempt under the bankrupt act of 1898.

As we have said, § 6 of the act adopts,

198 U. S. U. S., Book 49.

for the purposes of the bankruptcy proceedings, the exemptions allowed by the *laws of [211] the several states. The language so providing is as follows:

"Sec. 6. Exemptions of Bankrupts.—a. This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition."

It is beyond controversy that, if the section just quoted stood alone, the policies in question would be exempt under the bankrupt act. The contention that they are not arises from what is assumed to be a limitation imposed upon the terms of § 6 by a proviso found in § 70a of the act. We quote that section in full, italicizing the provision which it is deemed operates to take the proceeds or avails of policies of insurance out of the control of § 6:

"The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested, by operation of law, with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all (1) documents relating to his property; (2) interest in patents, patent rights, copyrights, and trademarks; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; (4) property transferred by him in fraud of his creditors; (5) property which, prior to the filing of the petition, he could by any means have transferred, or which might have been levied upon and sold under judicial process against him: *provided, that when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, *own, and carry such policy free from the* [212] *claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings; otherwise the policy shall pass to the trustee as assets; and (6) rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property."*

Conflicting views as to the operation upon § 6 of the proviso in § 70a referred to have been expounded by the circuit courts of ap-

peal. Two of the leading cases are *Steele v. Buel*, 44 C. C. A. 287, 104 Fed. 968, holding that the proviso does not qualify the exemptions accorded by § 6, and the other, a decision by the court of appeals of the ninth circuit, in *Re Scheld*, 52 L. R. A. 188, 44 C. C. A. 233, 104 Fed. 870, holding that the effect of the proviso was to limit, as to policies of insurance, the broad terms of § 6, adopting the state exemption laws.

Considering the matter originally, it is, we think, apparent that § 6 is couched in unlimited terms, and is accompanied with no qualification whatever. Even a superficial analysis of § 70a demonstrates that that section deals not with exemptions, but solely with the nature and character of property, the title to which passes to the trustee in bankruptcy. The opening clause of the section declares that the trustee, after his appointment, shall be vested "by operation of law with the title of the bankrupt, . . . except in so far as it is to property which is exempt," and this is followed by an enumeration, under six headings, of the various classes of property which pass to the trustee. Clearly, the words "except in so far as it is to property which is exempt," make manifest that it was the intention to exclude from the enumeration property exempt by the act. This qualification necessarily controls all the enumerations, and, therefore, excludes exempt property from all the provisions contained in the respective enumerations. The meaning now sought to be given to the proviso cannot in reason be affixed to it without holding that the words "except in so far as it is to property [213]*which is exempt," do not control and limit the proviso. But to say this is to read out of the section the dominant limitation which it contains, and, therefore, to segregate the proviso from its context, and cause it to mean exactly the reverse of what, when read in connection with the context, it necessarily implies.

It is, however, argued that unless the proviso be given the import attributed to it, and be treated as not subject to the limitation implied by the words creating the exception as to exempt property, that it becomes meaningless; and hence, under the rule of construction which commands that effect must be given, if possible, to all parts of a statute, the proviso must be construed as wholly disconnected from the clause as to exempt property. The premise upon which this proposition rests is a mistaken one. As § 70a deals only with property which, not being exempt, passes to the trustee, the mission of the proviso was, in the interest of the perpetuation of policies of life insurance, to provide a rule by which, where such policies passed to the trustee

because they were not exempt, if they had a surrender value their future operation could be preserved by vesting the bankrupt with the privilege of paying such surrender value, whereby the policy would be withdrawn out of the category of an asset of the estate. That is to say, the purpose of the proviso was to confer a benefit upon the insured bankrupt by limiting the character of the interest in a nonexempt life insurance policy which should pass to the trustee, and not to cause such a policy when exempt to become an asset of the estate. When the purpose of the proviso is thus ascertained it becomes apparent that to maintain the construction which the argument seeks to affix to the proviso would cause it to produce a result diametrically opposed to its spirit and to the purpose it was intended to subserve.

And the meaning which we deduce from the text and context of the proviso is greatly fortified by obvious considerations of public policy. It has always been the policy of Congress, *both in general legislation and [214] in bankrupt acts, to recognize and give effect to the state exemption laws. This was cogently pointed out by Circuit Judge Caldwell, in delivering the opinion in *Steele v. Buel*, where he said (44 C. C. A. 287, 104 Fed. 972):

"From the organization of the Federal courts under the judiciary act of 1789, the law has been that creditors suing in these courts could not subject to execution property of their debtor exempt to him by the law of the state. Judiciary Act of 1789 (1 Stat. at L. 93, chap. 21); *Wayman v. Southard*, 10 Wheat. 1, 32, 6 L. ed. 253, 260; *Lamaster v. Keeler*, 123 U. S. 376, 31 L. ed. 238, 8 Sup. Ct. Rep. 197; *Dartmouth Sav. Bank v. Bates*, 44 Fed. 546. . . . The same rule has obtained under the bankrupt acts, which have sometimes increased the exemptions, notably so under the act of 1867 (§ 5045, Rev. Stat.) but have never lessened or diminished them. An intention on the part of Congress to violate or abolish this wise and uniform rule, observed from the creation of our Federal system, should be made to appear by clear and unmistakable language. It will not be presumed from a doubtful or ambiguous provision fairly susceptible of any other construction."

There has been some contrariety of opinion expressed by the lower Federal courts as to the exact meaning of the words "cash surrender value" as employed in the proviso, some courts holding that it means a surrender value expressly stipulated by the contract of insurance to be paid, and other courts holding that the words embrace policies even though a stipulation in respect to surrender value is not contained therein,

where the policy possesses a cash value which would be recognized and paid by the insurer on the surrender of the policy. It is to be observed that this latter construction harmonizes with the practice under the bankrupt act of 1867 (*Re Newland*, 6 Ben. 342, Fed. Cas. No. 10,170; *Re McKinney*, 15 Fed. 535), and tends to elucidate and carry out the purpose contemplated by the proviso as we have construed it. However, [215] whatever influence *that construction may have, as the question is not necessarily here involved, we do not expressly decide it.

The judgment of the Circuit Court of Appeals is reversed, and that of the District Court affirmed; cause remanded to the latter court.

Mr. Justice **McKenna** took no part in the decision of this cause.

ISAAC N. HARRIS, *Plff. in Err.*,
v.

B. BALK.

(See S. C. Reporter's ed. 215-228.)

Judgments—full faith and credit—jurisdiction over garnishee temporarily within state—judgment against garnishee as bar to action on the debt—duty of garnishee to give notice to principal debtor.

1. The judgment of a state court, if that court had jurisdiction to render it, is entitled to the same full faith and credit in the courts of another state that it has in the state where rendered, as a valid domestic judgment.
2. The temporary presence of the garnishee within the state gives a court of that state jurisdiction to render judgment against him in the garnishment proceedings upon personal service of process within the state, if, during such temporary presence in the state, the principal debtor could have sued him there to recover the debt, and the laws of the state permit the garnishment of a debtor of the principal debtor.
3. The consent of a garnishee to a judgment impounding his debt to the principal debtor does not make the payment under the judgment voluntary, where he was absolutely without defense, so as to prevent him from pleading such payment in bar to an action on the debt.
4. The duty of the garnishee to give notice of the garnishment proceedings to the principal debtor is discharged by pleading the judgment therein in bar to an action on the debt while there then remained nearly a year in which the principal debtor might litigate the

question of his liability in the court which rendered the judgment.

[No. 191.]

Argued April 4, 1905. Decided May 8, 1905.

IN ERROR to the Supreme Court of the State of North Carolina to review a judgment which affirmed the judgment of the Superior Court of Beaufort County, in that state, refusing to give any effect to a judgment of a Maryland court in garnishment proceedings, pleaded in bar in an action on the debt. *Reversed* and remanded for further proceedings.

See same case below, 130 N. C. 381, 41 S. E. 940.

Statement by Mr. Justice **Peckham**:

The plaintiff in error brings the case here in order to review the judgment of the supreme court of North Carolina, affirming a judgment of a lower court against him for \$180, with interest, as stated therein. The case has been several times before the supreme court of that state, and is reported in 122 N. C. 64, 45 L. R. A. 257, 30 S. E. 318, again, 124 N. C. 467, 45 L. R. A. 260, 70 Am. St. Rep. 606, 32 S. E. 799. The opinion delivered at the time of entering the judgment now under review is to be found in 130 N. C. 381, 41 N. E. 940. An see also 132 N. C. 10, 43 S. E. 477.

The facts are as follows: The plaintiff in error, Harris, was a resident of North Carolina at the time of the commencement of this action, in 1896, and prior to that time was indebted to the defendant in error, Balk, also a resident of North Carolina, in the sum of \$180, for money borrowed from Balk by Harris during the year 1896, which Harris verbally promised to repay, but there was no written evidence of the obligation. During the year above mentioned one Jacob Epstein, a resident of Baltimore, in the state of Maryland, asserted that Balk was indebted to him in the sum of over \$300. In August, 1896, Harris visited Baltimore for the purpose of purchasing merchandise, and while he was in that city temporarily on August 6, 1896, Epstein caused to be issued out of a proper court in Baltimore a foreign or nonresident writ of attachment against Balk, attaching the debt due Balk from Harris, which writ the sheriff at Baltimore laid in the hands of Harris, with a summons to appear in the court at a day named. With that attachment, a writ of summons and a

NOTE.—As to full faith and credit to be given to state records and judicial proceedings—see *Lindley v. O'Reilly*, 1 L. R. A. 79, and note; *Cumington v. Belchertown*, 4 L. R. A. 131, and note; *Rand v. Hanson*, 12 L. R. A. 574, and note. And see notes to *Wiese v. San Francisco*

Musical Fund Soc. 7 L. R. A. 578; *Darby v. Mayer*, 6 L. ed. U. S. 367; and *Millis v. Duryee*, 3 L. ed. U. S. 411.

As to protection of a nonresident creditor against garnishment—see note to *Illinois C. R. Co. v. Smith*, 19 L. R. A. 577.

short declaration against Balk (as provided by the Maryland statute) were also delivered to the sheriff, and by him set up at the courthouse door, as required by the law of Maryland. Before the return day of the attachment writ Harris left Baltimore, and returned to his home in North Carolina. He

[217] did not contest the garnishee *process, which was issued to garnish the debt which Harris owed Balk. After his return Harris made an affidavit on August 11, 1896, that he owed Balk \$180, and stated that the amount had been attached by Epstein, of Baltimore, and by his counsel in the Maryland proceeding Harris consented therein to an order of condemnation against him as such garnishee for \$180, the amount of his debt to Balk. Judgment was thereafter entered against the garnishee, and in favor of the plaintiff, Epstein, for \$180. After the entry of the garnishee judgment, condemning the \$180 in the hands of the garnishee, Harris paid the amount of the judgment to one Warren, an attorney of Epstein, residing in North Carolina. On August 11, 1896, Balk commenced an action against Harris before a justice of the peace in North Carolina, to recover the \$180 which he averred Harris owed him. The plaintiff in error, by way of answer to the suit, pleaded in bar the recovery of the Maryland judgment and his payment thereof, and contended that it was conclusive against the defendant in error in this action, because that judgment was a valid judgment in Maryland, and was therefore entitled to full faith and credit in the courts of North Carolina. This contention was not allowed by the trial court, and judgment was accordingly entered against Harris for the amount of his indebtedness to Balk, and that judgment was affirmed by the supreme court of North Carolina. The ground of such judgment was that the Maryland court obtained no jurisdiction to attach or garnish the debt due from Harris to Balk, because Harris was but temporarily in the state, and the situs of the debt was in North Carolina.

Mr. George W. S. Musgrave argued the cause, and, with Mr. Sylvan Hayes Lauchheimer, filed a brief for plaintiff in error:

So far as the Maryland court is concerned, having acquired jurisdiction by virtue of personal service of process upon the garnishee within the state, the judgment so rendered against him, when measured by the laws, practice, and decisions of the state of Maryland, was in every respect valid.

Cockey v. Leister, 12 Md. 124, 71 Am. Dec. 588; *Garner v. Garner*, 56 Md. 127; *Buschman v. Hanna*, 72 Md. 1, 18 Atl. 962.

The situs of a debt for the purposes of garnishment is not only at the domicile of

the debtor, but in any state in which the garnishee may be found, provided the municipal law of the state permits the debtor to be garnished, and provided the court acquires jurisdiction over the garnishee through his voluntary appearance or by actual service of process upon him within the state.

Minor, Conf. L. § 125; *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797; *Tootle v. Coleman*, 57 L. R. A. 120, 46 C. C. A. 132, 107 Fed. 41; *Mooney v. Buford & G. Mfg. Co.* 18 C. C. A. 421, 34 U. S. App. 581, 72 Fed. 32; *Morgan v. Neville*, 74 Pa. 52; *Savin v. Bond*, 57 Md. 228; *National F. Ins. Co. v. Chambers*, 53 N. J. Eq. 468, 32 Atl. 663; *Harvey v. Great Northern R. Co.* 50 Minn. 405, 17 L. R. A. 84, 52 N. W. 905; *Wyeth Hardware & Mfg. Co. v. H. F. Lang & Co.* 127 Mo. 242, 27 L. R. A. 651, 48 Am. St. Rep. 626, 29 S. W. 1010; *Lancashire Ins. Co. v. Corbetts*, 165 Ill. 592, 36 L. R. A. 640, 56 Am. St. Rep. 275, 46 N. E. 631; *Embree v. Hanna*, 5 Johns. 101; *Chicago, B. & Q. R. Co. v. Moore*, 31 Neb. 629, 28 Am. St. Rep. 534, 48 N. W. 475; *Hull v. Blake*, 13 Mass. 153; *Blake v. Williams*, 6 Pick. 286, 17 Am. Dec. 372; *Harwell v. Sharp Bros.* 85 Ga. 124, 8 L. R. A. 514, 21 Am. St. Rep. 149, 11 S. E. 561; *Neufelder v. German American Ins. Co.* 6 Wash. 341, 22 L. R. A. 287, 36 Am. St. Rep. 166, 33 Pac. 870; *Howland v. Chicago, R. I. & P. R. Co.* 134 Mo. 474, 36 S. W. 29; *Burlington & M. River R. Co. v. Thompson*, 31 Kan. 180, 47 Am. Rep. 497, 1 Pac. 622; *Hannibal & St. J. R. Co. v. Crane*, 102 Ill. 249, 40 Am. Rep. 581; *Fithian v. New York & E. R. Co.* 31 Pa. 114; *Wabash R. Co. v. Dougan*, 142 Ill. 248, 34 Am. St. Rep. 74, 31 N. E. 594; *Berry Bros. v. Davis*, 77 Tex. 191, 19 Am. St. Rep. 748, 13 S. W. 978; *Nichols v. Hooper*, 61 Vt. 295, 17 Atl. 134; *Samuel v. Agnew*, 80 Ill. 553; *Baltimore & O. S. W. R. Co. v. Adams*, 159 Ind. 688, 60 L. R. A. 396, 66 N. E. 43; *Campbell v. Home Ins. Co.* 1 S. C. N. S. 158; *Glover v. Wells*, 40 Ill. App. 350; *Roche v. Rhode Island Ins. Co.* 2 Ill. App. 360; *Moore v. Chicago, R. I. & P. R. Co.* 43 Iowa, 385; *Cochran v. Fitch*, 1 Sandf. Ch. 142; *Mahany v. Kephart*, 15 W. Va. 609; *Holland v. Mobile & O. R. Co.* 16 Lea, 414; *Pomeroy v. Rand, McN. & Co.* 157 Ill. 176, 41 N. E. 636; *Cole v. Flitcraft*, 47 Md. 312; *Bank of United States v. Merchants' Bank*, 7 Gill, 415; *Brengle v. McClellan*, 7 Gill & J. 434; *Newland v. Reilly*, 85 Mich. 151, 48 N. W. 544; *Mashasuck Felt Mill v. Blanding*, 17 R. I. 297, 21 Atl. 538; *Cahoon v. Morgan*, 38 Vt. 236; *Black, Judgm.* §§ 593, 853, 857, 859, 923; *Rood, Garnishment*, §§ 242-245; *Mooney v.*

Union P. R. Co. 60 Iowa, 346, 14 N. W. 343; *Richardson v. Lester*, 83 Ill. 55.

The rule is that the rights of a garnishee are to be carefully protected. He is not to be placed in a situation, except from his own negligence, where he will be compelled to pay the debt twice.

Burton v. Warren, 11 Iowa, 169.

This case was an action which resulted in a judgment *in personam* against Harris.

Hodge & McLane, Attachment, §§ 184, 189; *Minor*, Conf. L. § 125; *Mooney v. Buford & G. Mfg. Co.* 18 C. C. A. 421, 34 U. S. App. 581, 72 Fed. 32.

Mr. John H. Small argued the cause and filed a brief for defendant in error:

The jurisdiction of the Maryland court may be attacked in this action, and even to the extent of contradicting the recital contained in the record.

Thompson v. Whitman, 18 Wall. 457, 21 L. ed. 897; *Knowles v. Logansport Gaslight & Coke Co.* 19 Wall. 58, 22 L. ed. 70; *Kilbourn v. Thompson*, 103 U. S. 198, 26 L. ed. 389; *Nobie v. Union River Logging R. Co.* 147 U. S. 173, 37 L. ed. 126, 13 Sup. Ct. Rep. 271; 1 Greenl. Ev. Lewis's ed. § 548.

If Balk had no property within the state of Maryland, the Maryland court was without jurisdiction.

Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565.

A nonresident cannot be held as garnishee.

Rood, Garnishment, p. 21, note 5, § 15.

One who is only temporarily in a state in which he does not reside cannot be subjected to garnishment.

Waples, Attachm. & Garnishment, 227, 228; *Drake*, Attachm. 5th ed. §§ 474-476; *Everett v. Connecticut Mut. L. Ins. Co.* 4 Colo. App. 513, 36 Pac. 617.

The majority of the decisions hold that where personal jurisdiction cannot be acquired over the defendant on account of his being a nonresident, the plaintiff cannot garnishee a nonresident while he is temporarily within the state.

14 Am. & Eng. Enc. Law, 2d ed. p. 803, note 2.

It has been held that a citizen of Maine, having his home and domicil there, was not liable to be sued as trustee of a citizen of Maine, in the courts of Massachusetts, under the trustee attachment process, notwithstanding his business in the coasting trade compelled him to pass about half his time in Massachusetts.

Peters v. Rogers, 5 Mason, 555, Fed. Cas. No. 11,033.

By the custom of London, no person could be summoned as trustee or garnishee unless he resided within the jurisdiction of the court.

14 Am. & Eng. Enc. Law, 2d ed. note 2, p. 815.

A state court cannot issue garnishment process against a nonresident temporarily in the state; and if such process is issued the court is without jurisdiction, unless it is made to appear that he has in his possession tangible property of the defendant, or is bound to pay the defendant money, or to deliver to him property within the state.

Pennsylvania R. Co. v. Rogers, 52 W. Va. 450, 62 L. R. A. 178, 44 S. E. 300.

The fact that the garnishee is a nonresident and only temporarily within the state is a jurisdictional question, and not personal to the garnishee.

Shinn, Attachm. & Garnishment, p. 860, § 491; *Rindge v. Green*, 52 Vt. 204.

In a personal action brought in a state court against a corporation which is neither incorporated nor does business within the state, nor has any agent or property therein, service of the summons upon its president, temporarily within the jurisdiction, cannot be recognized as valid by the courts of any other state.

Goldey v. Morning News, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559.

The mere order of Harris, given to wholesale merchants for merchandise, and while in possession of the latter, did not constitute property; and after said merchandise had been delivered to the common carrier for shipment from Baltimore to North Carolina, the said merchandise could not have been garnisheed in the hands of the common carrier.

Baldwin v. Great Northern R. Co. 81 Minn. 247, 51 L. R. A. 640, 83 Am. St. Rep. 370, 83 N. W. 986, 64 L. R. A. 625, brief.

Garnishment statutes are strictly construed as against the party resorting to the remedy.

State Bank v. Hinton, 12 N. C. (1 Dev. L.) 397.

A garnishee who has paid under an invalid judgment cannot plead the same in bar.

Meriam v. Rundlett, 13 Pick. 511; *Rood*, Garnishment, § 208, note.

If the garnishee can show that the attorney who purported to appear for him had no authority, the appearance so entered will be void. Harris testified in this suit that he did not employ any attorney to represent him in the garnishment proceeding in the Maryland court.

Moore v. Speed, 55 Mich. 84, 20 N. W. 801; *Pettit v. Muskegon Booming Co.* 74 Mich. 214, 41 N. W. 900.

A citizen of Maryland cannot sue a nonresident and garnishee a foreign corporation doing business in Maryland, when the

cause of action or contract of insurance was not consummated in Maryland.

Myer v. Liverpool, L. & G. Ins. Co. 40 Md. 595; *Cromwell v. Royal Canadian Ins. Co.* 49 Md. 366, 33 Am. Rep. 258.

[221] *Mr. Justice **Peckham**, after making the foregoing statement, delivered the opinion of the court:

The state court of North Carolina has refused to give any effect in this action to the Maryland judgment; and the Federal question is whether it did not thereby refuse the full faith and credit to such judgment which is required by the Federal Constitution. If the Maryland court had jurisdiction to award it, the judgment is valid and entitled to the same full faith and credit in North Carolina that it has in Maryland as a valid domestic judgment.

The defendant in error contends that the Maryland court obtained no jurisdiction to award the judgment of condemnation, because the garnishee, although at the time in the state of Maryland, and personally served with process therein, was a nonresident of that state, only casually or temporarily within its boundaries; that the situs of the debt due from Harris, the garnishee, to the defendant in error herein, was in North Carolina, and did not accompany Harris to Maryland; that, consequently, Harris, though within the state of Maryland, had not possession of any property of Balk, and the Maryland state court therefore obtained no jurisdiction over any property of Balk in the attachment proceedings, and the consent of Harris to the entry of the judgment was immaterial. The plaintiff in error, on the contrary, insists that, though the garnishee were but temporarily in Maryland, yet the laws of that state provide for an attachment of this nature if the debtor, the garnishee, is found in the state, and the court obtains jurisdiction over him by the service of process therein; that the judgment, condemning the debt from Harris to Balk, was a valid judgment, provided Balk could himself have sued Harris for the debt in Maryland. This, it is asserted, he could have done, and the judgment was therefore entitled to full faith and credit in the courts of North Carolina.

The cases holding that the state court obtains no jurisdiction over the garnishee if [222] he be but temporarily within the state *proceed upon the theory that the situs of the debt is at the domicile either of the creditor or of the debtor, and that it does not follow the debtor in his casual or temporary journey into another state, and the garnishee has no possession of any property or credit of the principal debtor in the foreign state.

We regard the contention of the plaintiff

in error as the correct one. The authorities in the various state courts upon this question are not at all in harmony. They have been collected by counsel, and will be found in their respective briefs, and it is not necessary to here enlarge upon them.

Attachment is the creature of the local law; that is, unless there is a law of the state providing for and permitting the attachment, it cannot be levied there. If there be a law of the state providing for the attachment of the debt, then, if the garnishee be found in that state, and process be personally served upon him therein, we think the court thereby acquires jurisdiction over him, and can garnish the debt due from him to the debtor of the plaintiff, and condemn it, provided the garnishee could himself be sued by his creditor in that state. We do not see how the question of jurisdiction *vel non* can properly be made to depend upon the so-called original situs of the debt, or upon the character of the stay of the garnishee, whether temporary or permanent, in the state where the attachment is issued. Power over the person of the garnishee confers jurisdiction on the courts of the state where the writ issues. *Blackstone v. Miller*, 188 U. S. 189-206, 47 L. ed. 439-445, 23 Sup. Ct. Rep. 277. If, while temporarily there, his creditor might sue him there and recover the debt, then he is liable to process of garnishment, no matter where the situs of the debt was originally. We do not see the materiality of the expression "situs of the debt," when used in connection with attachment proceedings. If by situs is meant the place of the creation of the debt, that fact is immaterial. If it be meant that the obligation to pay the debt can only be enforced at the situs thus fixed, we think it plainly untrue. The obligation of the debtor to pay his debt clings to and accompanies him wherever he goes. He is as *much bound to [223] pay his debt in a foreign state when therein sued upon his obligation by his creditor, as he was in the state where the debt was contracted. We speak of ordinary debts, such as the one in this case. It would be no defense to such suit for the debtor to plead that he was only in the foreign state casually or temporarily. His obligation to pay would be the same whether he was there in that way or with an intention to remain. It is nothing but the obligation to pay which is garnished or attached. This obligation can be enforced by the courts of the foreign state after personal service of process therein, just as well as by the courts of the domicile of the debtor. If the debtor leave the foreign state without appearing, a judgment by default may be entered, upon which execution may issue, or the judgment may be sued upon in any other state where the debtor might

be found. In such case the situs is unimportant. It is not a question of possession in the foreign state, for possession cannot be taken of a debt or of the obligation to pay it, as tangible property might be taken possession of. Notice to the debtor (garnishee) of the commencement of the suit, and notice not to pay to his creditor, is all that can be given, whether the garnishee be a mere casual and temporary comer, or a resident of the state where the attachment is laid. His obligation to pay to his creditor is thereby arrested, and a lien created upon the debt itself. *Cahoon v. Morgan*, 38 Vt. 236; *National F. Ins. Co. v. Chambers*, 53 N. J. Eq. 468, 483, 32 Atl. 663. We can see no reason why the attachment could not be thus laid, provided the creditor of the garnishee could himself sue in that state, and its laws permitted the attachment.

[224] There can be no doubt that Balk, as a citizen of the state of North Carolina, had the right to sue Harris in Maryland to recover the debt which Harris owed him. Being a citizen of North Carolina, he was entitled to all the privileges and immunities of citizens of the several states, one of which is the right to institute actions in the courts of another state. The law of Maryland provides for the attachment of credits in a *case like this. See §§ 8 and 10 of article 9 of the Code of Public General Laws of Maryland, which provide that, upon the proper facts being shown (as stated in the article), the attachment may be sued out against lands, tenements, goods, and credits of the debtor. Section 10 particularly provides that "any kind of property or credits belonging to the defendant, in the plaintiff's own hands, or in the hands of any one else, may be attached; and credits may be attached which shall not then be due." Sections 11, 12, and 13 of the above-mentioned article provide the general practice for levying the attachment, and the proceedings subsequent thereto. Where money or credits are attached, the inchoate lien attaches to the fund or credits when the attachment is laid in the hands of the garnishee, and the judgment condemning the amount in his hands becomes a personal judgment against him. *Buschman v. Hanna*, 72 Md. 1, 5, 6, 18 Atl. 962. Section 34 of the same Maryland Code provides also that this judgment of condemnation against the garnishee, or payment by him of such judgment, is pleadable in bar to an action brought against him by the defendant in the attachment suit for or concerning the property or credits so condemned.

It thus appears that Balk could have sued Harris in Maryland to recover his debt, notwithstanding the temporary character of Harris' stay there; it also appears that the municipal law of Maryland permits the debt-

or of the principal debtor to be garnished, and therefore if the court of the state where the garnishee is found obtains jurisdiction over him, through the service of process upon him within the state, then the judgment entered is a valid judgment. See *Minor on Conflict of Laws*, § 125, where the various theories regarding the subject are stated and many of the authorities cited. He there cites many cases to prove the correctness of the theory of the validity of the judgment where the municipal law permits the debtor to be garnished, although his being within the state is but temporary. See pp. 289, 290. This is the doctrine which is also adopted in *Morgan v. Neville*, 74 Pa. 52, by the *supreme court in Pennsylvania, per Ag-[225] new, J., in delivering the opinion of that court. The same principle is held in *Wyeth Hardware & Mfg. Co. v. H. F. Lang & Co.* 127 Mo. 242, 247, 27 L. R. A. 651, 48 Am. St. Rep. 626, 29 S. W. 1010; in *Lancashire Ins. Co. v. Corbetts*, 165 Ill. 592, 36 L. R. A. 640, 56 Am. St. Rep. 275, 46 N. E. 631; and in *Harvey v. Great Northern R. Co.* 50 Minn. 405, 406, 407, 17 L. R. A. 84, 52 N. W. 905; and to the same effect is *Embree v. Hanna*, 5 Johns. 101; also *Savin v. Bond*, 57 Md. 228, where the court held that the attachment was properly served upon a party in the District of Columbia while he was temporarily there; that as his debt to the appellant was payable wherever he was found, and process had been served upon him in the District of Columbia, the supreme court of the District had unquestioned jurisdiction to render judgment, and the same having been paid, there was no error in granting the prayer of the appellee that such judgment was conclusive. The case in 138 N. Y. 209, 20 L. R. A. 118, 34 Am. St. Rep. 448, 33 N. E. 938 (*Douglass v. Phenix Ins. Co.*) is not contrary to this doctrine. The question there was not as to the temporary character of the presence of the garnishee in the state of Massachusetts, but, as the garnishee was a foreign corporation, it was held that it was not within the state of Massachusetts so as to be liable to attachment by the service upon an agent of the company within that state. The general principle laid down in *Embree v. Hanna*, 5 Johns. 110, was recognized as correct. There are, as we have said, authorities to the contrary, and they cannot be reconciled.

It seems to us, however, that the principle decided in *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797, recognizes the jurisdiction, although in that case it appears that the presence of the garnishee was not merely a temporary one in the state where the process was served. In that case it was said: "All debts are payable everywhere unless there be

some special limitation or provision in respect to the payment; the rule being that debts, as such, have no *locus* or *situs*, but accompany the creditor everywhere, and authorize a demand upon the debtor everywhere. 2 Parsons, Contracts, 8th ed. 702 [9th ed. 739]. The debt involved in the [226] pending *case had no 'special limitation or provision in respect to payment.' It was payable generally, and could have been sued on in Iowa, and therefore was attachable in Iowa. This is the principle and effect of the best considered cases,—the inevitable effect from the nature of transitory actions and the purpose of foreign attachment laws, if we would enforce that purpose." The case recognizes the right of the creditor to sue in the state where the debtor may be found, even if but temporarily there; and upon that right is built the further right of the creditor to attach the debt owing by the garnishee to his creditor. The importance of the fact of the right of the original creditor to sue his debtor in the foreign state, as affecting the right of the creditor of that creditor to sue the debtor or garnishee, lies in the nature of the attachment proceeding. The plaintiff in such proceeding in the foreign state is able to sue out the attachment and attach the debt due from the garnishee to his (the garnishee's) creditor, because of the fact that the plaintiff is really, in such proceeding, a representative of the creditor of the garnishee, and therefore if such creditor himself had the right to commence suit to recover the debt in the foreign state, his representative has the same right, as representing him, and may garnish or attach the debt, provided the municipal law of the state where the attachment was sued out permits it.

It seems to us, therefore, that the judgment against Harris in Maryland, condemning the \$180 which he owed to Balk, was a valid judgment, because the court had jurisdiction over the garnishee by personal service of process within the state of Maryland.

It ought to be and it is the object of courts to prevent the payment of any debt twice over. Thus, if Harris, owing a debt to Balk, paid it under a valid judgment against him, to Epstein, he certainly ought not to be compelled to pay it a second time, but should have the right to plead his payment under the Maryland judgment. It is objected, however, that the payment by Harris to Epstein was not under legal compulsion. *Harris in truth owed the debt to Balk, which was attached by Epstein. He had, therefore, as we have seen, no defense to set up against the attachment of the debt. Jurisdiction over him personally had been obtained by the Maryland court. As he was absolutely without defense, there was no

reason why he should not consent to a judgment impounding the debt, which judgment the plaintiff was legally entitled to, and which he could not prevent. There was no merely voluntary payment within the meaning of that phrase as applicable here.

But most rights may be lost by negligence, and if the garnishee were guilty of negligence in the attachment proceeding, to the damage of Balk, he ought not to be permitted to set up the judgment as a defense. Thus it is recognized as the duty of the garnishee to give notice to his own creditor, if he would protect himself, so that the creditor may have the opportunity to defend himself against the claim of the person suing out the attachment. This duty is affirmed in the case above cited of *Morgan v. Neville*, 74 Pa. 52, and is spoken of in *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797, although it is not therein actually decided to be necessary, because in that case notice was given and defense made. While the want of notification by the garnishee to his own creditor may have no effect upon the validity of the judgment against the garnishee (the proper publication being made by the plaintiff); we think it has and ought to have an effect upon the right of the garnishee to avail himself of the prior judgment and his payment thereunder. This notification by the garnishee is for the purpose of making sure that his creditor shall have an opportunity to defend the claim made against him in the attachment suit. Fair dealing requires this at the hands of the garnishee. In this case, while neither the defendant nor the garnishee appeared, the court, while condemning the credits attached, could not, by the terms of the Maryland statute, issue the writ of execution unless the plaintiff gave bond or sufficient security before the court awarding the execution, to make restitution of the money paid if the defendant should, at any time within a year and a day, *ap-[228]pear in the action and show that the plaintiff's claim, or some part thereof, was not due to the plaintiff. The defendant in error, Balk, had notice of this attachment, certainly within a few days after the issuing thereof and the entry of judgment thereon, because he sued the plaintiff in error to recover his debt within a few days after his (Harris') return to North Carolina, in which suit the judgment in Maryland was set up by Harris as a plea in bar to Balk's claim. Balk, therefore, had an opportunity for a year and a day after the entry of the judgment to litigate the question of his liability in the Maryland court, and to show that he did not owe the debt, or some part of it, as was claimed by Epstein. He, however, took no proceedings to that end, so far as the record

shows, and the reason may be supposed to be that he could not successfully defend the claim, because he admitted in this case that he did, at the time of the attachment proceeding, owe Epstein some \$344.

Generally, though, the failure on the part of the garnishee to give proper notice to his creditor of the levying of the attachment would be such a neglect of duty on the part of the garnishee which he owed to his creditor as would prevent his availing himself of the judgment in the attachment suit as a bar to the suit of his creditor against himself, which might therefore result in his being called upon to pay the debt twice.

The judgment of the Supreme Court of North Carolina must be reversed, and the cause remanded for further proceedings not inconsistent with the opinion of this court.

Reversed.

Mr. Justice **Harlan** and Mr. Justice **Day** dissented.

[229] *JOSEPH L. HARLEY, *Appt.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 229-236.)

Court of claims — jurisdiction — contract right to compensation for use of patented device by the United States.

The use by the United States of a device patented by a government employee with the understanding on his part, not shared by the government officials, that compensation would be made, does not give a contract right to such compensation on which a claim can be founded within the jurisdiction of the court of claims,—especially where demand was first made by the petition in that court, after a delay of fourteen years.

[No. 195.]

Argued April 6, 1905. Decided May 8, 1905.

A PPEAL from the Court of Claims to review a judgment dismissing a petition which sought compensation for the use by the United States of a patented device. *Affirmed.*

See same case below, 39 Ct. Cl. 105.

The facts are stated in the opinion.

Messrs. W. W. Dodge and A. A. Hoehling, Jr., argued the cause and filed a brief for appellant:

The law implies compensation for property taken to the use of the government, just as it does in the case of property taken or used by an individual, without specific agreement as to compensation.

United States v. Burns, 12 Wall. 246, 20 198 U. S.

L. ed. 388; *Cammeyer v. Newton*, 94 U. S. 225, 24 L. ed. 72; *McKeever v. United States*, 14 Ct. Cl. 396; *James v. Campbell*, 104 U. S. 356, 26 L. ed. 786; *United States v. Great Falls Mfg. Co.* 112 U. S. 645, 28 L. ed. 846, 5 Sup. Ct. Rep. 306; *Great Falls Mfg. Co. v. Atty. Gen. (Great Falls Mfg. Co. v. Garland)* 124 U. S. 581, 31 L. ed. 527, 8 Sup. Ct. Rep. 631; *Hollister v. Benedict & B. Mfg. Co.* 113 U. S. 59, 28 L. ed. 901, 5 Sup. Ct. Rep. 717; *United States v. Palmer*, 128 U. S. 262, 32 L. ed. 442, 9 Sup. Ct. Rep. 104; *United States v. Berdan Fire-Arms Mfg. Co.* 156 U. S. 552, 39 L. ed. 530, 15 Sup. Ct. Rep. 420; *United States v. Lynch*, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349.

The mere fact that claimant was in government employ does not alter the case.

Solomons v. United States, 137 U. S. 342, 34 L. ed. 667, 11 Sup. Ct. Rep. 88.

Mr. Charles C. Binney argued the cause, and, with *Assistant Attorney General Pradt*, filed a brief for appellee:

No contract on the part of the government can be implied unless the officer concerned had authority to make an express contract.

Pitcher v. United States, 1 Ct. Cl. 7.

A patentee had no right, either in law or morals, to persuade or encourage officers of the government to adopt his inventions, and look on while they are being made use of, year after year, without objection or claim for compensation, and then set up a large demand upon the ground that the government had impliedly promised to pay for their use. A patentee is bound to deal fairly with the government, and, if he has a claim against it, to make such claim known openly and frankly, and not endeavor silently to raise up a demand in his favor by entrapping its officers to make use of his inventions.

Gill v. United States, 160 U. S. 426, 437, 40 L. ed. 480, 16 Sup. Ct. Rep. 322.

Unless the circumstances were such as to justify a belief that the minds of the parties actually met as to this point, no contract can be implied, for an implied contract is founded upon a presumed agreement (*Simpson v. United States*, 31 Ct. Cl. 217), to which agreement the United States must be a party in the same sense in which an individual might be, and to which the ordinary principles of contracts must and should apply. *Smoot's Case (United States v. Smoot)* 15 Wall. 36, 45, 21 L. ed. 107, 109.

Mr. Justice **McKenna** delivered the opinion of the court:

Appellant sued in the court of claims to recover the sum of \$102,000, for the use,

during the six years preceding the commencement of the suit, of a device invented by the appellant for registering impressions in connection with printing presses. The court of claims dismissed the petition. The findings of the court of claims are as follows:

"II. In November, 1869, the Secretary of the Treasury determined that certain valuable securities should not be printed in the Bureau of Engraving and Printing until proper and reliable registers should be attached to the presses. While the Chief of the Bureau was endeavoring to devise and procure a trustworthy form of register, the claimant brought to him the drawings of a device which he had invented, being substantially the device described in the foregoing letters patent. The Chief of the Bureau ordered a register to be immediately made after the claimant's device. At the time of giving such order he understood that the device was the claimant's invention.

"The register so ordered being completed, and tried, and found satisfactory, the Chief of the Bureau proposed to take the claimant to the Secretary of the Treasury, that [230] he might *explain it to him. The claimant thereupon objected that the invention was not yet patented, and that he wished, before exhibiting it, to obtain a patent for his individual protection. The Chief of the Bureau replied, 'Certainly; I will see that you are protected.' The claimant, then tacitly consenting, was taken before the Secretary, and explained to him the operation of the register, and the Secretary was at the same time informed that this was the register which the claimant had invented. The Secretary approved the form of register, and directed that such registers be made and attached to the presses in the Bureau.

"Before such registers were manufactured the claimant remonstrated to the effect that he wished first to secure a patent. The Chief of the Bureau replied that he would see the claimant protected, and would get him a patent attorney, who would explain the law to him. This the Chief of the Bureau did, and the attorney so selected proceeded to procure the patent before set forth, the claimant, not the defendants, paying him, and the costs and expenses thereof. The attorney so selected at the same time informed the claimant that the manufacture and use of registers in the Bureau would not interfere with or prevent the procurement of the patent.

"After being so advised, the claimant raised no further objection to the registers being manufactured and used, and tacitly acquiesced in the same.

"There was no agreement or understanding between the parties in regard to royalty

or the payment of remuneration for the use of the claimant's invention in the government's printing and engraving other than such as may be inferred from the preceding conversations. On the part of the claimant it was supposed and understood that he would be entitled to compensation, and that it would be allowed and paid by the Secretary of the Treasury. But on the part of the Secretary and Chief of the Bureau it was supposed and understood that the claimant, being an employee of the Treasury Department, would neither expect nor demand remuneration.

"*III. That ever since the issuance of said [231] letters patent the defendant has constructed, and has used continuously, from the date of said letters patent, to wit, March 1, 1870, upon and in connection with plate-printing presses used by the defendant in the Bureau of Engraving and Printing and in the Treasury building, the device aforesaid, so patented to the claimant, for the purpose of registering the number of impressions made by the various plate-printing presses, both hand and steam, employed and used by the defendant in the said Bureau of Engraving and Printing and in the Treasury Department building.

"IV. The claimant, at the time of the making of his invention, before described, was assistant master machinist in the Bureau of Engraving and Printing. He was never assigned to the duty of making inventions, and it was not a part of his duty to do so; and the invention before described was made within his own time, and exclusively at his own cost, and was a completed invention, properly and sufficiently set forth in drawings when first brought to the Chief of the Bureau, as set forth in finding II.

"V. The defendants were in the undisturbed use of the claimant's invention from July 24, 1878, to July 24, 1884, by attaching such registers to a great number of their presses. During that period the claimant made no objection to such use of his invention, and failed to give notice to the Secretary of the Treasury or the Chief of the Bureau of Engraving and Printing that he would demand royalty or remuneration therefor.

"VI. The average number of presses with claimant's device used by the defendants between July 24, 1878, and July 24, 1884, was 200 per day, covering 1802 working days."

The question in the case is whether, on these facts, a contract arose between the United States and the appellant, whereby the United States promised to pay him for the use of his device.

We held in *Russell v. United States*, 182 U. S. 516-530, 45 L. ed. 1210-1215, 21 Sup. Ct. Rep. 899, that in order to give the court

of claims jurisdiction, under the act of March 3, 1887 (24 Stat. at L. 505, chap. 359, U. S. Comp. Stat. 1901, p. 752), defining claims of which the court of claims had jurisdiction, the demand sued on must be founded on "a coming together of minds." And we excluded, as not meeting this condition, those contracts or obligations that the law is said to imply from a tort. *Schillinger v. United States*, 155 U. S. 163, 39 L. ed. 108, 15 Sup. Ct. Rep. 85; *United States v. Berdan Firearms Mfg. Co.* 156 U. S. 552, 39 L. ed. 530, 15 Sup. Ct. Rep. 420.

In the case at bar the court of claims finds that the appellant "supposed and understood that he would be entitled to compensation, and that it would be allowed and paid by the Secretary of the Treasury;" but it also finds that "on the part of the Secretary and Chief of Bureau (Engraving and Printing) it was supposed and understood that the claimant (appellant), being an employee of the Treasury Department, would neither expect nor demand remuneration." That there was "a coming together of minds" is therefore excluded by the findings. And the use of the device cannot give a right independent of the understanding under which it was used. The appellant should have been explicit in his demand. He contends *that he was; but manifestly he was not, or the curious opposition between his expectation and that of the Secretary of the Treasury and Chief of Bureau could not have occurred. And we cannot assent to the suggestion that he "was by coercion prevented" from making a demand "in terms" by his subordinate position. How long must we suppose such coercion lasted, and that he could have permitted a misunderstanding of his purpose? Six years passed, and the Chief of Bureau with whom the negotiations were made went out of office; another succeeded. No demand was made of either for compensation. Further time passed, and other Chiefs of Bureau succeeded. There was a succession of Secretaries of the Treasury; no demand was made of any of them. His first demand was the petition in this case,—over fourteen years from his first interview with the Secretary of the Treasury. This delay cannot be overlooked or interpreted favorably to appellant's contention. He sues for \$102,600, and this does not include the royalties that he contends he was entitled to for the first six years the device was used. He claims a royalty of 25 cents a day on an average of two hundred machines—that is, \$50 a day. He was an employee of the government, at a modest salary, and we cannot conceive there was no inducement in \$50 a day to an explicit de-

198 U. S.

mand of his rights, or that he was willing to wait, or felt himself coerced to wait, for their realization for fourteen years, and even to lose compensation for six years by the operation of the statute of limitations. The rights of the government are obvious. The contention of the appellant forces on it a liability that it might not have taken. It was given no election of the terms upon which it would use the register, or whether it would use it at all. Of course, this argument is based on the fact that there was no coming together of the minds of the parties, or, as expressed by the findings of the court of claims, that "it was supposed and understood" by the officers of the government that appellant "would neither expect nor demand remuneration." And this fact distinguishes the case from *McKeever v. United States*, 14 Ct. Cl. 396, affirmed by [236] this court; also from *United States v. Ly-nah*, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349, and the other cases cited by appellant.

Judgment affirmed.

Mr Justice **Peckham** dissents.

BOARD OF TRADE OF THE CITY OF
CHICAGO, *Petitioner*,

v.

CHRISTIE GRAIN & STOCK COMPANY
and C. C. Christie. (No. 224.)

L. A. KINSEY COMPANY *et al.*, *Petition-*
ers,
v.

BOARD OF TRADE OF THE CITY OF
CHICAGO. (No. 280.)

(See S. C. Reporter's ed. 236-253.)

Injunction against distributing market quotations—effect of illegality of transactions—monopoly—contracts in restraint of trade.

1. The use and distribution of the continuous quotations of prices on sales of grain and provisions for future delivery, which are collected by the Chicago board of trade, and which cannot be obtained by those so using and distributing them without a known breach of the confidential terms on which they are communicated by the board of trade to its customers, may be enjoined, even assuming that such quotations relate to "pre-

NOTE.—On *contracts in restraint of trade*—see notes to *Leslie v. Lorillard*, 1 L. R. A. 456; *People v. North River Sugar Ref. Co.* 2 L. R. A. 33; *Bowman v. Phillips*, 3 L. R. A. 632; *Richardson v. Buhl*, 6 L. R. A. 457; *People ex rel. Peabody v. Chicago Gas Trust Co.* 8 L. R. A.

tended buying and selling," within the meaning of Ill. act June 6, 1887, prohibiting the keeping of places where such transactions are committed.

2. Contracts with telegraph companies by which the Chicago board of trade limits the communication of quotations of prices on sales of grain and provisions for future delivery, collected by it, which it might have refrained from communicating to anyone, do not effect a monopoly or amount to an attempt at monopoly, and are not contracts in restraint of trade, either under the act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), or at common law.

[Nos. 224, 280.]

Argued April 20, 24, 25, 1905. Decided May 8, 1905.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which reversed a decree of the Circuit Court for the Western District of Missouri, enjoining the use and distribution of market quotations collected by the Chicago board of trade, and remanded the cause with instructions to dismiss the bill. *Reversed.* Also

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to review a decree which reversed a decree of the Circuit Court for the District of Indiana, dismissing a bill to enjoin the distribution of market quotations collected by the Chicago board of trade, and directed the entry of a decree granting the relief sought. *Affirmed.*

See same case below in Circuit Court of Appeals for Eighth Circuit, 61 C. C. A. 11, 125 Fed. 161; and in Circuit Court of Appeals for Seventh Circuit, 64 C. C. A. 669, 130 Fed. 507.

The facts are stated in the opinion.

Mr. Henry S. Robbins argued the cause and filed a brief for petitioner in No. 224:

Not all misconduct, even though criminal, by a plaintiff, will defeat his suit. The misconduct must, within the well-defined limitations of the clean-hands doctrine, have been a wrong done to the defendant himself, and must have been in regard to the subject-matter in litigation.

Fuller v. Berger, 65 L. R. A. 381, 56 C. A. 588, 120 Fed. 274; *Chicago v. Union Stock Yards & Transit Co.* 164 Ill. 224, 35 L. R. A. 281, 45 N. E. 430; *Bateman v. Fargason*, 2 Flipp. 660, 4 Fed. 32; *Ansley*

v. Wilson, 50 Ga. 421; *Langdon v. Templeton*, 66 Vt. 173, 28 Atl. 866; 1 Pom. Eq. § 399.

The general dissemination of these quotations is highly beneficial to legitimate commerce.

New York & C. Grain & Stock Exchange v. Board of Trade, 127 Ill. 153, 2 L. R. A. 411, 19 N. E. 855.

The question is reduced to this: Is market news, whose dissemination is so helpful to commerce, to be deemed infected with illegality or beyond judicial protection because the owner of this news maintains an exchange where parties to most of the transactions it records do not contemplate actual delivery? Does the existence of a property right in news depend upon its source, rather than the character or utility of the news itself? Would not this subordinate the practical to the purely sentimental? A sufficient answer to these questions is furnished by two decisions of this court.

Brooks v. Martin, 2 Wall. 79, 17 L. ed. 734; *Planters' Bank v. Union Bank*, 16 Wall. 483, 499, 21 L. ed. 473, 479.

While the methods differ, the principle of the system of offsetting or elimination will be found in most commercial exchanges. Such a settlement system of the Chicago stock exchange was upheld in *Clews v. Jamieson*, 182 U. S. 461, 45 L. ed. 1183, 21 Sup. Ct. Rep. 845.

A similar system of the New Orleans cotton exchange was upheld in *Lehman v. Feld*, 37 Fed. 852.

Speculation is not unlawful.

Kirkpatrick v. Adams, 20 Fed. 287.

Petitioner's rules, subject to which all contracts are made, require delivery, and this creates a presumption of legality.

Bibb v. Allen, 149 U. S. 499, 37 L. ed. 826, 13 Sup. Ct. Rep. 950.

Market news is a species of property which a court of equity will protect by injunction.

Exchange Teleg. Co. v. Gregory [1896] 1 Q. B. 147; *F. W. Dodge Co. v. Construction Information Co.* 183 Mass. 62, 60 L. R. A. 810, 97 Am. St. Rep. 412, 66 N. E. 204; *Kiernan v. Manhattan Quotation Teleg. Co.* 50 How. Pr. 194; *National Teleg. News Co. v. Western U. Teleg. Co.* 60 L. R. A. 805, 56 C. C. A. 198, 119 Fed. 294; *Illinois Commission Co. v. Cleveland Teleg. Co.* 56 C. C. A. 205, 119 Fed. 301; *Cleveland Teleg. Co. v. Stone*, 105 Fed. 794; *Board of Trade*

500; *National Benefit Co. v. Union Hospital Co.* 11 L. R. A. 437; *Western Wooden Ware Asso. v. Starkey*, 11 L. R. A. 503; *Lovejoy v. Michels*, 13 L. R. A. 770; *People v. North River Sugar Ref. Co.* 9 L. R. A. 39; *Oregon Steam Nav. Co. v. Winsor*, 22 L. ed. U. S. 315; *Fowle v. Park*, 33 L. ed. U. S. 67; *United States v.*

Trans-Missouri Freight Asso. 41 L. ed. U. S. 1008; *Chicago, M. & St. P. R. Co. v. Wabash, St. L. & P. R. Co.* 9 C. C. A. 666; and *Cravens v. Carter-Crume Co.* 34 C. C. A. 486.

On illegal trusts under modern anti-trust laws—see note to *Whitwell v. Continental Tobacco Co.* 64 L. R. A. 689.

v. C. B. Thomson Commission Co. 103 Fed. 902; *Board of Trade v. Hadden-Krull Co.* 109 Fed. 705; *Board of Trade v. Christie Grain & Stock Co.* 116 Fed. 944; *New York & C. Grain & Stock Exchange v. Board of Trade*, 127 Ill. 153, 2 L. R. A. 411, 19 N. E. 855.

They who deny a common-law right after publication necessarily concede that it is not lost by a limited or restricted publication.

Millar v. Taylor, 4 Burr. 2355, 2366; *Tompkins v. Halleck*, 133 Mass. 32, 43 Am. Rep. 480; *Palmer v. DeWitt*, 47 N. Y. 532, 7 Am. Rep. 480; *Macklin v. Richardson*, Ambler 694; *Croce v. Aiken*, 2 Biss. 208, Fed. Cas. No. 3,441; *Prince Albert v. Strange*, 2 De G. & S. 652; *Turner v. Robinson*, 10 Ir. Ch. Rep. 121; *Abernethy v. Hutchinson*, 1 Hall & T. 28; *Caird v. Sime*, L. R. 12 App. Cas. 326; *Bartlette v. Crittenden*, 4 McLean, 300, Fed. Cas. No. 1,082.

Bucket shops are not entitled to these quotations, either from petitioner or the distributing telegraph companies.

Central Stock & Grain Exchange v. Board of Trade, 196 Ill. 396, 63 N. E. 740; *Smith v. Western U. Teleg. Co.* 84 Ky. 664, 2 S. W. 483; *Bryant v. Western U. Teleg. Co.* 17 Fed. 825; *Re Renville*, 46 App. Div. 37, 61 N. Y. Supp. 549; *Bradley v. Western U. Teleg. Co.* 9 Ohio L. J. 223; 27 Am. & Eng. Enc. Law, 2d ed. pp. 1039, 1094; Gray, Communication by Telegraph, 19, note.

Petitioner and the telegraph companies, having then the right to withhold the quotations from bucket shops, clearly may establish such reasonable regulations respecting their distribution as will effectuate this purpose.

Sullivan v. Postal Teleg. Cable Co. 61 C. C. A. 1, 123 Fed. 411.

Petitioner, being the owner of and itself distributing these quotations, does not, by refusing to sell to bucket shops, contract, combine, or conspire in restraint of trade, or attempt to monopolize trade, within the meaning of the anti-trust act.

Whitwell v. Continental Tobacco Co. 64 L. R. A. 689, 60 C. C. A. 290, 125 Fed. 454.

An owner of property, who is under no legal duty to sell at all, and who may refuse to sell to a certain class of persons, as well as fix the price at which to sell, may also in selling to another impose the same restrictions upon the latter's selling, without making the transaction an illegal restraint of trade at common law.

Elliman v. Carrington [1901] 1 Ch. Div. 275; *Fowle v. Park*, 131 U. S. 88, 33 L. ed. 67, 9 Sup. Ct. Rep. 658; *E. Bement & Sons v. National Harrow Co.* 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747.

In all cases in which this court has held

the act applicable, the necessary tendency of the restriction was to deprive the public of the advantages that flow from free competition.

Hopkins v. United States, 171 U. S. 578, 600, 43 L. ed. 290, 299, 19 Sup. Ct. Rep. 40; *Anderson v. United States*, 171 U. S. 604, 615, 43 L. ed. 300, 305, 19 Sup. Ct. Rep. 50; *United States v. Joint Traffic Assn.* 171 U. S. 568, 43 L. ed. 287, 19 Sup. Ct. Rep. 25.

The interstate commerce clause of the Constitution, upon which this Sherman act rests, aims to protect interstate commerce, but does not protect interstate gambling.

Alexander v. State, 86 Ga. 246, 10 L. R. A. 859, 12 S. E. 408.

This court should not, in the absence of clear language, assume that Congress intended to nullify these state statutes, if indeed it lawfully might do so.

Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819; *Plumley v. Massachusetts*, 155 U. S. 461, 39 L. ed. 223; *Patterson v. Kentucky*, 97 U. S. 501, 24 L. ed. 1115; *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; *Hennington v. Georgia*, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086.

Messrs. James H. Harkless and W. H. Rossington argued the cause, and, with **Messrs. Charles S. Cryslar, Charles Blood Smith, Clifford Histed, and J. S. West**, filed a brief for respondents:

The quotations are not property, nor can they be impressed with a right of property by the board of trade.

Donaldson v. Beckett, 2 Bro. P. C. 129, 138; *Jefferys v. Boosey*, 4 H. L. Cas. 815; *Wheaton v. Peters*, 8 Pet. 591, 8 L. ed. 1055; *The Iolanthe Case*, 15 Fed. 442; *West Pub. Co. v. Lawyers' Co-Op. Pub. Co.* 25 L. R. A. 441, 64 Fed. 364; *Stowe v. Thomas*, 2 Wall. Jr. 547, Fed. Cas. No. 13,514.

The board of trade has no property right or interest in or to the knowledge of the quotations as they arise from the transactions of its members upon the floor of the board.

Millar v. Taylor, 4 Burr. 2362; *Jefferys v. Boosey*, 4 H. L. Cas. 935; *Keene v. Wheatley*, 4 Phila. 157, Fed. Cas. No. 7,644.

The right of property in mental or literary effort rests fundamentally upon the creative faculty, which must have been exercised by the claimant or someone through whom his title is derived.

Millar v. Taylor, 4 Burr. 2340.

Nothing can be the object of property which has not a corporeal substance.

Millar v. Taylor, 4 Burr. 2305; *Wheaton v. Peters*, 8 Pet. 591, 8 L. ed. 1055; *Keene v. Wheatley*, 4 Phila. 157, Fed. Cas. No. 7,644.

Nothing can be the object of property which is not capable of sole and exclusive enjoyment.

Millar v. Taylor, 4 Burr. 2362; *Keene v. Wheatley*, 4 Phila. 157, Fed. Cas. No. 7,644; 2 Kent, Com. 320; Bouvier, Law Dict. *Property*; *Walker v. Old Colony & N. R. Co.* 103 Mass. 14, 4 Am. Rep. 509; Schöuler, Pers. Prop. § 2; *Jones v. Vanzandt*, 4 McLean, 603, Fed. Cas. No. 7,503; 1 Bl. Com. 138; Webster, Dict. *Property*.

Nothing can be the object of property that is not capable of distinguishable, proprietary marks.

Jefferys v. Boosey, 4 H. L. Cas. 869.

The board of trade cannot alter the essential nature of these quotations by making record of them in its office. Its sole right of property is necessarily confined to the records themselves.

Wheaton v. Peters, 8 Pet. 657, 8 L. ed. 1079.

Petitioner is without power to claim a right of restricted publication. If it publishes at all, it must be unconditional.

New York & C. Grain & Stock Exchange v. Board of Trade, 127 Ill. 153, 2 L. R. A. 411, 19 N. E. 855; *Ladd v. Oxnard*, 75 Fed. 703; *Kecne v. Wheatley*, 4 Phila. 157, Fed. Cas. No. 7,644.

Petitioner has realized the full avails of its property according to its nature when it has sold and delivered the quotations to the telegraph companies.

Millar v. Taylor, 4 Burr. 2357, 2359, 2360; *Wheaton v. Peters*, 8 Pet. 657, 8 L. ed. 1079.

The delivery of these quotations to public agents, like the telegraph companies, is necessarily a publication to the world.

Assuming a right of property in the board to these quotations, they have from long, free, and unrestrained usage become a matter of general commercial necessity, and have become impressed with a public interest and use. The board of trade is estopped from discriminating with reference to such public use.

New York & C. Grain & Stock Exchange v. Board of Trade, 127 Ill. 153, 2 L. R. A. 411, 19 N. E. 855; *American Livestock Commission Co. v. Chicago Livestock Exchange*, 143 Ill. 239, 18 L. R. A. 190, 36 Am. St. Rep. 385, 32 N. E. 282.

The rule relating to the rights of the public in a business that has become impressed with a public trust is general in its application, and affects all property and business in which the public may acquire such interest.

Munn v. Illinois, 94 U. S. 126, 24 L. ed. 84; Bacon, Abr., *Fairs and Markets*; 12 Petersdorff, Abr. 553, note; *Northampton v. Ward*, 2 Strange, 1238; *Bolt v. Stennett*, 8

T. R. 606; *Allnut v. Inglis*, 12 East, 527; *Sandford v. Catawissa*, W. & E. R. Co. 24 Pa. 378, 64 Am. Dec. 667; *Shipper v. Pennsylvania R. Co.* 47 Pa. 338; *Houston & T. C. R. Co. v. Smith*, 63 Tex. 326; *Chicago Dock & Canal Co. v. Garrity*, 115 Ill. 155, 3 N. E. 448; *Barrington v. Commercial Dock Co.* 15 Wash. 175, 33 L. R. A. 116, 45 Pac. 749; *State ex rel. Atty. Gen. v. Columbus Gaslight & Coke Co.* 34 Ohio St. 572, 32 Am. Rep. 390; *Lindsay v. Anniston*, 104 Ala. 261, 27 L. R. A. 436, 53 Am. St. Rep. 44, 16 So. 545; *People v. King*, 110 N. Y. 418, 1 L. R. A. 293, 6 Am. St. Rep. 389; 18 N. E. 245; *Rushville v. Rushville Natural Gas Co.* 132 Ind. 575, 15 L. R. A. 321, 28 N. E. 853; *Zanesville v. Zanesville Gaslight Co.* 47 Ohio St. 1, 23 N. E. 55; *White v. Farmers' Highline Canal & Reservoir Co.* 22 Colo. 198, 21 L. R. A. 828, 43 Pac. 1028; *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. Rep. 48; *Louisville, E. & St. L. Consol. R. Co. v. Wilson*, 132 Ind. 517, 18 L. R. A. 105, 32 N. E. 311; *Munn v. Illinois*, 94 U. S. 126, 24 L. ed. 113; 9 Rose's Notes, p. 21; *Missouri ex rel. Baltimore & O. Teleg. Co. v. Bell Teleph. Co.* 23 Fed. 539; *Cotting v. Kansas City Stock Yards Co.* (*Cotting v. Godard*) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; *State ex rel. Payne v. Kinloch Teleph. Co.* 93 Mo. App. 349, 67 S. W. 684.

The circumstance that the business is a virtual or natural monopoly is given peculiar significance in some of the decisions.

State v. Edwards, 86 Me. 105, 25 L. R. A. 504, 41 Am. St. Rep. 528, 29 Atl. 948; *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350.

The legislature is without power to create a public use by legislative declaration, or to determine finally, by the exercise of power of regulation or otherwise, that property is so impressed.

Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 660, 661, 665, 22 L. ed. 455, 460, 461; *Geneseo v. Genesco Natural Gas, Coal, Oil, Salt, & Mineral Co.* 55 Kan. 358, 40 Pac. 655; *Central Branch Union P. R. Co. v. Smith*, 23 Kan. 745.

The conditions exacted of the public in the contract with the telegraph companies are unreasonable, unjust, and restrictive, and tend to the creation of a monopoly.

Kalamazoo Hack & Bus Co. v. Sootsma, 84 Mich. 194, 10 L. R. A. 819, 22 Am. St. Rep. 693, 47 N. W. 667; *Montana Union R. Co. v. Langlois*, 9 Mont. 419, 8 L. R. A. 753, 18 Am. St. Rep. 745, 24 Pac. 209; *Lindsay v. Anniston*, 104 Ala. 261, 27 L. R. A. 436, 53 Am. St. Rep. 44, 16 So. 545; *Lough v. Outerbridge*, 143 N. Y. 277, 25 L. R. A. 674, 42 Am. St. Rep. 712, 38 N. E.

292; *Cincinnati, H. & D. R. Co. v. Bowling Green*, 57 Ohio St. 345, 41 L. R. A. 422, 49 N. E. 123.

Every transaction denounced by this provision of the contract exacted from the applicants could be made by the brokers of the board of trade upon the board of trade, and would be upheld and enforced in the courts.

Central Stock & Grain Exchange v. Board of Trade, 196 Ill. 396, 63 N. E. 741; *Kent v. Miltenberger*, 13 Mo. App. 503; *Clarkey v. Foss*, 7 Biss. 540, Fed. Cas. No. 2,852; *Benson v. Morgan*, 26 Ill. App. 22; *A. G. Edwards Brokerage Co. v. Stevenson*, 160 Mo. 516, 61 S. W. 617; *Wagner v. Hildebrand*, 187 Pa. 136, 41 Atl. 34; *Sampson v. Camperdown Cotton Mills*, 82 Fed. 833; *Deierling v. Sloop*, 67 Mo. App. 446; *Winward v. Lincoln*, 23 R. I. 476, 64 L. R. A. 160, 51 Atl. 106; *Metropolitan Nat. Bank v. Jansen*, 47 C. C. A. 497, 108 Fed. 572; *Clews v. Jamieson*, 182 U. S. 461, 489-494, 45 L. ed. 1183, 1196-1198, 21 Sup. Ct. Rep. 845.

The contract between the telegraph companies and the board of trade is violative of the act of Congress of July 2, 1890, chap. 647, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," otherwise known as the Sherman anti-trust act.

Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96.

The telegraph company is an instrument of interstate commerce, and the business of telegraphing is commerce.

Pensacola Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 1, 24 L. ed. 708; *Western U. Teleg. Co. v. Texas*, 105 U. S. 460, 26 L. ed. 1067; *Western U. Teleg. Co. v. Pendleton*, 122 U. S. 347, 356, 30 L. ed. 1187, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 241, 44 L. ed. 147, 20 Sup. Ct. Rep. 96; *Gibbons v. Ogden*, 9 Wheat. 1, 189, 210, 6 L. ed. 23, 68, 73; *Brown v. Maryland*, 12 Wheat. 447, 6 L. ed. 688; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238; *Bowman v. Chicago & N. W. R. Co.* 425 U. S. 490, 31 L. ed. 708, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 203, 204, 29 L. ed. 161, 162, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *Leisy v. Hardin*, 135 U. S. 113, 34 L. ed. 133, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *License Cases*, 5 How. 509, 12 L. ed. 258; *Re Rahrer (Wilkerson v. Rahrer)* 140 U. S. 557, 35 L. ed. 575, 11 Sup. Ct. Rep. 865.

The mere fact of regulation, whether reasonable or unreasonable, brings the case within the statute.

198 U. S.

Chesapeake & O. Fuel Co. v. United States, 53 C. C. A. 256, 115 Fed. 610.

If the contract between the board of trade and telegraph companies is illegal, a court of equity will not lend its aid to its enforcement.

McMullen v. Hoffman, 174 U. S. 639, 654, 43 L. ed. 1117, 19 Sup. Ct. Rep. 839; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 548, 46 L. ed. 679, 685, 22 Sup. Ct. Rep. 431.

The fact, if it be a fact, that parties might use these quotations after receiving them, for illegal purposes or partly illegal purposes, is no concern whatever of the petitioner, and is no justification for its unlawful contract.

Western U. Teleg. Co. v. Ferguson, 57 Ind. 495; *Christie Street Commission Co. v. Board of Trade*, 92 Ill. App. 604; *Cope v. District Fair Asso.* 99 Ill. 489, 39 Am. Rep. 30.

The telegraph companies are incapacitated from entering into contracts of the character disclosed by this record.

Western U. Teleg. Co. v. Texas, 105 U. S. 460, 466, 26 L. ed. 1067, 1068.

The principles of the common law are operative upon all interstate commercial transactions, independent of any regulation of the subject by Congress.

Western U. Teleg. Co. v. Call Pub. Co. 181 U. S. 92, 45 L. ed. 765, 21 Sup. Ct. Rep. 565.

The act of Congress of July 2, 1890, was but declaratory in concrete form, and provided specific remedies for what was already the common law upon the subject.

United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249.

The petitioner is violating the law, and does not come into court with clean hands itself.

Board of Trade v. O'Dell Commission Co. 115 Fed. 574; *Delaware L. & W. R. Co. v. Frank*, 110 Fed. 689; *Hilson Co. v. Foster*, 80 Fed. 897; *Lynch v. Rosenthal*, 144 Ind. 86, 31 L. R. A. 835, 55 Am. St. Rep. 168, 42 N. E. 1103; *Topeka Water Supply Co. v. Potwin*, 43 Kan. 404, 23 Pac. 578; *Christie Street Commission Co. v. Board of Trade*, 94 Ill. App. 229; *Pearce v. Foote*, 113 Ill. 228, 58 Am. Rep. 414; *Soby v. People*, 134 Ill. 66, 25 N. E. 109.

The contract in question and the situation of the board of trade as well as the telegraph company, place them in such a position and relation that their doings and transactions are *ultra vires* of the corporation; and for that reason, if no other, they have no standing in a court of equity.

Thomas v. West Jersey R. Co. 101 U. S. 71, 25 L. ed. 950; *Bowman Dairy Co. v. Mooney*, 41 Mo. App. 665; *Western U.*

Teleg. Co. v. Ferguson, 57 Ind. 495; *Cope v. District Fair Asso.* 99 Ill. 489, 39 Am. Rep. 30.

Mr. Chester H. Krum also argued the cause for respondents.

Mr. E. D. Crumpacker argued the cause, and, with *Messrs. Jacob J. Kern, John A. Brown, Charles D. Fullen, and Peter Crumpacker*, filed a brief for petitioners in No. 280:

The board of trade has no property interest in the quotations, made up of transactions in its pits, when said transactions are not based upon actual bona fide contracts of purchase and sale of the commodity dealt in.

Central Stock & Grain Exchange v. Board of Trade, 196 Ill. 396, 63 N. E. 740; *Counselman v. Reicha*, 103 Iowa, 430, 72 N. W. 490; *First Nat. Bank v. Oskaloosa Packing Co.* 66 Iowa, 41, 23 N. W. 255; *Higgins v. McCrea*, 116 U. S. 671, 29 L. ed. 764, 6 Sup. Ct. Rep. 557; *Soby v. People*, 134 Ill. 68, 25 N. E. 109; *Irwin v. Williar*, 110 U. S. 499, 28 L. ed. 225, 4 Sup. Ct. Rep. 160; *Melchert v. American U. Teleg. Co.* 3 McCrary, 11 Fed. 193; *Barnard v. Backhaus*, 52 Wis. 593, 6 N. W. 252, 9 N. W. 595; *Dows v. Glaspel*, 4 N. D. 251, 60 N. W. 60; *Pickering v. Ceuse*, 79 Ill. 328; *Whitesides v. Hunt*, 97 Ind. 191, 49 Am. Rep. 441.

In seeking to control the quotations based upon the transactions as shown by the testimony in this case, the respondent does not present either such a party or such a subject-matter of controversy as may appeal to a court of equity for protection.

Soby v. People, 134 Ill. 68, 25 N. E. 109; *Weare Commission Co. v. People*, 111 Ill. App. 116, Affirmed in 209 Ill. 528, 70 N. E. 1076; *Liverpool & L. & G. Ins. Co. v. Clunie*, 88 Fed. 160; *Woodward v. Woodward*, 41 N. J. Eq. 224, 4 Atl. 424; 1 Pom. Eq. Jur. 399; *Delaware, L. & W. R. Co. v. Frank*, 110 Fed. 689; *Manhattan Medicine Co. v. Wood*, 108 U. S. 218, 27 L. ed. 706, 2 Sup. Ct. Rep. 436; *Lawrence Mfg. Co. v. Tennessee Mfg. Co.* 31 Fed. 776; *Krauss v. Jos. R. Peebles Sons Co.* 58 Fed. 585; *Symonds v. Jones*, 82 Me. 302, 8 L. R. A. 570, 17 Am. St. Rep. 485, 19 Atl. 820; *Joseph v. Macowsky*, 96 Cal. 518, 19 L. R. A. 53, 31 Pac. 914; *Holman v. Johnson*, Cowp. 341; *Fetridge v. Wells*, 4 Abb. Pr. 144; *Coppell v. Hall*, 7 Wall. 542, 559, 19 L. ed. 244, 248.

There is nothing in the by-laws of the respondent anywhere, or which would in any way even tend, to check gambling in grain in its pits.

Pardridge v. Cutler, 168 Ill. 504, 48 N. E. 125; *Weare Commission Co. v. People*, 111 Ill. App. 116, Affirmed in 209 Ill. 528, 70 N. E. 1076.

Messrs. Lloyd Charles Whitman and John A. Brown also argued the cause for petitioners.

Mr. Henry S. Robbins argued the cause and filed a brief for respondent in No. 280. For his contentions see his brief for petitioner in No. 224, as reported above.

Messrs. Julien T. Davies, Abraham I. Elkus, and Garrard Glenn, filed a brief by special leave for Edwin Hawley and Frank R. Ray:

Contracts to be performed only by the payment of differences are void at common law, in the absence of statute.

Irwin v. Williar, 110 U. S. 499, 28 L. ed. 225, 4 Sup. Ct. Rep. 160; *Ball v. Davis*, 1 N. Y. S. R. 517; *Flagg v. Gilpin*, 17 R. I. 10, 19 Atl. 1084; *Rumsey v. Berry*, 65 Me. 575; *Gregory v. Wendell*, 39 Mich. 337, 33 Am. Rep. 390; *Mohr v. Miesen*, 47 Minn. 228, 49 N. W. 862; *Brua's Appeal*, 55 Pa. 294; *Rudolf v. Winters*, 7 Neb. 126; *Cothran v. Ellis*, 125 Ill. 496, 16 N. E. 646; *Cunningham v. National Bank*, 71 Ga. 400, 51 Am. Rep. 266.

The form of the contract is unimportant. The actual intent of the parties at the time of the making of the contract is the absolute test.

Irwin v. Williar, 110 U. S. 499, 28 L. ed. 225, 4 Sup. Ct. Rep. 160; *Higgins v. McCrea*, 116 U. S. 671, 29 L. ed. 764, 6 Sup. Ct. Rep. 557; *Embrey v. Jemison*, 131 U. S. 336, 33 L. ed. 172, 9 Sup. Ct. Rep. 776; *Pearce v. Rice*, 142 U. S. 28, 35 L. ed. 925, 12 Sup. Ct. Rep. 130; *Story v. Salomon*, 71 N. Y. 420; *Peck v. Doran & Wright Co.* 57 Hun, 343, 10 N. Y. Supp. 401; *Kenyon v. Luther*, 19 N. Y. S. R. 32, 4 N. Y. Supp. 498; *Cover v. Smith*, 82 Md. 586, 34 Atl. 465; *Lester v. Buel*, 49 Ohio St. 240, 30 N. E. 821; *Rumsey v. Berry*, 65 Me. 570; *Gregory v. Wendell*, 39 Mich. 337, 33 Am. Rep. 390; *Flagg v. Baldwin*, 38 N. J. Eq. 219, 48 Am. Rep. 308; *Sharp v. Stalker*, 63 N. J. Eq. 596, 52 Atl. 1120; *Bibb v. Allen*, 149 U. S. 481, 37 L. ed. 819, 13 Sup. Ct. Rep. 950.

This intent may be proved by the circumstances surrounding the transaction, and proof of such circumstances is received with great liberality.

Kenyon v. Luther, 19 N. Y. S. R. 32, 4 N. Y. Supp. 498; *Ball v. Davis*, 1 N. Y. S. R. 517; *Dwight v. Badgley*, 60 Hun, 144, 14 N. Y. Supp. 498; *Peck v. Doran & Wright Co.* 57 Hun, 343, 10 N. Y. Supp. 401; *Yerkes v. Salomon*, 11 Hun, 471; *Mackey v. Rausch*, 39 N. Y. S. R. 232, 15 N. Y. Supp. 4; *Re Green*, 7 Biss. 338, Fed. Cas. No. 5,751; *Cobb v. Prell*, 5 McCrary, 80, 15 Fed. 774; *Re Chandler*, 9 Nat. Bankr. Reg. 514, Fed. Cas. No. 2,590; *Mohr v. Miesen*, 47 Minn. 228, 49 N. W.

862; *Kirkpatrick v. Bonsall*, 72 Pa. 155; *Lowry v. Dillman*, 59 Wis. 197, 18 N. W. 4; *Carroll v. Holmes*, 24 Ill. App. 455; *Hill v. Johnson*, 38 Mo. App. 383; *Crawford v. Spencer*, 92 Mo. 499, 1 Am. St. Rep. 745, 4 S. W. 713; *Cothran v. Ellis*, 125 Ill. 496, 16 N. E. 646; *Flagg v. Baldwin*, 38 N. J. Eq. 219, 48 Am. Rep. 308; *Sharp v. Stalker*, 63 N. J. Eq. 596, 52 Atl. 1120.

Mr. Justice **Holmes** delivered the opinion of the court:

These are two bills in equity brought by the Chicago board of trade to enjoin the principal defendants from using and distributing the continuous quotations of prices on sales of grain and provisions for future delivery, which are collected by the plaintiff, and which cannot be obtained by the defendants except through a known breach of the confidential terms on which the plaintiff communicates them. It is sufficient for the purposes of decision to state the facts, without reciting the pleadings in detail. The plaintiff was incorporated by special charter of the state of Illinois on February 18, 1859. The charter incorporated an existing board of trade, and there seems to be no reason to doubt, as indeed is alleged by the Christie Grain & Stock Company, that it then managed its chamber of commerce substantially as it has since. The main feature of its management is that it maintains an exchange hall for the exclusive use of its members, which now has become one of the great grain and provision markets of the world. Three separated portions of this hall are known respectively as the wheat pit, the corn pit, and the provision pit. In these pits the members make sales and purchases exclusively for future delivery, the members dealing always as principals between themselves, and being bound practically, at least, as principals to those who employ them when they are not acting on their own behalf.

The quotation of the prices continuously offered and accepted in these pits during business hours are collected at the plaintiff's expense, and handed to the telegraph companies, *which have their instruments close at hand, and by the latter are sent to a great number of offices. The telegraph companies all receive the quotations under a contract not to furnish them to any bucket shop or place where they are used as a basis for bets or illegal contracts. To that end they agree to submit applications to the board of trade for investigation, and to require the applicant, if satisfactory, to make a contract with the telegraph company and the board of trade, which, if observed, confines the information within a circle of persons all con-

[246]

198 U. S. U. S., Book 49.

tracting with the board of trade. The principal defendants get and publish these quotations in some way not disclosed. It is said not to be proved that they get them wrongfully, even if the plaintiff has the rights which it claims. But as the defendants do not get them from the telegraph companies authorized to distribute them, have declined to sign the above-mentioned contracts, and deny the plaintiff's rights altogether, it is a reasonable conclusion that they get, and intend to get, their knowledge in a way which is wrongful unless their contention is maintained.

It is alleged in the bills that the principal defendants keep bucket shops, and the plaintiff's proof on that point fails, except so far as their refusal to sign the usual contracts may lead to an inference, but, if the plaintiff has the rights which it alleges, the failure is immaterial. The main defense is this: It is said that the plaintiff itself keeps the greatest of bucket shops, in the sense of an Illinois statute of June 6, 1887, that is, places wherein is permitted the pretended buying and selling of grain, etc., without any intention of receiving and paying for the property so bought, or of delivering the property so sold. On this ground it is contended that if, under other circumstances, there could be property in the quotations, which hardly is admitted, the subject-matter is so infected with the plaintiff's own illegal conduct that it is *caput lupinum*, and may be carried off by any one at will.

It appears that in not less than three quarters of the transactions in the grain pit there is no physical handing over of *any[247] grain, but that there is a settlement, either by the direct method, so called, or by what is known as ringing up. The direct method consists simply in setting off contracts to buy wheat of a certain amount at a certain time, against contracts to sell a like amount at the same time, and paying the difference of price in cash, at the end of the business day. The ring settlement is reached by a comparison of books among the clerks of the members buying and selling in the pit, and picking out a series of transactions which begins and ends with dealings which can be set against each other by eliminating those between—as, if A has sold to B 5,000 bushels of May wheat, and B has sold the same amount to C, and C to D, and D to A. Substituting D for B by novation, A's sale can be set against his purchase, on simply paying the difference in price. The circuit court of appeals for the eighth circuit took the defendant's view of these facts, and ordered the bill to be dismissed. 61 C. C. A. 11, 125 Fed. 161. The circuit court of appeals for the seventh circuit declined to follow this decision, and granted an injunction, as

prayed. 64 C. C. A. 669, 130 Fed. 507. Thereupon writs of certiorari were granted by this court, and both cases are here.

As has appeared, the plaintiff's chamber of commerce is, in the first place, a great market, where, through its eighteen hundred members, is transacted a large part of the grain and provision business of the world. Of course, in a modern market, contracts are not confined to sales for immediate delivery. People will endeavor to forecast the future, and to make agreements according to their prophecy. Speculation of this kind by competent men is the self-adjustment of society to the probable. Its value is well known as a means of avoiding or mitigating catastrophes, equalizing prices, and providing for periods of want. It is true that the success of the strong induces imitation by the weak, and that incompetent persons bring themselves to ruin by undertaking to speculate in their turn. But legislatures and courts generally have recognized that the natural evolutions of a complex society [248] are to be *touched only with a very cautious hand, and that such coarse attempts at a remedy for the waste incident to every social function as a simple prohibition and laws to stop its being are harmful and vain. This court has upheld sales of stock for future delivery, and the substitution of parties, provided for by the rules of the Chicago stock exchange. *Clews v. Jamieson*, 182 U. S. 461, 45 L. ed. 1183, 21 Sup. Ct. Rep. 845.

When the Chicago board of trade was incorporated, we cannot doubt that it was expected to afford a market for future as well as present sales, with the necessary incidents of such a market, and while the state of Illinois allows that charter to stand, we cannot believe that the pits, merely as places where future sales are made, are forbidden by the law. But again, the contracts made in the pits are contracts between the members. We must suppose that from the beginning, as now, if a member had a contract with another member to buy a certain amount of wheat at a certain time, and another to sell the same amount at the same time, it would be deemed unnecessary to exchange warehouse receipts. We must suppose that then as now, a settlement would be made by the payment of differences, after the analogy of a clearing house. This naturally would take place no less that the contracts were made in good faith, for actual delivery, since the result of actual delivery would be to leave the parties just where they were before. Set-off has all the effects of delivery. The ring settlement is simply a more complex case of the same kind. These settlements would be frequent,

as the number of persons buying and selling was comparatively small.

The fact that contracts are satisfied in this way by set-off and the payment of differences detracts in no degree from the good faith of the parties, and if the parties know when they make such contracts that they are very likely to have a chance to satisfy them in that way, and intend to make use of it, that fact is perfectly consistent with a serious business purpose, and an intent that the contract shall mean what it says. There is no doubt, from the rules of the board of trade or the evidence, *that the [249] contracts made between the members are intended and supposed to be binding in manner and form as they are made. There is no doubt that a large part of those contracts is made for serious business purposes. Hedging, for instance, as it is called, is a means by which collectors and exporters of grain or other products, and manufacturers who make contracts in advance for the sale of their goods, secure themselves against the fluctuations of the market by counter contracts for the purchase or sale, as the case may be, of an equal quantity of the product, or of the material of manufacture. It is none the less a serious business contract for a legitimate and useful purpose that it may be offset before the time of delivery in case delivery should not be needed or desired.

Purchases made with the understanding that the contract will be settled by paying the difference between the contract and the market price at a certain time (*Embrey v. Jemison*, 131 U. S. 336, 33 L. ed. 172, 9 Sup. Ct. Rep. 776; *Weare Commission Co. v. People*, 209 Ill. 528, 70 N. E. 1076) stand on different ground from purchases made merely with the expectation that they will be satisfied by set-off. If the latter might fall within the statute of Illinois, we would not be the first to decide that they did when the object was self-protection in business, and not merely a speculation entered into for its own sake. It seems to us an extraordinary and unlikely proposition that the dealings which give its character to the great market for future sales in this country are to be regarded as mere wagers or as "pretended" buying or selling, without any intention of receiving and paying for the property bought, or of delivering the property sold, within the meaning of the Illinois act. Such a view seems to us hardly consistent with the admitted fact that the quotations of prices from the market are of the utmost importance to the business world, and not least to the farmers; so important, indeed, that it is argued here and has been held in Illinois that the quotations are clothed with a public use. It seems to us hardly consistent with the obvious pur-

poses of the plaintiff's charter, or indeed with the words of the statute invoked. The [250] *sales in the pits are not pretended, but, as we have said, are meant and supposed to be binding. A set-off is, in legal effect, a delivery. We speak only of the contracts made in the pits, because in them the members are principals. The subsidiary rights of their employers where the members buy as brokers we think it unnecessary to discuss.

In the view which we take, the proportion of the dealings in the pit which are settled in this way throws no light on the question of the proportion of serious dealings for legitimate business purposes to those which fairly can be classed as wagers, or pretended contracts. No more does the fact that the contracts thus disposed of call for many times the total receipts of grain in Chicago. The fact that they can be and are set off sufficiently explains the possibility, which is no more wonderful than the enormous disproportion between the currency of the country and contracts for the payment of money, many of which in like manner are set off in clearing houses without any one dreaming that they are not paid, and for the rest of which the same money suffices in succession, the less being needed the more rapid the circulation is.

But suppose that the board of trade does keep a place where pretended and unlawful buying and selling are permitted, which, as yet, the supreme court of Illinois, we believe, has been careful not to intimate, it does not follow that it should not be protected in this suit. The question whether it should be involves several elements which we shall take up in turn.

In the first place, apart from special objections, the plaintiff's collection of quotations is entitled to the protection of the law. It stands like a trade secret. The plaintiff has the right to keep the work which it has done, or paid for doing, to itself. The fact that others might do similar work, if they might, does not authorize them to steal the plaintiff's. Compare *Bleistein v. Donaldson Lithographing Co.* 188 U. S. 239, 249, 250, 47 L. ed. 460, 462, 23 Sup. Ct. Rep. 298. The plaintiff does not lose its rights by communicating the result to persons, even [251] if many, in confidential relations *to itself, under a contract not to make it public, and strangers to the trust will be restrained from getting at the knowledge by inducing a breach of trust, and using knowledge obtained by such a breach. *Exchange Teleg. Co. v. Gregory* [1896] 1 Q. B. 147; *F. W. Dodge Co. v. Construction Information Co.* 183 Mass. 62, 60 L. R. A. 810, 97 Am. St. Rep. 412, 66 N. E. 204; *Board of Trade v. C. B. Thomson Commission Co.* 103 Fed. 902; *Board of Trade v. Haddon-Krull Co.* 198 U. S.

109 Fed. 705; *National Teleg. News Co. v. Western Union Teleg. Co.* 60 L. R. A. 805, 56 C. C. A. 198, 119 Fed. 294; *Illinois Commission Co. v. Cleveland Teleg. Co.* 56 C. C. A. 205, 119 Fed. 301.

The publications insisted on in some of the arguments were publications in breach of contract, and do not affect the plaintiff's rights. Time is of the essence in matters like this, and it fairly may be said that, if the contracts with the plaintiff are kept, the information will not become public property until the plaintiff has gained its reward. A priority of a few minutes probably is enough.

If, then, the plaintiffs' collection of information is otherwise entitled to protection, it does not cease to be so, even if it is information concerning illegal acts. The statistics of crime are property to the same extent as any other statistics, even if collected by a criminal who furnishes some of the data. The supreme court of Illinois has recognized, in the fullest terms, the value and necessity of the knowledge which the plaintiffs control. It must have known, even if it did not have the evidence before it, as to which we cannot tell from the report, what was the course of dealing on the exchange. Yet it was so far from suggesting that the plaintiffs' work was unmeritorious that it held it clothed with a public use. *New York & C. Grain & Stock Exch. v. Board of Trade*, 127 Ill. 153, 2 L. R. A. 411, 19 N. E. 855.

The defendants lay hold of the declaration in the case last cited, and say, with doubtful consistency, that this information is of such importance that it is clothed with a public use, and that, therefore, they are entitled to get and use it. In the case referred to it was held that the plaintiff, which had been receiving *the continuous quotations, was [252] entitled still to receive them on paying for them, and submitting to all reasonable requirements in relation to the same. Perhaps the right of the plaintiff would have been more obvious if it had demanded an opportunity, on reasonable conditions, of collecting the information for itself, especially if the legislature had seen fit to provide by law for its doing so. But it is not necessary to consider whether we are bound by that decision, or, if not, should follow it, since in these cases the claim is not qualified by submission to reasonable rules or an offer of payment. It is a claim of independent rights and a denial that the plaintiff has any right at all. The supreme court of Illinois gave no sanction to such a claim as that.

Finally it is urged that the contracts with the telegraph companies violate the act of July 2, 1890, chap. 647 (26 Stat.

at L. 209, U. S. Comp. Stat. 1901, p. 3200). The short answer is that the contracts are not relied on as a cause of action. They are stated simply to show that the only communication of its collected facts by the plaintiff is a confidential communication, and does not destroy the plaintiff's rights. But so far as these contracts limit the communication of what the plaintiff might have refrained from communicating to anyone, there is no monopoly or attempt at monopoly, and no contract in restraint of trade, either under the statute or at common law. *E. Bement & Sons v. National Harrow Co.* 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747; *Fowle v. Park*, 131 U. S. 88, 33 L. ed. 67, 9 Sup. Ct. Rep. 658; *Elliman v. Carrington* [1901] 2 Ch. 275. It is argued that the true purpose is to exclude all persons who do not deal through members of the board of trade. Whether there is anything in the law to hinder these regulations being made with that intent we shall not consider, as we do not regard such a general scheme as shown by the contracts or proved. A scheme to exclude bucket shops is shown and proclaimed, no doubt, and the defendants, with their contention as to the plaintiff, call this an attempt at a monopoly in bucket shops. But it is simply a restraint on the acquisition for illegal purposes of the fruits of the plaintiff's work. *Central Stock & [253] Grain Exch. v. *Board of Trade*, 196 Ill. 396, 63 N. E. 740. We are of opinion that the plaintiff is entitled to an injunction, as prayed.

Decree in No. 224 reversed.

Decree in No. 280 affirmed.

Mr. Justice **Harlan**, Mr. Justice **Brewer**, and Mr. Justice **Day** dissent.

UNITED STATES

v.

JU TOY.

(See S. C. Reporter's ed. 253-280.)

Habeas corpus in Chinese exclusion cases—conclusiveness of decision of Secretary of Commerce and Labor—due process of law.

1. Habeas corpus should not be granted in

favor of a person of Chinese descent, detained for return to China by the steamship company which brought him to an American port, where his petition alleges nothing but citizenship as making his detention unlawful, and he has been denied admission to the United States by the immigration officers after examination, and such denial has been affirmed on appeal by the Secretary of Commerce and Labor.

2. The decision of the Secretary of Commerce and Labor, affirming the denial by the immigration officers, after examination, of the right of a person of Chinese descent to enter the United States, is no less conclusive on the Federal courts under the act of August 18, 1894 (28 Stat. at L. 372, 390, chap. 301, U. S. Comp. Stat. 1901, p. 1303), § 1, in habeas corpus proceedings when citizenship is the ground on which the right of entry is claimed than when the ground is domicile and the belonging to a class excepted from the exclusion acts.
3. The constitutional guaranty of due process of law is not infringed by the provision of the act of August 18, 1894 (28 Stat. at L. 372, 390, chap. 301, U. S. Comp. Stat. 1901, p. 1303), § 1, making the decision of the appropriate department on the right of a person of Chinese descent to enter the United States conclusive on the Federal courts in habeas corpus proceedings, in the absence of any abuse of authority, even where citizenship is the ground on which the right of entry is claimed.

[No. 535.]

Argued April 3, 1905. Decided May 8, 1905.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Ninth Circuit presenting the question whether habeas corpus should be granted in behalf of a person of Chinese descent whose right to enter the United States has been denied by the immigration officers and affirmed on appeal by the Secretary of Commerce and Labor, and citizenship is the only ground alleged as making the detention unlawful, and whether, under such circumstances, the writ should be dismissed or a further hearing be granted, and whether the decision of the Secretary of Commerce and Labor is conclusive, in the absence of abuse of authority. The first question answered in the negative,

NOTE.—On the jurisdiction of the United States Courts on habeas corpus—see *Re Relnitz*, 4 L. R. A. 236, and note. See also notes to *State ex rel. Cochran v. Winters*, 10 L. R. A. 616; *Re Huse*, 25 C. C. A. 4; and *Tinsley v. Anderson*, 43 L. ed. U. S. 91.

As to habeas corpus to test constitutionality of statute—see note to *Hovey v. Elliott*, 39 L. R. A. 449.

As to questions reviewable by habeas corpus—see notes to *State v. Jackson*, 1 L. R. A. 373; *Bion's Appeal*, 11 L. R. A. 694; *United States v. Hamilton*, 1 L. ed. U. S. 490; *Ex parte Carli*,

27 L. ed. U. S. 288; *Otelza y Cortes v. Jacobus*, 34 L. ed. U. S. 464; and *Pearce v. Texas*, 39 L. ed. U. S. 164.

As to what constitutes due process of law—see *Kuntz v. Sumption*, 2 L. R. A. 655, and note; *Re Gannon*, 5 L. R. A. 359, and note; *Ulman v. Baltimore*, 11 L. R. A. 224, and note; *Gilman v. Tucker*, 13 L. R. A. 304, and note. And see notes to *People v. O'Brien*, 2 L. R. A. 255; *Pearson v. Yewdall*, 24 L. ed. U. S. 436; and *Wilson v. North Carolina*, 42 L. ed. U. S. 865.

the third in the affirmative, and the second by stating that the writ should be dismissed.

The facts are stated in the opinion.

Assistant Attorney General **McReynolds** argued the cause and filed a brief for the United States:

Congress by constitutional enactments has entrusted to executive officers as a special tribunal determination of all questions of fact—including a claim of citizenship—relating to the right of entry into the United States of Chinese applying therefor; and a bare allegation of citizenship is not enough to support a petition for habeas corpus by one denied admission.

United States v. Sing Tuck, 194 U. S. 161, 168, 170, 48 L. ed. 917, 920, 921, 24 Sup. Ct. Rep. 621; *Lem Moon Sing v. United States*, 158 U. S. 538, 546, 39 L. ed. 1082, 1085, 15 Sup. Ct. Rep. 967; *Chin Bak Kan v. United States*, 186 U. S. 193, 200, 46 L. ed. 1121, 1125, 22 Sup. Ct. Rep. 891; *Japanese Immigrant Case*, 189 U. S. 86, 97, 100, 47 L. ed. 721, 724, 725, 23 Sup. Ct. Rep. 611; *Den ex dem. Murray v. Hoboken Land & Improv. Co.* 18 How. 272, 280, 282, 15 L. ed. 376, 377; *Springer v. United States*, 102 U. S. 586, 594, 26 L. ed. 253, 256; *Hilton v. Merritt*, 110 U. S. 97, 107, 28 L. ed. 83, 86, 3 Sup. Ct. Rep. 548; *Robertson v. Baldwin*, 165 U. S. 275, 279, 41 L. ed. 715, 716, 17 Sup. Ct. Rep. 326; *Fong Yue Ting v. United States*, 149 U. S. 698, 713, 714, 37 L. ed. 905, 913, 13 Sup. Ct. Rep. 1016; *Public Clearing House v. Coyne*, 194 U. S. 497, 508, 48 L. ed. 1092, 1098, 24 Sup. Ct. Rep. 789; *Bushnell v. Leland*, 164 U. S. 684, 685, 41 L. ed. 598, 599, 17 Sup. Ct. Rep. 209.

The direct course of all the later decisions, both English and American, is to establish the rule that probable cause must first be shown to obtain the writ of habeas corpus, whether it be granted at common law or under the statute.

Church, Habeas Corpus, § 92; *Ex parte Watkins*, 3 Pet. 193, 7 L. ed. 650; *Ex parte Milligan*, 4 Wall. 2, 110, 18 L. ed. 281, 292; *Ex parte Royall*, 117 U. S. 250, 29 L. ed. 871, 6 Sup. Ct. Rep. 734; *Ex parte Terry*, 128 U. S. 301, 32 L. ed. 407, 9 Sup. Ct. Rep. 77.

Where the law has confided to a special tribunal authority to hear and determine matters arising in the course of its duties, a decision by it within the scope of its authority as to questions of fact is conclusive against collateral attack. And where the jurisdiction depends upon a question of fact which is the very gist of the controversy, the determination of that is generally final.

United States v. Sing Tuck, 194 U. S. 161, 48 L. ed. 917, 24 Sup. Ct. Rep. 621; *Gonzales v. Williams*, 192 U. S. 1, 48 L. ed. 198 U. S.

317, 24 Sup. Ct. Rep. 177; *United States v. Arredondo*, 6 Pet. 691, 729, 8 L. ed. 547, 561; *Quinby v. Conlan*, 104 U. S. 420, 425, 426, 26 L. ed. 800, 802; *United States v. California & O. Land Co.* 148 U. S. 31, 43, 37 L. ed. 354, 360, 13 Sup. Ct. Rep. 458; *Japanese Immigrant Case*, 189 U. S. 86, 100, 47 L. ed. 721, 725, 23 Sup. Ct. Rep. 611; *Bates & G. Co. v. Payne*, 194 U. S. 106, 109, 48 L. ed. 894, 895, 24 Sup. Ct. Rep. 595; *Foley v. Harrison*, 15 How. 447, 14 L. ed. 166; *Den ex dem. Murray v. Hoboken Land & Improv. Co.* 18 How. 272, 15 L. ed. 372; *Providence Rubber Co. v. Goodyear*, 9 Wall. 798, 19 L. ed. 569; *Shepley v. Cowan*, 91 U. S. 340, 23 L. ed. 427; *Moore v. Robbins*, 96 U. S. 535, 24 L. ed. 850; *Springer v. United States*, 102 U. S. 586, 26 L. ed. 253; *Steel v. St. Louis Smelting & Ref. Co.* 106 U. S. 450, 27 L. ed. 227, 1 Sup. Ct. Rep. 389; *Hilton v. Merritt*, 110 U. S. 97, 106, 28 L. ed. 83, 86, 3 Sup. Ct. Rep. 548; *Had-den v. Merritt*, 115 U. S. 25, 27, 29 L. ed. 333, 334, 5 Sup. Ct. Rep. 1169; *Lee v. Johnson*, 116 U. S. 51, 29 L. ed. 571, 6 Sup. Ct. Rep. 249; *Burfenning v. Chicago, St. P. M. & O. R. Co.* 163 U. S. 323, 41 L. ed. 176, 16 Sup. Ct. Rep. 1018; *Bushnell v. Leland*, 164 U. S. 684, 685, 41 L. ed. 598, 599, 17 Sup. Ct. Rep. 209; *Gardner v. Bonestell*, 180 U. S. 369, 45 L. ed. 576, 21 Sup. Ct. Rep. 399; *Bates & G. Co. v. Payne*, 194 U. S. 106, 48 L. ed. 894, 24 Sup. Ct. Rep. 595; *Heath v. Wallace*, 138 U. S. 585, 34 L. ed. 1068, 11 Sup. Ct. Rep. 380.

Where the jurisdiction of a tribunal of special or limited authority may be said to depend upon the existence of a certain state of facts which it must pass upon, its decision thereon, if there was any evidence on which to base it, must be held final and conclusive in all collateral inquiries.

Cooley, Const. Lim. 6th ed. p. 501; 17 Am. & Eng. Enc. Law, 2d ed. p. 1085; *Church, Habeas Corpus*, 2d ed. pp. 381, 517; *People ex rel. Tweed v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211; *People's Sav. Bank v. Wilcox*, 15 R. I. 258, 2 Am. St. Rep. 894, 3 Atl. 211; *Evansville, I. & C. S. L. R. Co. v. Evansville*, 15 Ind. 395; *Brittain v. Kin-naird*, 1 Brod. & B. 432; *Simmons v. Saul*, 138 U. S. 439, 452, 34 L. ed. 1054, 1060, 11 Sup. Ct. Rep. 369; *New Orleans v. Fisher*, 180 U. S. 185, 45 L. ed. 485, 21 Sup. Ct. Rep. 347.

A habeas corpus proceeding is collateral to one the validity of which is attacked thereby.

Re Lennon, 166 U. S. 548, 553, 41 L. ed. 1110, 1112, 17 Sup. Ct. Rep. 658; *Ex parte Watkins*, 3 Pet. 193, 7 L. ed. 650.

The function of habeas corpus is to test the legality of confinement, and unless that

appears contrary to law the writ should not be granted.

Ex parte Watkins, 3 Pet. 201, 7 L. ed. 652; *Nishimura Ekiu v. United States*, 142 U. S. 651, 662, 35 L. ed. 1146, 1150, 12 Sup. Ct. Rep. 336; *Ex parte Curtis*, 106 U. S. 375, 27 L. ed. 235, 1 Sup. Ct. Rep. 381; *Wales v. Whitney*, 114 U. S. 571, 29 L. ed. 279, 5 Sup. Ct. Rep. 1050; *Carter v. McClaughry*, 183 U. S. 381, 46 L. ed. 245, 22 Sup. Ct. Rep. 181.

Unless the return to a writ of habeas corpus is in some way traversed, the facts therein stated must be taken as true.

Crowley v. Christensen, 137 U. S. 94, 34 L. ed. 624, 11 Sup. Ct. Rep. 13.

The writ of habeas corpus cannot properly be used to perform the function of a writ of error or an appeal.

Ex parte Watkins, 3 Pet. 201, 7 L. ed. 652; *Wales v. Whitney*, 114 U. S. 571, 29 L. ed. 279, 5 Sup. Ct. Rep. 1050.

Mr. Hayden Johnson argued the cause, and, with *Messrs. Henry C. Dibble* and *Oliver Dibble*, filed a brief for appellee:

Before the ruling of this court in the *Sing Tuck Case*, the lower courts had all held that the writ could issue before the hearing before the inspector and the appeal therefrom. Since that decision, all the courts have held that the writ will lie after the appeal, and that to deny it would be a denial of the due process of law guaranteed by the 5th Amendment.

Gee Fook Sing v. United States, 1 C. C. A. 211, 7 U. S. App. 27, 49 Fed. 146.

It is submitted that, when the right to due process of law depends upon the existence of a fact, the party claiming the right is entitled to have that fact tried according to the law of the land. Were this not so, it can be readily seen that in permitting the fact to be tried by arbitrary rules this constitutional guaranty might be greatly abridged, if not entirely destroyed.

Ex parte Milligan, 4 Wall. 2, 18 L. ed. 281; *State v. Scott*, 1 Bail. L. 294.

Messrs. Henry C. Dibble and *Oliver Dibble* also filed a separate brief for appellee:

The Chinese exclusion and restriction acts do not apply to citizens.

United States v. Wong Kim Ark, 169 U. S. 653, 42 L. ed. 892, 18 Sup. Ct. Rep. 456.

No act of Congress can be construed or understood to be a bar to a judicial hearing and determination of the question of citizenship.

Gee Fook Sing v. United States, 1 C. C. A. 211, 7 U. S. App. 27, 49 Fed. 146.

In those instances where it has been decided that special tribunals may be established by Congress to determine questions of fact arising in administrative matters, it has always been held that, while the courts

will not interfere with such special tribunals by mandamus, if questions of private rights afterward arise in respect to facts determined by such special tribunals, resort may be had to equity for the ultimate determination of such private rights.

Johnson v. Towsley, 13 Wall. 83, 20 L. ed. 486.

Habeas corpus is the proper and the only remedy in these cases.

Re Jew Wong Loy, 91 Fed. 240; *Re Jung Ah Lung*, 25 Fed. 141, Affirmed in 124 U. S. 621, 31 L. ed. 591, 8 Sup. Ct. Rep. 663.

Mr. Justice Holmes delivered the opinion of the court:

This case comes here on a certificate from the circuit court of appeals presenting certain questions of law. It appears that the appellee, being detained by the master of the steamship *Doric* for return to China, presented a petition for habeas corpus to the district court, alleging that he was a native-born citizen of the United States, returning after a temporary *departure, and was denied permission to land by the collector of the port of San Francisco. It also appears from the petition that he took an appeal from the denial, and that the decision was affirmed by the Secretary of Commerce and Labor. No further grounds are stated. The writ issued, and the United States made return, and answered, showing all the proceedings before the Department, which are not denied to have been in regular form, and setting forth all of the evidence and the orders made. The answer also denied the allegations of the petition. Motions to dismiss the writ were made on the grounds that the decision of the Secretary was conclusive, and that no abuse of authority was shown. These were denied, and the district court decided, seemingly on new evidence, subject to exceptions, that *Ju Toy* was a native-born citizen of the United States. An appeal was taken to the circuit court of appeals, alleging errors the nature of which has been indicated. Thereupon the latter court certified the following questions:

"First. Should a district court of the United States grant a writ of habeas corpus in behalf of a person of Chinese descent being held for return to China by the steamship company which brought him therefrom, who, having recently arrived at a port of the United States, made application to land as a native-born citizen thereof, and who, after examination by the duly authorized immigration officers, was found by them not to have been born in the United States, was denied admission, and ordered deported, which finding and action upon appeal was affirmed by the Secretary of Commerce and Labor, when the foregoing facts

appear to the court, and the petition for the writ alleges unlawful detention on the sole ground that petitioner does not come within the restrictions of the Chinese exclusion acts, because born in and a citizen of the United States, and does not allege or show in any other way unlawful action or abuse of their discretion or powers by the immigration officers who excluded him?

[260] "Second. In a habeas corpus proceeding should a district court of the United States dismiss the writ, or should it direct a new or further hearing upon evidence to be presented, where the writ had been granted in behalf of a person of Chinese descent being held by the steamship company for return to China, from whence it brought him, who recently arrived from that country, and asked permission to land, upon the ground that he was born in and was a citizen of the United States, when the uncontradicted return and answer show that such person was granted a hearing by the proper immigration officers, who found he was not born in the United States, that his application for admission was considered and denied by such officers, and that the denial was affirmed upon appeal to the Secretary of Commerce and Labor, and where nothing more appears to show that such executive officers failed to grant a proper hearing, abused their discretion, or acted in any unlawful or improper way upon the case presented to them for determination?

"Third. In a habeas corpus proceeding in a district court of the United States, instituted in behalf of a person of Chinese descent being held for return to China by the steamship company which recently brought him therefrom to a port of the United States, and who applied for admission therein upon the ground that he was a native-born citizen thereof, but who, after a hearing, the lawfully designated immigration officers found was not born therein, and to whom they denied admission, which finding and denial, upon appeal to the Secretary of Commerce and Labor, was affirmed,—should the court treat the finding and action of such executive officers upon the question of citizenship and other questions of fact as having been made by a tribunal authorized to decide the same, and as final and conclusive unless it be made affirmatively to appear that such officers, in the case submitted to them, abused the discretion vested in them, or, in some other way, in hearing and determining the same, committed prejudicial error?"

We assume in what we have to say, as [261] the questions assume, *that no abuse of authority of any kind is alleged. That being out of the case, the first of them is answered

198 U. S.

by the case of *United States v. Sing Tuck*, 194 U. S. 161, 170, 48 L. ed. 917, 921, 24 Sup. Ct. Rep. 621: "A petition for habeas corpus ought not to be entertained unless the court is satisfied that the petitioner can make out at least a prima facie case." This petition should have been denied on this ground, irrespective of what more we have to say, because it alleged nothing except citizenship. It disclosed neither abuse of authority nor the existence of evidence not laid before the Secretary. It did not even set forth that evidence, or allege its effect. But, as it was entertained, and the district court found for the petitioner, it would be a severe measure to order the petition to be dismissed on that ground now, and we pass on to further considerations.

The broad question is presented whether or not the decision of the Secretary of Commerce and Labor is conclusive. It was held in *United States v. Sing Tuck*, 194 U. S. 161, 167, 48 L. ed. 917, 920, 24 Sup. Ct. Rep. 621, that the act of August 18, 1894 (28 Stat. at L. 372, 390, chap. 301, § 1, U. S. Comp. Stat. 1901, p. 1303), purported to make it so, but whether the statute could have that effect constitutionally was left untouched, except by a reference to cases where an opinion already had been expressed. To quote the latest first, in *Japanese Immigrant Case (Yamataya v. Fisher)*, 189 U. S. 36, 97, 47 L. ed. 721, 724, 23 Sup. Ct. Rep. 611, 613, it was said: "That Congress may exclude aliens of a particular race from the United States, prescribe the terms and conditions upon which certain classes of aliens may come to this country, establish regulations for sending out of the country such aliens as come here in violation of law, and commit the enforcement of such provisions, conditions, and regulations exclusively to executive officers, without judicial intervention, are principles firmly established by the decisions of this court." See also *United States ex rel. Turner v. Williams*, 194 U. S. 279, 290, 291, 48 L. ed. 979, 983, 984, 24 Sup. Ct. Rep. 719; *Chin Bak Kan v. United States*, 186 U. S. 193, 200, 46 L. ed. 1121, 1125, 22 Sup. Ct. Rep. 891. In *Fok Young Yo v. United States*, 185 U. S. 296, 304, 305, 46 L. ed. 917, 921, 22 Sup. Ct. Rep. 686, it was held that the decision of the collector of customs on the right of transit across the territory of the [262] United States was conclusive, and, still more to the point, in *Lem Moon Sing v. United States*, 158 U. S. 538, 39 L. ed. 1082, 15 Sup. Ct. Rep. 967, where the petitioner for habeas corpus alleged facts which, if true, gave him a right to enter and remain in the country, it was held that the decision of the collector was final as to whether or not he belonged to the privileged class.

1043

It is true that it may be argued that these cases are not directly conclusive of the point now under decision. It may be said that the parties concerned were aliens, and that although they alleged absolute rights, and facts which it was contended went to the jurisdiction of the officer making the decision, still their rights were only treaty or statutory rights, and therefore were subject to the implied qualification imposed by the later statute, which made the decision of the collector with regard to them final. The meaning of the cases, and the language which we have quoted, is not satisfied by so narrow an interpretation, but we do not delay upon them. They can be read.

It is established, as we have said, that the act purports to make the decision of the Department final, whatever the ground on which the right to enter the country is claimed,—as well when it is citizenship as when it is domicile, and the belonging to a class excepted from the exclusion acts. *United States v. Sing Tuck*, 194 U. S. 161, 167, 48 L. ed. 917, 920, 24 Sup. Ct. Rep. 621; *Lem Moon Sing v. United States*, 158 U. S. 538, 546, 547, 39 L. ed. 1082, 15 Sup. Ct. Rep. 967. It also is established by the former case and others which it cites that the relevant portion of the act of August 18, 1894 [28 Stat. at L. 372] chap. 301, is not void as a whole. The statute has been upheld and enforced. But the relevant portion being a single section, accomplishing all its results by the same general words, must be valid as to all that it embraces, or altogether void. An exception of a class constitutionally exempted cannot be read into those general words merely for the purpose of saving what remains. That has been decided over and over again. *United States v. Reese*, 92 U. S. 214, 221, 23 L. ed. 563, 565; *Trade-Mark Cases*, 100 U. S. 82, 98, 99, 25 L. ed. 550, 553, 554; *Allen v. [263] *Louisiana*, 103 U. S. 80, 84, 26 L. ed. 318, 319; *United States v. Harris*, 106 U. S. 629, 641, 642, 27 L. ed. 290, 294, 295, 1 Sup. Ct. Rep. 601; *Poindexter v. Greenhow*, 114 U. S. 269, 305, 29 L. ed. 185, 197, 5 Sup. Ct. Rep. 903, 962; *Baldwin v. Franks*, 120 U. S. 678, 685-689, 30 L. ed. 766, 768, 769, 7 Sup. Ct. Rep. 656, 763; *Smiley v. Kansas*, 196 U. S. 447, 455, ante, 546, 550, 25 Sup. Ct. Rep. 289. It necessarily follows that when such words are sustained, they are sustained to their full extent.

In view of the cases which we have cited it seems no longer open to discuss the question propounded as a new one. Therefore we do not analyze the nature of the right of a person presenting himself at the frontier for admission. *Re Ross* (*Ross v. McIntyre*), 140 U. S. 453, 464, 35 L. ed. 581, 1044

586, 11 Sup. Ct. Rep. 897. But it is not improper to add a few words. The petitioner, although physically within our boundaries, is to be regarded as if he had been stopped at the limit of our jurisdiction, and kept there while his right to enter was under debate. If, for the purpose of argument, we assume that the 5th Amendment applies to him, and that to deny entrance to a citizen is to deprive him of liberty, we nevertheless are of opinion that with regard to him due process of law does not require judicial trial. That is the result of the cases which we have cited, and the almost necessary result of the power of Congress to pass exclusion laws. That the decision may be intrusted to an executive officer, and that his decision is due process of law, was affirmed and explained in *Nishimura Ekiu v. United States*, 142 U. S. 651, 660, 35 L. ed. 1146, 1149, 12 Sup. Ct. Rep. 336, and in *Fong Yue Ting v. United States*, 149 U. S. 698, 713, 37 L. ed. 905, 913, 13 Sup. Ct. Rep. 1016, before the authorities to which we already have referred. It is unnecessary to repeat the often-quoted remarks of Mr. Justice Curtis, speaking for the whole court in *Den ex dem. Murray v. Hoboken Land & Improv. Co.* 18 How. 272, 280, 15 L. ed. 372, 376, to show that the requirement of a judicial trial does not prevail in every case. *Lem Moon Sing v. United States*, 158 U. S. 538, 546, 547, 39 L. ed. 1082, 1085, 15 Sup. Ct. Rep. 967; *Japanese Immigrant Case* (*Yamataya v. Fisher*), 189 U. S. 86, 100, 47 L. ed. 721, 725, 23 Sup. Ct. Rep. 611; *Public Clearing House v. Coyne*, 194 U. S. 497, 508, 509, 48 L. ed. 1092, 1098, 24 Sup. Ct. Rep. 789.

We are of opinion that the first question should be answered, no; that the third question should be answered, *yes, with the re-[264] sult that the second question should be answered that the writ should be dismissed, as it should have been dismissed in this case. It will be so certified.

Mr. Justice **Brewer**, dissenting:

I am unable to concur in the views expressed in the foregoing opinion, and, believing the matter of most profound importance, I give my reasons therefor.

Ju Toy presented his petition to the United States district court at San Francisco, alleging that he was a native-born citizen of the United States; that he was a resident of the United States, temporarily absent, and returning to the city and state in which he was born; that the collector of the port of San Francisco refused to permit him to land, and that he was detained by the general manager of the steamship company in which he came to San Francisco, with a view to his return to China. A writ of

habeas corpus was issued, and thereupon the district attorney, in behalf of the United States, answered, setting up the application for landing, a hearing and denial thereof by the immigration officer, an appeal to the Secretary of Commerce and Labor, and his action approving that of the immigration officer, and with the answer exhibited a copy of all the evidence offered upon the hearing, and the orders by the officer and the Secretary. Thereupon a motion was made by the district attorney to dismiss the writ, on the ground substantially that it did not appear that the immigration officer or the Secretary of Commerce and Labor abused the discretion vested in them by law, or that their action was unlawful or that any error prejudicial to the petitioner was committed. This motion to dismiss was overruled, and the cause referred to a referee to take evidence. Upon the testimony taken by him the referee reported that the petitioner was born in the United States and a citizen thereof. Exceptions to this report [265] were filed by the district attorney, which were overruled by the court, and thereupon judgment was entered that the petitioner was illegally restrained of his liberty, and that he be discharged from custody. An appeal from this order was taken to the court of appeals for the ninth circuit, which court certified to us the following questions:

"First. Should a district court of the United States grant a writ of habeas corpus in behalf of a person of Chinese descent being held for return to China by the steamship company which brought him therefrom, who, having recently arrived at a port of the United States, made application to land as a native-born citizen thereof, and who, after examination by the duly authorized immigration officers, was found by them not to have been born in the United States, was denied admission, and ordered deported, which finding and action upon appeal was affirmed by the Secretary of Commerce and Labor, when the foregoing facts appear to the court, and the petition for the writ alleges unlawful detention on the sole ground that petitioner does not come within the restrictions of the Chinese exclusion acts, because born in and a citizen of the United States, and does not allege or show in any other way unlawful action or abuse of their discretion or powers by the immigration officers who excluded him?

"Second. In a habeas corpus proceeding should a district court of the United States dismiss the writ or should it direct a new or further hearing upon evidence to be presented, where the writ had been granted in behalf of a person of Chinese descent being held by the steamship company for return

198 U. S.

to China, from whence it brought him, who recently arrived from that country, and asked permission to land, upon the ground that he was born in and was a citizen of the United States, when the uncontradicted return and answer show that such person was granted a hearing by the proper immigration officers, who found he was not born in the United States, that his application for admission was considered and denied by such officers, and that the denial was affirmed upon appeal to *the Secretary of Commerce and Labor, and where nothing more appears to show that such executive officers failed to grant a proper hearing, abused their discretion, or acted in any unlawful or improper way upon the case presented to them for determination?

[266]

"Third. In a habeas corpus proceeding in a district court of the United States instituted in behalf of a person of Chinese descent being held for return to China by the steamship company which recently brought him therefrom to a port of the United States, and who applied for admission thereupon the ground that he was a native-born citizen thereof, but who, after a hearing, the lawfully designated immigration officers found was not born therein, and to whom they denied admission, which finding and denial, upon appeal to the Secretary of Commerce and Labor, was affirmed,—should the court treat the finding and action of such executive officers upon the question of citizenship and other questions of fact as having been made by a tribunal authorized to decide the same, and as final and conclusive unless it be made affirmatively to appear that such officers, in the case submitted to them, abused the discretion vested in them, or, in some other way, in hearing and determining the same, committed prejudicial error?"

The proposition presented by these questions is that, unless the petitioner for a writ of habeas corpus shows that the immigration officers have been guilty of unlawful action or abuse of their discretion or powers, the writ must be denied, and the petitioner banished from the country. In order to see what action is lawful, I refer to the rules prescribed under the authority hereinafter referred to. Rule 6 declares that "immediately upon the arrival of Chinese persons . . . it shall be the duty of the officer . . . to adopt suitable means to prevent communication with them by any persons other than the officials under his control, to have said Chinese persons examined promptly, as by law provided, touching their right to admission, and to permit those proving such right to land."

Rules 7, 8, 9, 10, and 21 are as follows:

*"Rule 7. The examination prescribed in [267]

Rule 6 should be separate and apart from the public, in the presence of government officials and such witness or witnesses only as the examining officer shall designate, and if, upon the conclusion thereof, the Chinese applicant for admission is adjudged to be inadmissible, he should be advised of his right of appeal, and his counsel should be permitted, after duly filing notice of appeal, to examine, but not make copies of, the evidence upon which the excluding decision is based.

"Rule 8. Every Chinese person refused admission under the provisions of the exclusion laws by the decision of the officer in charge at the port of entry must, if he shall elect to take an appeal to the Secretary, give written notice thereof to said officer within two days after such decision is rendered.

"Rule 9. Notice of appeal provided for in Rule 8 shall act as a stay upon the disposal of the Chinese person whose case is thereby affected until a final decision is rendered by the Secretary; and, within three days after the filing of such notice, unless further delay is required to investigate and report upon new evidence, the complete record of the case, together with such briefs, affidavits, and statements as are to be considered in connection therewith, shall be forwarded to the Commissioner General of Immigration by the officer in charge at the port of arrival, accompanied by his views thereon in writing; but on such appeal no evidence will be considered that has not been made the subject of investigation and report by the said officer in charge.

"Rule 10. Additional time for the preparation of cases after the expiration of three days next succeeding the filing of notice of appeal will be allowed only in those instances in which, in the judgment of said officer in charge, a literal compliance with Rule 9 would occasion injustice to the appellant, or the risk of defeat of the purposes of the law; and the reasons for delay beyond the time prescribed shall, in every instance, be stated in writing in the papers forwarded to the Commissioner General of Immigration."

[268] **"Rule 21. The burden of proof in all cases rests upon Chinese persons claiming the right of admission to or residence within the United States to establish such right affirmatively and satisfactorily to the appropriate government officers, and in no case in which the law prescribes the nature of the evidence to establish such right shall other evidence be accepted in lieu thereof, and in every doubtful case the benefit of the doubt shall be given by administrative officers to the United States government."

It will be seen that under these rules it

is the duty of the immigration officer to prevent communication with the Chinese seeking to land by any one except his own officers. He is to conduct a private examination, with only the witnesses present whom he may designate. His counsel, if, under the circumstances, the Chinaman has been able to procure one, is permitted to look at the testimony, but not to make a copy of it. He must give notice of appeal, if he wishes one, within two days, and within three days thereafter the record is to be sent to the Secretary at Washington; and every doubtful question is to be settled in favor of the government. No provision is made for summoning witnesses from a distance or for taking depositions, and, if, for instance, the person landing at San Francisco was born and brought up in Ohio, it may well be that he would be powerless to find any testimony in San Francisco to prove his citizenship. If he does not happen to have money he must go without the testimony, and when the papers are sent to Washington (3,000 miles away from the port, which, in this case, was the place of landing), he may not have the means of employing counsel to present his case to the Secretary. If this be not a star-chamber proceeding of the most stringent sort, what more is necessary to make it one?

I do not see how any one can read those rules and hold that they constitute due process of law for the arrest and deportation of a citizen of the United States. If they do in proceedings by the United States, they will also in proceedings instituted *by a [269] state, and an obnoxious class may be put beyond the protection of the Constitution by ministerial officers of a state, proceeding in strict accord with exactly similar rules.

It will be borne in mind that the petitioner has been judicially determined to be a free-born American citizen, and the contention of the government, sustained by the judgment of this court, is that a citizen, guilty of no crime—for it is no crime for a citizen to come back to his native land—must, by the action of a ministerial officer, be punished by deportation and banishment, without trial by jury and without judicial examination.

Such a decision is, to my mind, appalling. By all the authorities the banishment of a citizen is punishment, and punishment of the severest kind. In *Fong Yue Ting v. United States*, 149 U. S. 698, 37 L. ed. 905, 13 Sup. Ct. Rep. 1016, it was held by a majority of the court that the removal from this country of an alien was not a punishment, Mr. Justice Gray, speaking for that majority, saying, (p. 730, 37 L. ed. 919, 13 Sup. Ct. Rep. 1028):

"The proceeding before a United States judge, as provided for in § 6 of the act of 1892 [27 Stat. at L. 25, chap. 60, U. S. Comp. Stat. 1901, p. 1320], is, in no proper sense, a trial and sentence for a crime or offense. It is simply the ascertainment, by appropriate and lawful means, of the fact whether the conditions exist upon which Congress has enacted that an alien of this class may remain within the country. The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment."

But it was not suggested, and indeed could not be, that the deportation and exile of a citizen was not punishment. The forcible removal of a citizen from his country is spoken of as banishment, exile, deportation, relegation, or transportation; but, by whatever name called, it is always considered a punishment. In Black's Law Dictionary "banishment" is defined as "a punishment inflicted upon criminals, by compelling them to quit a city, place, or [270] country, for a specific period of time, *or for life. It is inflicted principally upon political offenders, 'transportation' being the word used to express a similar punishment of ordinary criminals." The same author defines "exile" as banishment, and "transportation" as "a species of punishment consisting in removing the criminal from his own country to another (usually a penal colony), there to remain in exile for a prescribed period." In Rapalje & Lawrence's Law Dictionary (vol. 1, page 109), "banishment" is called: "A punishment by forced exile, either for years or for life; inflicted principally upon political offenders, 'transportation' being the word used to express a similar punishment of ordinary criminals." In 4 Bl. Com. 377, it is said: "Some punishments consist in exile or banishment, by abjuration of the realm, or transportation." Vattel, Nations, bk. 1, § 228, declares: "As a man may be deprived of any right whatsoever by way of punishment; exile, which deprives him of the right of dwelling in a certain place, may be inflicted as a punishment; banishment is always one; for a mark of infamy cannot be set on any one but with a view of punishing him for a fault, either real or pretended."

President Madison, in his report on the Virginia resolutions concerning the alien and sedition laws, said (4 Elliott's Debates, 455), referring to the possibilities which attend a removal from the country, "if a banishment of this sort be not a punishment, and among the severest of punish-

ments, it will be difficult to imagine a doom to which the name can be applied."

The 12th section of the English habeas corpus act (31 Car. II.), one of the three great muniments of English liberty, enacted "that no subject of this realm, that now is or hereafter shall be an inhabitant or resident of this kingdom of England, dominion of Wales, or town of Berwick-upon-Tweed, shall or may be sent prisoner into Scotland, Ireland, Jersey, Guernsey, Tangier, or into parts, garrisons, islands, or places beyond the seas, which are or at any time hereafter shall be within or without the dominions of his majesty, his heirs or successors; *and that every such imprisonment is hereby enacted and adjudged to be illegal, . . . and the person or persons who shall knowingly frame, contrive, write, seal, or countersign any warrant for such commitment, detainer, or transportation, or shall so commit, detain, imprison, or transport any person or persons, contrary to this act, or be any ways advising, aiding, or assisting therein, being lawfully convicted thereof shall be disabled from thenceforth to bear any office of trust or profit within the said realm of England, dominion of Wales, or town of Berwick-upon-Tweed, or any of the islands, territories, or dominions thereunto belonging; and shall incur and sustain the pains, penalties, and forfeitures limited, ordained, and provided in and by statute of provision and *praemunire*, made in the sixteenth year of King Richard II.; and be incapable of any pardon from the king, his heirs or successors, of the said forfeitures, losses, or disabilities, or any of them." [3 Eng. Stat. at L. 400, chap. 2.]

It is true in this case the petitioner was returning to San Francisco from China. Whether his absence from this country had been for a few weeks or a few years is not shown, nor does it matter. The right of a citizen is not lost by a temporary absence from his native land, and when he returns he is entitled to all the protection which he had when he left.

In *Gonzales v. Williams*, 192 U. S. 1, 48 L. ed. 317, 24 Sup. Ct. Rep. 177, the petitioner, held in custody by the immigration officers, sued out a habeas corpus on the ground that she was not an alien immigrant. The circuit court decided against her, but on appeal we discharged her from custody, saying (p. 7, L. ed. p. 319, Sup. Ct. Rep. p. 177):

"If she was not an alien immigrant within the intent and meaning of the act of Congress entitled 'An Act in Amendment of the Various Acts Relative to Immigration and the Importation of Aliens under Contract or Agreement to Perform Labor,' approved

March 3, 1891 (26 Stat. at L. 1084, chap. 551), the commissioner had no power to detain or deport her, and the final order of the circuit court must be reversed."

It is true, the facts were admitted. So [272] placing that case *alongside of this, the result is that if the United States admits that the petitioner is not an alien, he is entitled to his discharge. If he proves the fact, he is not entitled, but must be deported. It was not suggested in that case that the immigration officer had been guilty of any abuse of discretion or powers, the only complaint being that he had ordered the deportation of the petitioner, who was not an alien. That same fact is alleged here, but, is now adjudged insufficient to prevent the deportation. In *Gee Fook Sing v. United States*, 1 C. C. A. 211, 212, 7 U. S. App. 27, 30, 49 Fed. 146, 148, the court of appeals of the ninth circuit held:

"That any person alleging himself to be a citizen of the United States, and desiring to return to his country from a foreign land, and that he is prevented from doing so without due process of law, and who, on that ground, applies to any United States court for a writ of habeas corpus, is entitled to have a hearing and a judicial determination of the facts so alleged; and that no act of Congress can be understood or construed as a bar to such hearing and judicial determination."

See also *Re Look Tin Sing*, 10 Sawy. 353, 21 Fed. 905; *Ex parte Chan San Hee*, 35 Fed. 354; *Re Yung Sing Hee*, 36 Fed. 437; *Re Wy Shing*, 13 Sawy. 530, 36 Fed. 553. In the first of these cases it was said by Mr. Justice Field (p. 361, Fed. p. 910):

"Being a citizen, the law could not intend that he should ever look to the government of a foreign country for permission to return to the United States, and no citizen can be excluded from this country except in punishment for crime. Exclusion for any other cause is unknown to our laws, and beyond the power of Congress."

In *Ex parte Tong Tong*, 108 U. S. 556, 559, 27 L. ed. 826, 827, 2 Sup. Ct. Rep. 871, 872, Mr. Chief Justice Waite said:

"The writ of habeas corpus is the remedy which the law gives for the enforcement of the civil right of personal liberty."

In *United States v. Jung Ah Lung*, 124 U. S. 621, 31 L. ed. 591, 8 Sup. Ct. Rep. 663, a petition for habeas corpus by a Chinese laborer, it was held that—

[273] *"The jurisdiction of the court was not affected by the fact that the collector had passed on the question of allowing the person to land, or by the fact that the treaty provides for diplomatic action in case of a hardship."

By the 5th Amendment to the Constitu-

tion no person can "be deprived of life, liberty, or property without due process of law." It may be true, as decided in *Den ex dem. Murray v. Hoboken Land & Improv. Co.* 18 How. 272, 15 L. ed. 372, an action involving the validity of a distress warrant issued by the Solicitor of the Treasury, that the requirement of a judicial trial does not extend to every case, but, as stated by Mr. Justice Curtis in that case (p. 284, L. ed. p. 377): "To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination." And in *Hager v. Reclamation Dist. No. 108*, 111 U. S. 701, 708, 28 L. ed. 569, 572, 4 Sup. Ct. Rep. 663, 667, it was held that "undoubtedly where life and liberty are involved, due process requires that there be a regular course of judicial proceedings, which imply that the party to be affected shall have notice and an opportunity to be heard." By article 3, § 2 of the Constitution, "the trial of all crimes, except in cases of impeachment, shall be by jury;" and by the 5th Amendment, "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury."

Summing this up, banishment is a punishment, and of the severest sort. There can be no punishment except for crime. This petitioner has been guilty of no crime, and so judicially determined. Yet, in defiance of this adjudication of innocence, with only an examination before a ministerial officer, he is compelled to suffer punishment as a criminal, and is denied the protection of either a grand or petit jury.

But, it is said, that he did not prove his innocence before *the ministerial officer. Can [274] one who judicially establishes his innocence of any offense be punished for crime by the action of a ministerial officer? Can he be punished because he has failed to show to the satisfaction of that officer that he is innocent of an offense? The Constitution declares that "the privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of invasion or rebellion, the public safety may require it." There is no rebellion or invasion. Can a citizen be deprived of the benefit of that so much vaunted writ of protection by the action of a ministerial officer?

By § 8 of the act of September 13, 1888 (25 Stat. at L. 476, chap. 1015, U. S. Comp. Stat. 1901, p. 1315), the act prohibiting

the coming of Chinese laborers, the Secretary of the Treasury was authorized to make rules and regulations to carry into effect the provisions of the statute. This authority, by subsequent legislation, has been vested in the Secretary of Commerce and Labor, by whom some sixty-one rules have been announced. In the second rule it is provided that "if the Chinese person has been born in the United States, neither the immigration acts nor the Chinese exclusion acts prohibiting persons of the Chinese race, and especially Chinese laborers, from coming into the United States, apply to such person." Rule 46 reads: "The provisions of the laws regulating immigration, excluding those which prescribe payment of the head tax, apply to the residents and natives of Porto Rico and Philippine Islands, and, moreover, the provisions of the laws relating to the exclusion of Chinese apply to all such persons as are of the Chinese race, except those who are born in the United States." In other words, the Department rules exclude from the jurisdiction of the immigration officers citizens of Chinese descent, and limit that jurisdiction to Chinese aliens. In *United States v. Wong Kim Ark*, 169 U. S. 649, 42 L. ed. 890, 18 Sup. Ct. Rep. 456, it is stated (p. 653, L. ed. p. 892, Sup. Ct. Rep. p. 458):

"It is conceded that, if he is a citizen of the United States, the acts of Congress known as the Chinese exclusion acts, prohibiting persons of the Chinese race, and [275] especially Chinese *laborers, from coming into the United States, do not and cannot apply to him."

By the act of August 18, 1894 (28 Stat. at L. 390, chap. 301, U. S. Comp. Stat. 1901, p. 1303), it is provided that "in every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of the Treasury." The same limitation of finality to the case of aliens is repeated in the act of March 3, 1903 (32 Stat. at L. 1213, chap. 1012, U. S. Comp. Stat. Supp. p. 170). So it appears that this court discharged from the custody of the immigration officers a person of Chinese descent on the ground that he was a citizen of the United States, doing this upon the concession of the government that, if he was a citizen, the exclusion acts had no application to him; that Congress in terms makes the decision of the immigration officer final only when the party is an alien, and that the rules prescribed by the proper department exclude from the operation of the 198 U. S.

law citizens of the United States of Chinese descent. Yet, in spite of all this, it is held that this citizen of the United States must, by virtue of the ruling of a ministerial officer, be banished from the country of which he is a citizen. And this upon the ground that such officer has a right to decide whether he is or is not a citizen, and his decision on the question excludes all judicial examination.

Let us see what have been the rulings of this court in other cases, and first in respect to judicial decisions. In *Thompson v. Whitman*, 18 Wall. 457, 21 L. ed. 897, Thompson, a sheriff of a county in New Jersey, was sued by Whitman for taking and carrying away a sloop, the property of the plaintiff, and justified his action by the judgment of the court, which had ordered the sloop to be sold for violating a statute of New Jersey in reference to raking and gathering clams. There was thus a judicial determination of the liability of the sloop to seizure and condemnation. Notwithstanding this judicial determination, this court held that the plaintiff might show, as a matter of fact,*that the sloop was not with-[276] in the limits of the state of New Jersey, and therefore was not violating its statute. In the opinion, by Mr. Justice Bradley, this quotation was made from the opinion of Chief Justice Marshall in *Rose v. Himely*, 4 Cranch, 269, 2 L. ed. 617:

"Upon principle," says Chief Justice Marshall, "it would seem that the operation of every judgment must depend on the power of the court to render that judgment; or, in other words, on its jurisdiction over the subject-matter, which it has determined. In some cases that jurisdiction unquestionably depends as well on the state of the thing as on the constitution of the court. If, by any means whatever, a prize court should be induced to condemn, as prize of war, a vessel which was never captured, it could not be contended that this condemnation operated a change of property. Upon principle, then, it would seem that, to a certain extent, the capacity of the court to act upon the thing condemned, arising from its being within or without their jurisdiction, as well as the constitution of the court, may be considered by that tribunal which is to decide on the effect of the sentence."

Rose's "Notes on United States Reports" show that a multitude of cases, both state and Federal, rely upon *Thompson v. Whitman* as authority. Among them is *Scott v. McNeal*, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108, in which it was held that a court of probate, having jurisdiction in the administration of deceased persons, had no jurisdiction to appoint an administrator of one who was alive, although he had been ab-

sent, and not heard from for seven years, and that a sale made by the administrator appointed in such a case passed no title. It was cited approvingly in *Andrews v. Andrews*, 188 U. S. 14, 47 L. ed. 366, 23 Sup. Ct. Rep. 237. There a decree of divorce, rendered by a South Dakota court, in a case in which both parties were in court, and in which the court found not only that there were sufficient grounds for divorce, but also that the plaintiff had been a bona fide resident of South Dakota for the statutory length of time, and therefore had the requisite status to give that court jurisdiction, could be [277] *upset in Massachusetts by proof that the plaintiff was not in fact a bona fide resident of South Dakota. The same case was also relied upon as authority in *Bell v. Bell*, 181 U. S. 175, 177, 45 L. ed. 804, 805, 21 Sup. Ct. Rep. 551, 552, where we said:

"No valid divorce from the bond of matrimony can be decreed on constructive service by the courts of a state in which neither party is domiciled. And by the law of Pennsylvania every petitioner for a divorce must have had a bona fide residence within the state for one year next before the filing of the petition. . . . The recital in the proceedings in Pennsylvania of the facts necessary to show jurisdiction may be contradicted. *Thompson v. Whitman*, 18 Wall. 457, 21 L. ed. 897."

I have always supposed that a judgment of a court of competent jurisdiction was at least as conclusive as the finding of a ministerial officer, and that the right of personal liberty was as sacred in the eyes of the law as the title to a sloop.

Turning now to the action of ministerial or administrative officers, and what has been the uniform ruling of this court? Take the Land Department. Questions of fact within the undoubted jurisdiction of that Department are considered as settled by its rulings. But questions of fact upon which its jurisdiction rests are never so regarded. Thus, whether a tract of public land be swamp, mineral, or agricultural, may be finally determined by the Department; but whether a tract is public land is not so determined, and in all the multitude of cases that have been presented to this court it has never even been suggested that a ruling of the Department that a tract was public land was conclusive unless it appeared that the Land Department was guilty of some abuse of its discretion or powers. The question, and the only question, has been, Was the tract public land or not? In *United States v. Stone*, 2 Wall. 525, 17 L. ed. 765, it appeared that a tract of land adjacent to a military post had been at one time surveyed, and by that survey was included within the military reservation. Subse-

quently *a new survey was had, by which [278] this tract was excluded, and thereafter it was, in due course of administration, patented. Thereupon this suit was brought to set aside the patent. It was not suggested that the Land Department had been guilty of any irregularity in administration, or had not proceeded in accordance with the established rules of procedure; yet the court unanimously held that the patent must be set aside, on the ground that the land was reserved to the United States as a part of the military reservation by the original survey. In *St. Louis Smelting Co. v. Kemp*, 104 U. S. 636, 641, 26 L. ed. 875, 876, we said:

"Of course, when we speak of the conclusive presumptions attending a patent for lands, we assume that it was issued in a case where the Department had jurisdiction to act and execute it; that is to say, in a case where the lands belonged to the United States, and provision had been made by law for their sale. If they never were public property, or had previously been disposed of, or if Congress had made no provision for their sale, or had reserved them, the Department would have no jurisdiction to transfer them, and its attempted conveyance of them would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed. The action of the Department would in that event be like that of any other special tribunal not having jurisdiction of a case which it had assumed to decide."

It would be an affectation to attempt to cite all the authorities in which this doctrine is announced. In *Doolan v. Carr*, 125 U. S. 618, 31 L. ed. 844, 8 Sup. Ct. Rep. 1228, decided in 1887, Mr. Justice Miller cites more than a dozen cases as directly in point. Since then the doctrine has been again and again restated.

Take also the matter of imports. The Secretary of the Treasury is charged with the collection of the duties on them, but has it ever been held or even suggested that a ruling of the customhouse officers, approved by the Secretary of the Treasury, is a final determination that the article so passed upon was subject to duty, and precluded the courts from inquiring *as to that fact? Cer- [279] tainly this court has wasted a great deal of time determining whether a given article was subject to duty or not if the decision of the customhouse officers, approved by the Secretary of the Treasury, was a final decision of the question.

But it is said that the exclusion acts speak of Chinese persons, and that such term includes citizens as well as aliens, and, therefore, Congress has given power to the immigration officers to banish citizens of the

United States if they happen to be of Chinese descent. But obviously the statutes refer to citizens of China, and not to citizens of the United States. The treaty of 1894 (28 Stat. at L. 1210), in execution of which most of these statutes were passed, speaks, on the one hand, of Chinese subjects in the United States, and, on the other, of citizens of the United States in China. The treaty declared the rights and burdens of Chinese citizens in the United States, as well as the rights and burdens of citizens of the United States in China. The treaty then, placing Chinese subjects over against American citizens, must have had in mind citizenship, and not race. The legislation carrying that treaty into effect must be interpreted in the light of that fact. The statutes of the United States expressly limit the finality of the determination of the immigration officers to the case of aliens. It has been conceded by the government that these statutes do not apply to citizens, and this court made a most important decision based upon that concession. The rules of the Department declare that the statutes do not apply to citizens, and yet, in the face of all this, we are told that they may be enforced against citizens, and that Congress so intended. Banishment of a citizen not merely removes him from the limits of his native land, but puts him beyond the reach of any of the protecting clauses of the Constitution. In other words, it strips him of all the rights which are given to a citizen. I cannot believe that Congress intended to provide that a citizen, simply because he belongs to an obnoxious race, can be deprived of all the liberty and protection which the

[280] Constitution *guarantees, and if it did so intend, I do not believe that it has the power to do so.

Mr. Justice **Peckham** concurred in the foregoing dissent.

Mr. Justice **Day** also dissented.

FIRST NATIONAL BANK OF CHICAGO,
H. W. Rogers and James C. Rogers, as H.
W. Rogers & Brother, *Petitioners*,

v.

CHICAGO TITLE & TRUST COMPANY,
Trustee of Alexander Rodgers, Bankrupt,
The National Storage Company, James A.
Patten, Frank E. Winans, and E. W.
Bailey & Company.

(See S. C. Reporter's ed. 280-292.)

Courts—jurisdiction of court of bankruptcy to determine adverse claim—consent—appeal to circuit court of appeals.

NOTE.—On appeal and review in bankruptcy cases—see note to *Re Eggert*, 43 C. C. A. 9.

On the jurisdiction of the circuit court of appeals—see notes to *Lau Ow Bew v. United*

1. The failure of adverse claimants to abandon their claims to property not in the possession of the receiver in bankruptcy, after their objections to the jurisdiction of a court of bankruptcy to act on the receiver's petition for directions respecting a sale have been overruled, does not amount to a waiver of their objections, or a consent to an exercise of this jurisdiction.
2. A court of bankruptcy, after adjudging, in a proceeding begun by the receiver's petition for directions respecting a sale, that the receiver was not in possession of the property, has no jurisdiction to decree the sale, and determine the rights of adverse claimants to the proceeds.
3. No appeal lies from a decree of a court of bankruptcy in a proceeding begun by the receiver's petition for directions respecting a sale, by which the question of his possession of the property was decided, a sale decreed, and the rights of adverse claimants determined, since this is a proceeding in bankruptcy, and not an independent suit, and can only be reviewed by the circuit court of appeals by the revision in matter of law authorized under the bankrupt act of July 1, 1898 (30 Stat. at L. 553, chap. 541, U. S. Comp. Stat. 1901, p. 3432), § 24b, "on due notice and petition."

[No. 139.]

Argued January 19, 20, 1905. Decided May 15, 1905.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to review a decree which reversed, on appeal, a decree of the District Court for the Northern District of Illinois, by which rights of adverse claimants to the proceeds of a sale, in proceedings begun by the receiver's petition for directions respecting such sale, were determined after adjudging that the receiver was not in the possession of the property. *Reversed* with directions to dismiss the appeal and remand the cause to the District Court for the modification of its decree by directing that the return of the proceeds of sale should be without prejudice.

See same case below, 60 C. C. A. 567, 125 Fed. 169.

Statement by Mr. Chief Justice **Fuller**:
The petition for certiorari represented:

"1. That for some years prior to the 10th day of May, 1901, Alexander Rodgers was a wholesale dealer in seeds in the city of Chicago, Illinois, and that on said day he was adjudged a bankrupt by the district court of the United States for the northern district of Illinois, and the Chicago Title & Trust Company, respondent herein, was duly

States, 1 C. C. A. 6; *Salmon v. Mills*, 13 C. C. A. 374; and *United States Freehold Land & Emigration Co. v. Gallegos*, 32 C. C. A. 475.

appointed receiver, and subsequently trustee, of the estate of said bankrupt.

"2. That the National Storage Company, respondent, is a corporation organized under the laws of Illinois to do, and is engaged in doing, a warehousing business in the state of Illinois and elsewhere. That some months prior to said 10th day of May, said storage company issued to said Alexander Rodgers sundry warehouse receipts which were similar except as to the quantities and dates; one of which said receipts is in the words and figures following:

"Warrant No. 8401. Lot No. 1.

"The National Storage Company, office 217 First National Bank Building, Chicago, hereby acknowledges to have received two hundred and fifty (250) bags timothy seed, said to weigh 31,751 pounds, contained in div. B. sec. 1, fifth floor, at its warehouse premises No. 281, located at 220-230 Johnson street, Chicago, Illinois, and will surrender the same to the order hereon of Alexander Rodgers upon payment of *charges and delivery of this warrant, at its office in Chicago, duly indorsed.

"It is agreed that this company is not responsible for loss or damage to property occasioned by fire, water, leakage, vermin, ratage, shrinkage, accidental or providential causes, riot or insurrection, frost or change of weather, or from being perishable while in storage, and that this company shall, in the custody of the above property, be the agent of the holder of this warrant.

"Storage and charges as per contract on file with this company.

"Chicago, Aug. 31, 1900."

"[Signed by the National Storage Company by its president and treasurer, and the corporate seal affixed.]

"That immediately thereafter said Rodgers indorsed and hypothecated thirteen of said receipts to your petitioner the First National Bank of Chicago, to secure loans made by it to him aggregating about \$12,000, and indorsed and hypothecated five of said receipts to your petitioner, H. W. Rogers & Brother, to secure a loan by them to him of \$5,000, and that said loans are still unpaid and due to petitioners respectively, and said petitioners, at the time said Rodgers was adjudged a bankrupt, held and still hold said warehouse receipts as security for said loans respectively.

"3. That on the 13th day of May, 1901, said Chicago Title & Trust Company, as said receiver, filed in said district court a petition reciting that it had taken possession of the seed mentioned in said warehouse receipts, and asking the court's directions in

respect to a sale thereof. That to said petition each of these petitioners filed a special appearance, specially objecting to the jurisdiction of said district court over said seed, and such petitioner, as did also said National Storage Company. That thereupon the court referred said petition to a referee to take proof and report his conclusions; that the referee took proof and reported that the seed covered *by said warehouse receipts was, at the time of the adjudication in bankruptcy, in the possession of said storage company, that the district court was without jurisdiction, and recommending a dismissal of said petition.

"That subsequently exceptions to said report were heard by said district court, and it confirmed the referee's finding as to possession, but overruled his finding as to jurisdiction, and held it had jurisdiction, and ordered (the petitioner First National Bank consenting) that said seed be sold and the proceeds thereof be deposited with said First National Bank, subject to the further order of said court; that said seed was sold, and the amount realized therefrom was in excess of the amounts of petitioners' said claims, and this money is still in the hands of the petitioner the First National Bank.

"That said petitioners thereupon severally filed petitions in said court, asking payment of their said claims out of said proceeds. That said Chicago Title & Trust Company, as trustee, and the respondents James A. Patten, and E. W. Bailey & Company, as creditors, answered said petitions, denying the right of your petitioners to said fund; and thereupon said petitions were referred to said referee to take additional proof and report the same to the court, and the said matter again coming before the court upon the report of said referee and exceptions thereto, said petitions of your petitioners were consolidated, and the court confirmed said report of said referee, except so far as it found a lack of jurisdiction in said district court, and adjudged that said district court had jurisdiction; that said decree also found that said storage company was, at the time of the filing of the bankruptcy petition herein, in the possession of, and entitled to the possession of, said seed, and decreed that petitioner First National Bank retain out of said proceeds the sum of \$9,854.15 on account of its claim, and pay therefrom to petitioners H. W. Rogers & Brother \$5,000.

"That thereupon said Chicago Title & Trust Company, as trustee, and said James A. Patten, severally perfected appeals *from said order or decree to the circuit court of appeals of the seventh circuit.

"That thereafter said two appeals were

duly filed in said circuit court of appeals, and were there, by order of court, consolidated and heard as one case.

"That said circuit court of appeals thereafter filed its opinion in said consolidated causes, reviewing the question of fact whether the storage company was in possession of said seed at the time of the proceedings in bankruptcy, and held that said district court had erred in deciding this question of fact, and overruled said district court upon said question of fact, and decided that said storage company was not in possession of said seed, and remanded said cause, with directions to enter a decree for said trustee.

"That thereafter these petitioners filed a petition for rehearing in said cause, which was subsequently denied.

"That your petitioners are advised by counsel that there existed in law no right of appeal by said trustee or said Patten from said order of said district court, and that, if said alleged attempts to appeal should be treated strictly as appeals, said circuit court of appeals was without jurisdiction of the subject-matter, and its said order reversing said decree of the district court was null and void.

"That your petitioners are also advised by counsel that, if said appeals rightly could be, and were, treated by said circuit court of appeals as, in effect, petitions for revision, said circuit court of appeals, by the express terms of the bankruptcy statute, was limited in its jurisdiction to a revision of the decision of the district court in matter of law, and that said circuit court of appeals, in reversing said district court upon the said question of fact, proceeded without jurisdiction, and in violation of the said statute."

The granting of the writ was objected to, and it was stated that Alexander Rodgers, the bankrupt, filed his petition in bankruptcy May 8, 1901; that the Chicago Title & Trust Company was appointed receiver the [285] same day; and that the *bankrupt turned over his property, including the seed in dispute, to the receiver. And it was insisted that the proceeding was a plenary suit, to the institution of which, in the district court sitting in bankruptcy, the petitioners, as adverse parties, had consented. Certiorari was granted, and thereafter a motion to quash the writ was filed on the ground that the matters involved and determined in the cause were controversies arising in bankruptcy proceedings, as distinguished from proceedings in bankruptcy, and that the remedy was by error or appeal rather than by certiorari. Consideration of this motion was postponed to the hearing on the merits.

198 U. S. U. S., Book 49.

The case in the circuit court of appeals is reported 60 C. C. A. 567, 125 Fed. 169.

Mr. Henry S. Robbins argued the cause, and, with Messrs. Wallace Hackman and James G. Elsdon, filed a brief for petitioners:

By proceeding with the case after their objections to jurisdiction were overruled, these petitioners did not waive their right to insist upon them in the appellate tribunals.

Louisville Trust Co. v. Comingor, 184 U. S. 18, 46 L. ed. 413, 22 Sup. Ct. Rep. 293; *Re Baudouine*, 41 C. C. A. 318, 101 Fed. 574.

The proceeding in the district court was a proceeding in bankruptcy, and was not an independent suit.

Louisville Trust Co. v. Comingor, 184 U. S. 18, 46 L. ed. 413, 22 Sup. Ct. Rep. 293; *Re Baudouine*, 41 C. C. A. 318, 101 Fed. 574.

The district court was not, in the case at bar, without jurisdiction *ab initio*. It necessarily must have jurisdiction to proceed up to the point of determining that there exists an adverse claim; that is, that the property is in the possession of an adverse claimant.

Louisville Trust Co. v. Comingor, 184 U. S. 18, 46 L. ed. 413, 22 Sup. Ct. Rep. 293; *Mueller v. Nugent*, 184 U. S. 1, 46 L. ed. 405, 22 Sup. Ct. Rep. 269; *Re Baird*, 116 Fed. 765; *Re Kane*, 131 Fed. 386.

Even if jurisdiction existed in the district court, because of its possession of this fund, to decide the merits of this disputed ownership, the case in that court was a proceeding in bankruptcy.

Re Antigo Screen Door Co. 59 C. C. A. 248, 123 Fed. 249.

The appeal could not properly be treated as a petition for revision.

Re Whitener, 44 C. C. A. 434, 105 Fed. 180; *Re Worcester County*, 42 C. C. A. 637, 102 Fed. 808.

In this view the circuit court of appeals should, when this point of jurisdiction was raised, have dismissed the appeal. Indeed, it should have done so had counsel not raised the question.

Mansfield, C. & L. M. R. Co. v. Swan, 111 U. S. 379, 28 L. ed. 462, 4 Sup. Ct. Rep. 510.

Hence, that court acted without jurisdiction, and certiorari is proper to correct this.

American Sugar Ref. Co. v. New Orleans, 181 U. S. 277, 45 L. ed. 859, 21 Sup. Ct. Rep. 646; *Kingman & Co. v. Western Mfg. Co.* 170 U. S. 675, 42 L. ed. 1192, 18 Sup. Ct. Rep. 786.

Messrs. Joseph E. Paden and Newton Wyeth argued the cause, and, with *Messrs. James H. Reed, James H. Beal, and Reed, Smith, Shaw, & Beal*, filed a brief for respondents:

If the appeal was technically improper the circuit court of appeals could treat the same as a petition for review, and, so treated, the decision rendered therein by the circuit court of appeals was justified, and was the only decision that could properly be rendered.

The thing litigated could have been made the subject of an independent suit, and therefore constituted a separable controversy, and could properly be treated as appealable.

Hewit v. Berlin Mach. Works, 194 U. S. 296, 48 L. ed. 986, 24 Sup. Ct. Rep. 690; *Re Jacobs*, 39 C. C. A. 647, 99 Fed. 539; *Plymouth Cordage Co. v. Smith*, 194 U. S. 311, 48 L. ed. 992, 24 Sup. Ct. Rep. 725.

Re Richards, 37 C. C. A. 634, 96 Fed. 935; *Re Abraham*, 35 C. C. A. 592, 93 Fed. 767; *Chesapeake Shoe Co. v. Seldner*, 58 C. C. A. 261, 122 Fed. 593.

Messrs. Joseph E. Paden and Newton Wyeth also filed a reply brief for respondents:

Where a party appears and maintains the bona fides of the transfer on a full hearing, answers on the merits, and the like, he will be held to have consented to the jurisdiction.

Re Steuer, 104 Fed. 976; *Bryan v. Bernheimer*, 181 U. S. 188, 45 L. ed. 814, 21 Sup. Ct. Rep. 557; *Hicks v. Knost*, 178 U. S. 541, 44 L. ed. 1183, 20 Sup. Ct. Rep. 1006; *Boonville Nat. Bank v. Blakey*, 47 C. C. A. 43, 107 Fed. 891.

The petitioners and the storage company and Wirans were defendants to the original petition of the receiver, who afterwards was trustee from July 3, 1901, and they became cross complainants by filing in September, 1901, their petitions for affirmative relief after the sale. Under these circumstances they consented to the jurisdiction and to a full hearing of the controversy.

Hicks v. Knost, 178 U. S. 541, 44 L. ed. 1183, 20 Sup. Ct. Rep. 1006; *Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. ed. 1175, 20 Sup. Ct. Rep. 1000; *Re Steuer*, 104 Fed. 976.

If the claimants elect to contest their rights upon the merits in the district court, they can consent so to do, and, under § 23b, waive all question as to jurisdiction.

Mueller v. Nugent, 184 U. S. 1, 46 L. ed. 405, 22 Sup. Ct. Rep. 269; *Louisville Trust Co. v. Cominger*, 184 U. S. 18, 46 L. ed.

413, 22 Sup. Ct. Rep. 293; *Jaquith v. Rowley*, 188 U. S. 620, 47 L. ed. 620, 23 Sup. Ct. Rep. 369; *Hewit v. Berlin Mach. Works*, 194 U. S. 296, 48 L. ed. 986, 24 Sup. Ct. Rep. 690.

These respondents carried the case by appeal to the circuit court of appeals, and obtained a review on questions of both fact and law. It was competent for the opposite parties to consent that an appealable case should be heard in the district court. We think that the following cases indicate that the appeal was properly heard in the circuit court of appeals:

Elliott v. Tocppner, 187 U. S. 327, 47 L. ed. 200, 23 Sup. Ct. Rep. 133; *Duncan v. Landis*, 45 C. C. A. 666, 106 Fed. 839; *Boonville Nat. Bank v. Blakey*, 47 C. C. A. 43, 107 Fed. 891.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

In the view we take of the case, the petition for certiorari sufficiently discloses the facts. If the proceeding in the district court was a proceeding in bankruptcy, and not an independent suit, no appeal lay to the circuit court of appeals, and the jurisdiction of that court was confined to revision in matter of law "on due notice and petition" under clause b of § 24.

The distinction between steps in bankruptcy proceedings proper and controversies arising out of the settlement of the estates of bankrupts is recognized in §§ 23, 24, and 25 of the present act, and the provisions as to revision in matter of law and appeals were framed and must be construed in view of that distinction. *Holden v. Stratton*, 191 U. S. 115, 48 L. ed. 116, 24 Sup. Ct. Rep. 45; *First Nat. Bank v. Klug*, 186 U. S. 202, 46 L. ed. 1127, 22 Sup. Ct. Rep. 899; *Elliott v. Tocppner*, 187 U. S. 327, 333, 334, 47 L. ed. 200, 203, 23 Sup. Ct. Rep. 133.

This distinction existed under the prior bankruptcy law, *and the then decisions in [289] respect of a proceeding in bankruptcy and an independent suit are applicable. It was settled that the bankruptcy court was without jurisdiction to determine adverse claims to property not in the possession of the assignee in bankruptcy, by summary proceedings, whether absolute title or only a lien was asserted. *Smith v. Mason*, 14 Wall. 419, 20 L. ed. 748; *Marshall v. Knox*, 16 Wall. 551, 21 L. ed. 481; *Re Bonesteel*, 7 Blatchf. 175, Fed. Cas. No. 1,627, Mr. Justice Nelson; *Knight v. Cheney*, 5 Nat. Bankr. Reg. 305, Fed. Cas. No. 7,883, Mr. Justice Clifford; *Re Ballou*, 4 Ben. 135, Fed. Cas. No. 818, Mr. Justice Blatchford, then district judge; *Re Marter*, 12 Nat. Bankr.

Reg. 185, Fed. Cas. No. 9,143, Mr. Justice Brown, then district judge.

The present act was plainly framed in recognition of the principle of these cases. Subdivision 7 of § 2 confers jurisdiction on the district courts as courts of bankruptcy to "cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided;" and we held in *Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. ed. 1175, 20 Sup. Ct. Rep. 1000, that this exception referred to clause b of § 23 of the act, which provides: "Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt whose estate is being administered by such trustee might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant." [30 Stat. at L. pp. 546, 552, chap. 541, U. S. Comp. Stat. 1901, pp. 3422, 3431.] And that the district courts had no jurisdiction of such plenary suit without consent.

Petitioners asserted this express statutory limitation on jurisdiction, and objected that the district court could not proceed, but their objections were overruled. That they then did not abandon their claims did not amount to a waiver of their objections or to a consent to an exercise of jurisdiction against which they protested. *Louisville Trust Co. v. Comingor*, 184 U. S. 18, 46 L. ed. 413, 22 Sup. Ct. Rep. 293. In that case, to a rule entered in the bankruptcy court, requiring an adverse claimant in possession of a fund to pay it to the trustee in bankruptcy, the claimant tendered a formal response, denying jurisdiction, which the [290] *court refused to entertain, and he then participated in a hearing upon the merits. The bankruptcy court sustained its jurisdiction upon the ground that, by his "acquiescence in that mode of procedure," he had assented to its jurisdiction. Upon petition for review the circuit court of appeals reversed the bankruptcy court, and this court, upon certiorari, affirmed the circuit court of appeals. We said:

"This brought the controversy within the ruling in *Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. ed. 1175, 20 Sup. Ct. Rep. 1000, and the questions attempted to be litigated before the referee and in the district court as to the allowance of the two amounts could only be raised in the district court by consent, and then only by plenary suit. If the jurisdiction of the district court was not consented to, then the state court, under the circumstances of this case, was the proper

198 U. S.

forum, and the matters in dispute were to be disposed of there. . . .

"The proceeding was purely summary. . . .

"The question is whether the district court had jurisdiction to finally adjudicate the merits in this proceeding. . . .

"In many cases jurisdiction may depend on the ascertainment of facts involving the merits, and in that sense the court exercises jurisdiction in disposing of the preliminary inquiry, although the result may be that it finds that it cannot go farther. And where, in a case like that before us, the court erroneously retains jurisdiction to adjudicate the merits, its action can be corrected on review.

"We are of opinion that even if Comingor could have consented to be pursued in this manner, he did not so consent. He was ruled to show cause, and the cause he showed defeated jurisdiction over the subject-matter,—that is, jurisdiction to proceed summarily. He did not come in voluntarily, but in obedience to peremptory orders; and although he participated in the proceedings before the referee, he had pleaded his claims in the outset, and he made his formal protest to the exercise of jurisdiction before the final order was entered."

And since, as elaborately expounded in *Bardes v. First Nat. Bank*, the *district [291] court had no jurisdiction of an independent suit, it follows that the proceeding in that court could not be held to have been such, as, indeed, in form, on reason, and on authority, it manifestly was not. But, nevertheless, the district court had jurisdiction to determine whether it could or could not proceed further. *Louisville Trust Co. v. Comingor*, 184 U. S. 18, 46 L. ed. 413, 22 Sup. Ct. Rep. 293; *Mueller v. Nugent*, 184 U. S. 1, 46 L. ed. 405, 22 Sup. Ct. Rep. 269; *Schweer v. Brown*, 195 U. S. 171, ante, 144, 25 Sup. Ct. Rep. 15.

In the present case, the receiver filed a petition reciting that he had taken possession of the property. This was denied. The district court adjudged that the receiver had not, at the time of filing its petition, the right of possession, and that the National Storage Company, at that date, and also at the time of the filing of the petition in bankruptcy, was entitled to possession and had possession. Nevertheless it retained jurisdiction and decreed payment to petitioners out of the proceeds of the sale.

The sale in the circumstances did not change the situation. The proceeds stood in place of the property, and the order returning the proceeds was equivalent to an order returning the property. This it was proper to do, whether the court had held

that it lacked jurisdiction, or ruled in favor of petitioners on the merits. The court of appeals sustained the jurisdiction of the district court upon the ground that it had acquired a fund, and had jurisdiction to dispose of it; but we do not think that a court of bankruptcy can create a jurisdiction forbidden by statute. And, in any view, the proceeding was a proceeding in bankruptcy. Being such, an appeal from the decree of the district court, under § 25a, did not lie, and parties aggrieved could only invoke the supervisory power under § 24b. *Holden v. Stratton*, 191 U. S. 115, 48 L. ed. 116, 24 Sup. Ct. Rep. 45; *Hutchinson v. Otis*, 190 U. S. 552, 47 L. ed. 1179, 23 Sup. Ct. Rep. 778.

But this was an appeal, and not a petition for revision, and hence it was that the circuit court of appeals reviewed the questions of fact, and declined to accept the findings of the referee and the district court.

[292] In the exercise of supervisory *power, it would have been confined to matter of law. We are clear that an appeal would not lie, and *the decrees of the circuit court of appeals must be reversed*, with a direction to dismiss the appeals, and remand the cause to the district court for further proceedings in conformity with this opinion.

In our view the district court should have declined, upon its findings, to retain jurisdiction; and in that event the decrees for the return of the money should have been without prejudice to the right of respondents to litigate in a proper court, which modification we direct to be made.

Ordered accordingly.

EMPIRE STATE-IDAHO MINING & DEVELOPING COMPANY and the American Bonding Company of Baltimore, Appts.,

v.

KENNEDY J. HANLEY.

(See S. C. Reporter's ed. 292-298.)

Appeal from circuit court of appeals.

1. An allegation by a party claiming an interest in a mining claim by virtue of a purchase from an administrator under a decree of the probate court, that a subsequent decree of that court annulling the prior decree was invalid for want of jurisdiction to render it at a subsequent term, for want of notice and for lack of evidence, does not amount to an assertion that he was deprived of his interest by the court without due process of law, which would support the jurisdiction of a Federal circuit court irrespective of diversity of citizenship, and therefore permit an appeal to the Supreme Court from a decree of the circuit court of appeals in the cause.

2. Appellants cannot invoke the supposed presence of a constitutional question in a cause as the ground for sustaining an appeal from the United States circuit court of appeals, where, if any such question was disposed of by the decree, it was decided in their favor.

[No. 604.]

Submitted May 1, 1905. Decided May 15, 1905.

APPEAL from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which, on a third appeal, affirmed a decree of the Circuit Court for the District of Idaho, granting a part of the relief sought by a bill in equity asserting ownership of certain interests in a mining claim. *Dismissed* for want of jurisdiction.

Statement by Mr. Chief Justice **Fuller**:

Hanley brought this bill in equity in the circuit court of the United States for the district of Idaho, setting up diversity of citizenship as the ground of jurisdiction, and asserted ownership *of an undivided [293] one-eighth interest, and of an undivided one-third interest in the Skookum mining claim, Shoshone county, Idaho. As to the one-third interest, Hanley claimed under certain proceedings in the probate court of that county, which were, without notice to him, as he said, set aside, and the interest conveyed to the Chemung Company, and by the latter to the Empire State etc. Mining Company. Hanley's title to the one-eighth interest was derived through mesne conveyances from the original grantee under a patent from the United States. This interest Hanley had conveyed to Sweeny and Clark by a deed deposited in the Exchange National Bank of Spokane, to be delivered on certain specified conditions, and he averred that Sweeny and Clark obtained possession of the deed wrongfully, and contrary to the escrow agreement, and afterwards made a pretended deed of the interest to the Empire State Company.

On hearing, the circuit court decreed against Hanley as to both interests. Hanley carried the case to the circuit court of appeals, which held that he was not entitled to relief as to the one-third interest, but that he was as to the one-eighth interest. The decree was therefore reversed and the cause remanded for further proceedings. 48 C. C. A. 612, 109 Fed. 712. The case went back and was referred to a master for an accounting as to the eighth interest, who reported a large amount of money as due to Hanley. The circuit court reduced the amount by deducting the cost of working the property while Hanley was excluded from

the mine, and entered a decree quieting Hanley's title to the one-eighth interest, and giving him judgment against the Empire State Company for the last-named amount. Defendant appealed from this decree, and filed a supersedeas bond with the American Bonding Company of Baltimore as surety, and Hanley prosecuted a cross appeal, questioning the deduction. The circuit court of appeals sustained the cross appeal, and held that the circuit court erred in allowing defendants their working costs. 61 C. C. A. 153, 126 Fed. 97. The case was remanded with directions to modify the decree. This [294] was *done and recovery of the original amount decreed, and also recovery on the bond of the amount it was given to secure, and another appeal was taken by the companies to the court of appeals, which affirmed the decree. The pending appeal having been subsequently allowed, was submitted on motion to dismiss.

Messrs. George Turner and W. B. Heyburn submitted the cause for appellants. Mr. F. T. Post was on the brief:

The jurisdiction of the circuit court must at all times be shown on the face of the complaint, and it has been held in such cases, construing the court of appeals statute, that if, in addition to the allegation of diverse citizenship, a distinct Federal question appears on the face of the complaint, the right of appeal from the circuit court of appeals to the Supreme Court exists.

Spreckels Sugar Ref. Co. v. McClain, 192 U. S. 397, 48 L. ed. 496, 24 Sup. Ct. Rep. 376; *Northern P. R. Co. v. Soderberg*, 188 U. S. 526, 47 L. ed. 575, 28 Sup. Ct. Rep. 365; *American Sugar Ref. Co. v. New Orleans*, 181 U. S. 281, 45 L. ed. 862, 21 Sup. Ct. Rep. 646; *Howard v. United States*, 184 U. S. 681, 46 L. ed. 757, 22 Sup. Ct. Rep. 543; *Colorado Cent. Consol. Min. Co. v. Turck*, 150 U. S. 141, 37 L. ed. 1031, 14 Sup. Ct. Rep. 35.

The action of the courts of Idaho, as alleged in the complaint, constituted a deprivation of property without due process of law, within the meaning of the 14th Amendment.

Noble v. Union River Logging R. Co. 147 U. S. 175, 37 L. ed. 127, 13 Sup. Ct. Rep. 271; *Scott v. McNeal*, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Kennard v. Louisiana*, 92 U. S. 480, 23 L. ed. 478; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 708, 28 L. ed. 572, 4 Sup. Ct. Rep. 663; *United States v. Lee*, 106 U. S. 220, 27 L. ed. 181, 1 Sup. Ct. Rep. 240.

The office of pleadings is to state facts, 198 U. S.

not conclusions of law. It is the duty of the court to declare the conclusions, and of the parties to state the premises. No more is necessary in jurisdictional averments.

Northern P. R. Co. v. Soderberg, 188 U. S. 526, 47 L. ed. 575, 23 Sup. Ct. Rep. 365; *Warner v. Searle & H. Co.* 191 U. S. 195, 48 L. ed. 145, 24 Sup. Ct. Rep. 79.

Jurisdictional averments frequently have no relation to the merits of the case. A suitor comes into a Federal court by reason of his status as an officer of the government, or, if a corporation, by reason of having derived its corporate existence at the hands of the Federal government. It has been held that a right of appeal in such cases lies, in favor of either party, from the circuit court of appeals to the Supreme Court.

Howard v. United States, 184 U. S. 676, 46 L. ed. 754, 22 Sup. Ct. Rep. 543; *Union P. R. Co. v. Harris*, 158 U. S. 326, 39 L. ed. 1003, 15 Sup. Ct. Rep. 843; *Sonnenheil v. Christian Moerlein Brewing Co.* 172 U. S. 401, 43 L. ed. 492, 19 Sup. Ct. Rep. 233; *Northern P. R. Co. v. Amato*, 144 U. S. 465, 36 L. ed. 506, 12 Sup. Ct. Rep. 740.

It is a familiar law in the practice of the courts of equity, that good ground of equity with reference to one part of a transaction gives the court power to adjudicate with reference to the entire case.

1 Pom. Eq. Jur. 2d. ed. §§ 181, 231, 242.

There is no reason why this principle should not apply as well to the constitutional and statutory jurisdiction of the Federal courts as to their equitable jurisdiction. It has been so applied on the circuit.

Brooks v. Stolley, 3 McLean, 523, Fed. Cas. No. 1,962.

It has also been applied by this court, in principle, in the series of cases where bills which were equitable in the original sense, and therefore required diversity of citizenship for purposes of Federal jurisdiction, have been treated as ancillary and supplemental for the purpose of avoiding objection to the Federal jurisdiction.

Blossom v. Milwaukee & C. R. Co. 1 Wall. 655, 17 L. ed. 673; *Milwaukee & M. R. Co. v. Milwaukee & St. P. R. Co.* (*Milwaukee & M. R. Co. v. Soutter*) 2 Wall. 635, 17 L. ed. 895; *Freeman v. Howe*, 24 How. 460, 16 L. ed. 752; *Johnson v. Christian*, 125 U. S. 642, 31 L. ed. 820, 8 Sup. Ct. Rep. 989, 1135; *Pacific R. Co. v. Missouri P. R. Co.* 111 U. S. 505, 28 L. ed. 498, 4 Sup. Ct. Rep. 583; *Krippendorf v. Hyde*, 110 U. S. 276, 28 L. ed. 145, 4 Sup. Ct. Rep. 27.

Mr. M. A. Folsom submitted the cause for appellee:

If the jurisdiction of the circuit court was dependent entirely upon diversity of citizenship, the decree of the circuit court

of appeals is final, and this appeal cannot be maintained.

Stevenson v. Fain, 195 U. S. 165, *ante*, 142, 25 Sup. Ct. Rep. 6.

This court has repeatedly held that the allegations of a Federal question must be clear and distinct, and must show a substantial Federal question. All doubts are to be resolved against the jurisdiction of the circuit court.

Grace v. American Cent. Ins. Co. 109 U. S. 278, 27 L. ed. 932, 3 Sup. Ct. Rep. 207; *Lampasas v. Bell*, 180 U. S. 276, 45 L. ed. 527, 21 Sup. Ct. Rep. 368; *Western U. Teleg. Co. v. Ann Arbor R. Co.* 178 U. S. 239, 44 L. ed. 1052, 20 Sup. Ct. Rep. 867; *New Orleans v. Benjamin*, 153 U. S. 423, 38 L. ed. 769, 14 Sup. Ct. Rep. 905; *York v. Texas*, 137 U. S. 15, 34 L. ed. 604, 11 Sup. Ct. Rep. 9.

Unless Hanley first established the regularity of the sale to him, he would not be in a position to attack the regularity of the sale to the Chemung company. He could not claim to have been deprived of the interest, until he had established that he had acquired it. The constitutional question, if any was raised, was therefore conjectural.

Cosmopolitan Min. Co. v. Walsh, 193 U. S. 460, 48 L. ed. 749, 24 Sup. Ct. Rep. 489; *Cornell v. Green*, 163 U. S. 75, 41 L. ed. 76, 16 Sup. Ct. Rep. 969; *Ansbro v. United States*, 159 U. S. 695, 697, 40 L. ed. 310, 16 Sup. Ct. Rep. 187; *Re Lennon*, 150 U. S. 393, 400, 37 L. ed. 1120, 1122, 14 Sup. Ct. Rep. 23; *Carey v. Houston & T. C. R. Co.* 150 U. S. 170, 37 L. ed. 1041, 14 Sup. Ct. Rep. 63.

The complainant in his bill did not refer to the Constitution of the United States, and did not rely upon it. He claimed no immunity or privileges under it, nor did he ask the application or the protection of the Constitution of the United States, or the construction of the same.

Cornell v. Green, 163 U. S. 75, 41 L. ed. 76, 16 Sup. Ct. Rep. 969; *Carey v. Houston & T. C. R. Co.* 150 U. S. 170, 37 L. ed. 1041, 14 Sup. Ct. Rep. 63; *Re Lennon*, 150 U. S. 393, 37 L. ed. 1120, 14 Sup. Ct. Rep. 123.

If sufficient allegations of the constitutional question with reference to the one-third interest were made in the complaint, the appellants here do not bear such a relation to the question as to entitle them to appeal to this court.

New Orleans v. Emsheimer, 181 U. S. 153, 45 L. ed. 794, 21 Sup. Ct. Rep. 584; *Anglo American Provision Co. v. Davis Provision Co.* 191 U. S. 376, 48 L. ed. 228, 14 Sup. Ct. Rep. 93; *Lampasas v. Bell*, 180 U. S. 276, 45 L. ed. 527, 21 Sup. Ct. Rep. 368.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

We are of opinion that the jurisdiction of the circuit court was dependent entirely upon diversity of citizenship, and that *this[297] appeal must be dismissed. Appellants' contention is that the allegations of Hanley's complaint as to the one-third interest amounted to the assertion that he had been deprived of that interest by the probate court without due process of law, and were sufficient to support the jurisdiction of the circuit court on this ground, irrespective of diversity of citizenship. We do not so regard the allegations. What Hanley asserted was that his title to the third interest was good because he had purchased it from the administrator under the decree of the probate court, and that the subsequent decree of that court, annulling the prior decree, was invalid for want of jurisdiction to render it at a subsequent term, for want of notice and for lack of evidence.

Granting that the 14th Amendment applies to the action of the courts as well as of the legislative and executive authorities of the states, the averments of the complaint did not suggest that the courts of Idaho would hold the later proceedings of the probate court, if attacked by Hanley directly, effectual to overthrow his purchase; or charge that in such action as had been taken they had committed error so gross as to amount in law to a denial by the state of due process of law. Hanley's contention was in effect that the later proceedings were void for lack of jurisdiction, and he did not pretend that he could not have obtained redress by direct suit in the state courts.

The Constitution and laws of the United States were not mentioned in the complaint, nor any dispute or controversy raised as to the effect or construction of the Constitution or laws on the determination of which the result depended; nor was any title, right, privilege, or immunity specially set up or claimed under Constitution or law.

If this had been a writ of error to a state court, the averments would not have brought it within § 709 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 575). If it had been a direct appeal from the circuit court under § 5 of the act of March 3, 1891 [26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549], it could not have been sustained, because the construction or* ap-[298] plication of the Constitution of the United States was not distinctly presented for decision in the court below.

And as an appeal from the circuit court of appeals under § 6 of the act of 1891, it

cannot be sustained because it falls within the settled rule that: "Where the jurisdiction of the circuit court is invoked on the ground of diverse citizenship, it will not be held to rest also on the ground that the suit arose under the Constitution of the United States, unless it really and substantially involves a dispute or controversy as to the effect or construction of the Constitution, upon the determination of which the result depends, and which appears on the record by a statement in legal and logical form, such as good pleading requires; and where the case is not brought within this rule the decree of the circuit court of appeals is final." *Arbuckle v. Blackburn*, 191 U. S. 405, 48 L. ed. 239, 24 Sup. Ct. Rep. 148; *Western U. Teleg. Co. v. Ann Arbor R. Co.* 178 U. S. 238, 44 L. ed. 1052, 20 Sup. Ct. Rep. 867.

If the allegation of diversity of citizenship had been omitted from the bill, the jurisdiction could not have been maintained.

The decisions of the courts below did not turn on any Federal question. The circuit court held that Hanley had no title to the one-third interest because the Idaho statute relating to probate sales had not been complied with; the court of appeals, that Hanley was not entitled to the aid of a court of equity in respect of that interest, because of his conduct at the time of the transaction.

Appellants succeeded in their defense as to the one-third interest, and Hanley accepted the result on the second appeal. They now make a grievance of their own success, and ask that the supposed constitutional question as to the third interest only be made the basis of jurisdiction here, although, if the decree disposed of any such question, it was in their favor. In our opinion this cannot be permitted. *Anglo-American Provision Co. v. Davis Provision Co.* 191 U. S. 376, 48 L. ed. 227, 24 Sup. Ct. Rep. 92; *Lampasas v. Bell*, 180 U. S. 276, 45 L. ed. 527, 21 Sup. Ct. Rep. 268.

Appeal dismissed.

[299]*OLD DOMINION STEAMSHIP COMPANY, *Plff. in Err.*,

v.

COMMONWEALTH OF VIRGINIA.

(See S. C. Reporter's ed. 299-310.)

State taxation of vessels engaged in inter-

NOTE.—As to where ships are taxable—see note to *Johnson v. De Bary-Baya Merchants' Line*, 37 L. R. A. 518.

198 U. S.

state commerce—effect of enrolment or registry outside the state.

Vessels which, though engaged in interstate commerce, are employed in such commerce wholly within the limits of a state, are subject to taxation in that state, although they may have been registered or enrolled under U. S. Rev. Stat. §§ 4141, 4311, U. S. Comp. Stat. 1901, pp. 2808 and 2959, at a port outside the limits of the state.

[No. 231.]

Argued April 25, 26, 1905. Decided May 15, 1905.

IN ERROR to the Supreme Court of Appeals of the State of Virginia to review a judgment affirming, on appeal, a finding of the state corporation commission declaring taxable, under the laws of the state, certain vessels belonging to a foreign corporation, registered or enrolled at a port outside the limits of the state, and employed in interstate commerce wholly within the limits of the state. *Affirmed.*

See same case below, 102 Va. 576, 102 Am. St. Rep. 855, 46 S. E. 783.

Statement by Mr. Justice **Brewer**:

On March 17, 1904, the supreme court of appeals of the state of Virginia, in a matter appealed from a finding of the state corporation commission, entered the following findings and order:

"That the Old Dominion Steamship Company was a nonresident corporation, having been incorporated by the senate and house of representatives of the state of Delaware; that it was then and had been for many years theretofore engaged in the transportation of passengers and freight on the Atlantic ocean and communicating navigable waters, between the city of New York, in the state of New York, and Norfolk, and certain other ports within the state of Virginia. That said steamship company, in the prosecution of its said transportation business, owned and operated the vessel property above named; that these vessels, with the exception of the tug *Germania*, whose movements and use will be hereinafter stated, visited various ports or points within the state of Virginia, for the purpose of receiving freight and passengers, for which they issued bills of lading and tickets to points outside the state of Virginia; that, owing to the shallow waters where these vessels plied, it was impossible in most instances for the larger ocean-going steamers of the company to be used; that in consequence the vessels above enumerated were used to receive the freight and passengers as aforesaid, giving the shipper for freight a bill of lading for

the same, destined to New York and other points outside of Virginia, and the passenger a ticket to his destination, and thus transported such freight and passengers to deeper water at Norfolk and Old Point Comfort, where, upon such bills of lading and tickets, the passengers and freight were transferred to one of the larger ocean-going vessels of the steamship company, and so the ultimate destination, namely, New York, and elsewhere outside of Virginia, was reached; that any other business transacted by the above-named vessels was incidental in character and comparatively insignificant in amount; that the said vessels were built and designed for interstate traffic especially, and were adjuncts to or branches of the main line of the Old Dominion Steamship Company between New York and Norfolk; that each and all of the said vessels were regularly enrolled, under the United States laws, outside of the state of Virginia, with the name and port of such enrolment painted on the stern of each of them; that the said vessels, though regularly enrolled and licensed for coastwise trade, were then used on old established routes upon navigable waters within Virginia, as follows, to wit:

"First. The steamer Hampton Roads, between Fort Monroe and Hampton and Norfolk.

"Second. The steamer Mobjack, between points in Mathews and Gloucester counties and Norfolk.

"Third. The steamers Luray and Accomac, between Smithfield and Norfolk.

"Fourth. The steamer Virginia Dare, between Suffolk and Norfolk.

"Fifth. The steamers Berkeley and Brandon, between Richmond and Norfolk; and

[301] *The steamers Berkeley and Brandon ply between Richmond and Norfolk. These two steamers were completed in the year 1901, or early in 1902, one of them having been constructed at the William R. Trigg shipyard in the city of Richmond, and the other outside of the state of Virginia. Early in the year 1902 they were placed upon the line between Norfolk and Richmond, one steamer leaving Richmond each evening and arriving in Norfolk each morning, thus giving a night trip every night each way between Richmond and Norfolk. At the time these steamers were placed upon this route, and since that time, the Old Dominion Steamship Company has, by public advertisement, called attention to the fact that these two steamers were especially fitted in the matter of stateroom accommodations for carrying passengers between Richmond and Norfolk, and the said two steamers have since that time been advertising for the carriage of passengers and freight on their route between Richmond and Norfolk, and

have been regularly carrying freight and passengers between the said two points in Virginia as well as taking on freight and passengers for further transportation on their ocean steamers at Norfolk. The Old Dominion Steamship Company applied, under the revenue laws of the state of Virginia, for a license to sell liquor at retail on each of these steamers, and on July 1st, 1902, there was granted, through the commissioner of the revenue of the city of Richmond, a license to the Old Dominion Steamship Company for the sale of liquor at retail on each of these steamers, said licenses to expire on April 30th, 1903. On or about the same time the said steamship company complied with the revenue laws of the United States, and paid the necessary revenue tax through the custom house at the city of Richmond for the purpose of selling liquor at retail on each of these steamers. In the spring of 1903 the said steamship company, in order to obtain licenses to sell liquor at retail on each of these steamers, applied for the same in the city of Richmond, and complied with the requirements of § 143 of the new revenue law, approved April 16th, 1903, and so obtained *licenses for the year 1903-1904 to[302] sell liquor at retail on each of these steamers on their route between the cities of Richmond and Norfolk, and likewise, on or about the same time, complied with the revenue laws of the United States in the matter of selling liquor at retail on each of the said steamers on said route.

"Sixth. The steam tug Germania, which was used in the harbor of Norfolk and Hampton Roads for the purpose of docking the large ocean-going steamers of the Old Dominion Steamship Company, and the transferring from different points in those waters freight from connecting lines destined to points outside of Virginia.

"And the court, having maturely considered said transcript of the record of the finding aforesaid and the arguments of counsel, is of opinion that the legal situs of the vessels and barges assessed for taxation by the finding of the state corporation commission is, for that purpose, within the jurisdiction of the state of Virginia, and that said property is amenable to the tax imposed thereon,—notwithstanding the fact that said vessels and barges are owned by a nonresident corporation, that they may have been enrolled under the act of Congress at some port outside the state of Virginia, and that they are engaged, in part, in interstate commerce,—and doth so decide and declare. Therefore it seems to the court here that the finding of the state corporation commission appealed from is without error, and said finding is approved and affirmed. It is further considered by the

court that the appellee recover against the appellant thirty dollars damages and its costs by it about its defense expended upon this appeal."

To review this order the Old Dominion Steamship Company sued out this writ of error.

Mr. William H. White argued the cause and filed a brief for plaintiff in error:

Vessels enrolled under the Federal statutes become vessels of the United States.

Wheeling, P. & C. Transp. Co. v. Wheeling, 99 U. S. 278, 25 L. ed. 413.

Because of their peculiar nature and employment, and because Congress has fixed their home port, they cannot be taxed as of their actual situs, but only at their home port.

Pullman Palace Car Co. v. Twombly, 29 Fed. 658; *Baltimore & O. R. Co. v. Maryland*, 21 Wall. 456, 470, 22 L. ed. 678, 683; *Hays v. Pacific Mail S. S. Co.* 17 How. 596, 15 L. ed. 254.

The record in this case does not show whether these vessels were actually taxed at their home port or not. It matters not whether they are actually so taxed by the state where they are enrolled. They are liable to taxation there.

Morgan v. Parham, 16 Wall. 471, 21 L. ed. 303; *Roberts v. Charlevoix Twp.* 60 Mich. 197, 26 N. W. 878; *Johnson v. DeBary-Baya Merchants' Line*, 37 Fla. 499, 37 L. R. A. 518, 19 So. 640.

Mr. William A. Anderson argued the cause and filed a brief for defendant in error:

The state has the right to tax all property, movable as well as immovable, actually located within its confines.

State Tax on Foreign-held Bonds, 15 Wall. 300, 21 L. ed. 179; Story, Conf. L. 7th ed. § 550; Judson, Taxn. § 393; 1 Cooley, Taxn. 3d ed. p. 22.

A tax on ships does not violate the commerce clause of the Federal Constitution. The only question is whether they are properly within the jurisdiction of the state levying the tax. If they are, the right of the state to tax them is unquestioned.

State ex rel. Ravenel v. Charleston, 4 Rich. L. 286.

It is competent for a state to levy a tax on steamboats plying exclusively in its own waters, and owned by its own citizens, although enrolled and licensed as coasting vessels under the laws of the United States.

Lott v. Mobile Trade Co. 43 Ala. 578.

The state may tax such vessels although they are used in interstate commerce. Such a tax is not a burden upon or regulation of commerce among the states.

198 U. S.

Perry v. Torrence, 8 Ohio, 521, 32 Am. Dec. 725.

A state may tax sleeping cars used upon a railroad within the state, although they are owned by a foreign corporation and are employed in interstate commerce.

Denver & R. G. R. Co. v. Church, 17 Colo. 1, 31 Am. St. Rep. 252, 28 Pac. 468.

Railroad cars engaged in interstate commerce, though owned and used by a foreign company, may be taxed by the state in which they are so used.

Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; *Pullman's Palace Car Co. v. Hayward*, 141 U. S. 36, 35 L. ed. 621, 11 Sup. Ct. Rep. 883.

Vehicles of transportation upon water, though engaged in interstate commerce, are liable to a property tax to the same extent and in the same manner that vehicles used in transportation upon land are rightfully and lawfully subjected to such a property tax.

Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 218, 29 L. ed. 167, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826.

Vehicles of commerce employed exclusively in interstate commerce may be taxed in the state where they are located and regularly used.

Pullman's Palace Car Co. v. Hayward, 141 U. S. 36, 35 L. ed. 621, 11 Sup. Ct. Rep. 883; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 206, 29 L. ed. 163, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 30, 35 L. ed. 619, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305, 166 U. S. 185, 41 L. ed. 965, 17 Sup. Ct. Rep. 604; *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70, 43 L. ed. 899, 19 Sup. Ct. Rep. 599; *Union Refrigerator Transit Co. v. Lynch*, 177 U. S. 152, 44 L. ed. 710, 20 Sup. Ct. Rep. 631.

The artificial will yield to the actual situs, and the latter will determine the just and the legal locus of the property for taxation.

North Western Lumber Co. v. Chehalis County, 25 Wash. 95, 54 L. R. A. 212, 87 Am. St. Rep. 747, 64 Pac. 909; *National Dredging Co. v. State*, 99 Ala. 462, 12 So. 720; *Norfolk & W. R. Co. v. Board of Public Works*, 97 Va. 23, 32 S. E. 779; *Minturn v. Hays*, 2 Cal. 590, 56 Am. Dec. 366.

The permanent locus of the property, and not the residence of its owner, determines its situs for taxation.

State Tax on Foreign-held Bonds, 15 Wall. 319, 21 L. ed. 186; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35

1061

L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; *Union Refrigerator Transit Co. v. Lynch*, 177 U. S. 152, 44 L. ed. 710, 20 Sup. Ct. Rep. 631.

Mr. Justice **Brewer** delivered the opinion of the court:

The facts being settled, the only question is one of law. Can Virginia legally subject these vessels to state taxation? The general rule is that tangible personal property is subject to taxation by the state in which it is, no matter where the domicile of the owner may be. This rule is not affected by the fact that the property is employed in interstate transportation. *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876, in which Mr. Justice Gray, speaking for the court, said (p. 23, L. ed. p. 616, Inters. Com. Rep. p. 599, Sup. Ct. Rep. p. 878):

"It is equally well settled that there is nothing in the Constitution or laws of the United States which prevents a state from taxing personal property, employed in interstate or foreign commerce, like other personal property within its jurisdiction."

See also *Cleveland, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 439-445, 38 L. ed. 1041, 1046, 4 Inters. Com. Rep. 677, 14 Sup. Ct. Rep. 1122; *Western U. Teleg. Co. v. Taggart*, 163 U. S. 1-14, 41 L. ed. 49-54, 16 Sup. Ct. Rep. 1054.

This is true as to water as well as to land transportation. In *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, *217, 29 L. ed. 158, 166, 1 Inters. Com. Rep. 382, 390, 5 Sup. Ct. Rep. 826, 835, Mr. Justice Field, in delivering the opinion of the court, after referring to certain impositions upon interstate commerce, added:

"Freedom from such impositions does not, of course, imply exemption from reasonable charges, as compensation for the carriage of persons, in the way of tolls or fares, or from the ordinary taxation to which other property is subjected, any more than like freedom of transportation on land implies such exemption."

See also *Passenger Cases*, 7 How. 283, 12 L. ed. 702, in which Mr. Justice McLean said (p. 402, L. ed. p. 752):

"A state cannot regulate foreign commerce, but it may do many things which more or less affect it. It may tax a ship or other vessel used in commerce, the same as other property owned by its citizens."

The same doctrine is laid down in the same case by Mr. Chief Justice Taney (p. 479, L. ed. p. 784). See also *Wheeling, P. & C. Transp. Co. v. Wheeling*, 99 U. S. 273, 25 L. ed. 412. That the service in which these vessels were engaged formed one link

in a line of continuous interstate commerce may affect the state's power of regulation, but not its power of taxation. True, they were not engaged in an independent service, as the cabs in *New York ex rel. Pennsylvania R. Co. v. Knight*, 192 U. S. 21, 48 L. ed. 325, 24 Sup. Ct. Rep. 202, but, being wholly within the state, that was their actual situs. And, as appears from the authorities referred to, the fact that they were engaged in interstate commerce does not impair the state's authority to impose taxes upon them as property. Indeed, it is not contended that these vessels, although engaged in interstate commerce, are not subject to state taxation, the contention being that they are taxable only at the port at which they are enrolled. In support of this contention the two principal cases relied upon are *Hays v. Pacific Mail S. S. Co.* 17 How. 596, 15 L. ed. 254, and *Morgan v. Parham*, 16 Wall. 471, 21 L. ed. 303.

Registry and enrolment are prescribed by Rev. Stat. §§ 4141 and 4311, U. S. Comp. Stat. 1901, pp. 2808 and 2959, for vessels of the United States engaged in foreign and domestic commerce. Section 4141 reads:

*"Sec. 4141. Every vessel, except as is [307] hereinafter provided, shall be registered by the collector of that collection district which includes the port to which such vessel shall belong at the time of her registry; which port shall be deemed to be that at or nearest to which the owner, if there be but one, or, if more than one, the husband or acting and managing owner of such vessel, usually resides."

By sections 4131 and 4311 (U. S. Comp. Stat. 1901, pp. 2803 and 2959) vessels registered or enrolled are declared to be deemed vessels of the United States. As stated by Chancellor Kent, in his Commentaries, vol. 3, p. *139:

"The object of the registry acts is to encourage our own trade, navigation, and ship-building, by granting peculiar or exclusive privileges of trade to the flag of the United States, and by prohibiting the communication of those immunities to the shipping and mariners of other countries. These provisions are well calculated to prevent the commission of fraud upon individuals, as well as to advance the national policy. The registry of all vessels at the custom house, and the memorandums of the transfers, add great security to title, and bring the existing state of our navigation and marine under the view of the general government. By these regulations the title can be effectually traced back to its origin."

This object does not require, and there is no suggestion in the statutes, that vessels registered or enrolled are exempt from the ordinary rules respecting taxation of per-

sonal property. It is true by § 4141 there is created what may be called the home port of the vessel, an artificial situs, which may control the place of taxation in the absence of an actual situs elsewhere, and to that extent only do the two cases referred to go.

In *Hays v. Pacific Mail S. S. Co.* 17 How. 596, 15 L. ed. 254, ocean steamers owned and registered in New York, and regularly plying between Panama and San Francisco and ports in Oregon, remaining in San Francisco no longer than was necessary to land and receive passengers and cargo and in Benicia only for repairs and supplies, [308] were held not subject to taxation *by the state of California. In the course of the opinion, by Mr. Justice Nelson, it was said (p. 599, L. ed. p. 255):

"We are satisfied that the state of California had no jurisdiction over these vessels for the purpose of taxation; they were not properly abiding within its limits so as to become incorporated with the other personal property of the state; they were there but temporarily, engaged in lawful trade and commerce, with their situs at the home port, where the vessels belonged, and where the owners were liable to be taxed for the capital invested, and where the taxes had been paid."

Clearly the ruling was that these steamers had acquired no actual situs within the state of California; that occasionally touching at ports in the state did not make them incorporated with the other personal property of the state. Hence, having no situs in California, they were not subject to taxation there, but were subject to state taxation at the artificial situs established by their registry.

In *Morgan v. Parham*, 16 Wall. 471, 21 L. ed. 303, it appeared that a steamship was registered in New York, under the ownership of the plaintiff; that she was employed as a coasting steamer between Mobile and New Orleans; that she was regularly enrolled as a coaster in Mobile by her master, and received a license as a coasting vessel for that and subsequent years. It was held that she was not subject to taxation by the state of Alabama. Mr. Justice Hunt, in delivering the opinion of the court, said (pp. 474, 476, L. ed. p. 304):

"The fact that the vessel was physically within the limits of the city of Mobile, at the time the tax was levied, does not decide the question. Thus, if a traveler on that day had been passing through that city in his private carriage, or an emigrant with his worldly goods on a wagon, it is not contended that the property of either of these

persons would be subject to taxation, as property within the city. It is conceded by the respective counsel that it would not have been.

"On the other hand this vessel although a vehicle of commerce, was not exempt from taxation on that score. A steamboat, *or a [309] post coach, engaged in a local business within a state, may be subject to local taxation, although it carry the mail of the United States. The commerce between the states may not be interfered with by taxation or other interruption, but its instruments and vehicles may be. . . . It is the opinion of the court that the state of Alabama had no jurisdiction over this vessel for the purpose of taxation, for the reason that it had not become incorporated into the personal property of that state, but was there temporarily only."

In other words, here, as in the prior case, there was no actual situs of the vessel. She had not become commingled with the general property of the state, and was therefore subject to taxation at the artificial situs,—the port of her registry.

In *Wheeling, P. & C. Transp. Co. v. Wheeling*, 99 U. S. 273, 25 L. ed. 412, Mr. Justice Clifford concludes his discussion with this statement (p. 285, L. ed. p. 416):

"From which it follows, as a necessary consequence, that the enrolment of a ship or vessel does not exempt the owner of the same from taxation for his interest in the ship or vessel as property, upon a valuation of the same, as in the case of other personal property."

Of course, if the enrolment does not exempt vessels from taxation as other personal property, the place of enrolment, whether within or without the state in which the property is actually situated, is immaterial, for other like property is taxable at its actual situs.

So far as the state authorities are concerned, reference may be made to *Lott v. Mobile Trade Co.* 43 Ala. 578; *National Dredging Co. v. State*, 99 Ala. 462, 12 So. 720; *Northwestern Lumber Co. v. Chehalis County*, 25 Wash. 95, 54 L. R. A. 212, 87 Am. St. Rep. 747, 64 Pac. 909.

Our conclusion is that where vessels, though engaged in interstate commerce, are employed in such commerce wholly within the limits of a state, they are subject to taxation in that state, although they may have been registered or enrolled at *a port [310] outside its limits. The conclusion, therefore, reached by the Court of Appeals of Virginia was right, and its judgment is affirmed.

ABRAM P. THOMPSON, *Plff. in Err.*,

v.

JOSEPH J. DARDEN.

(See S. C. Reporter's ed. 310-317.)

Compulsory pilotage—validity—discrimination.

1. The adoption of compulsory pilotage regulations by a state, under the authority of U. S. Rev. Stat. § 4235, U. S. Comp. Stat. 1901, p. 2903, does not violate U. S. Const. art. 1, § 9, cl. 6, which provides that no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another.
2. No discrimination in state pilotage laws forbidden by U. S. Rev. Stat. § 4237, U. S. Comp. Stat. 1901, p. 2903, is made by the Virginia compulsory pilotage charge on all vessels (except coasting vessels having a pilot's license), either inward bound from the sea through the Virginia capes to Smith's Point, Yorktown, Newport News, or Norfolk and intermediate points, or outward bound to the sea from those points through the capes, although compulsory pilotage does not prevail in all the inland waters of the state.

[No. 159.]

Argued March 3, 1905. Decided May 15, 1905.

IN ERROR to the Supreme Court of Appeals of the State of Virginia to review the denial of a writ of error to the Court of Law and Chancery of the City of Norfolk, in that state, which had entered judgment on a verdict in favor of plaintiff in an action to recover a compulsory pilotage charge imposed by the laws of that state. Judgment of lower court affirmed.

See same case below on first writ of error, 101 Va. 635, 44 S. E. 755.

The facts are stated in the opinion.

Mr. Robert M. Hughes argued the cause and filed a brief for plaintiff in error:

The clause of the Federal Constitution which provides that no preference shall be given, by any regulation of commerce or revenue, to the ports of one state over those of another, applies both to Federal and state legislation.

Passenger Cases, 7 How. 414, 12 L. ed. 757.

And it applies to any legislation that works beneficially to the ports of one state over those of another.

Williams v. The Lizzie Henderson, Fed. Cas. No. 17,726a.

NOTE.—On liability of vessel or owner for compulsory pilotage fees—see note to *Clayton v. Hedd*, 39 L. R. A. 177.

As to the effect, on state pilotage laws, of congressional prohibition against discrimination—see note to *Olsen v. Smith*, ante, 224.

1064

The statute works a discrimination in favor of voyages between Virginia ports and Maryland ports. No pilot fee is imposed for such a voyage, and yet a pilotage fee is imposed for all vessels coming from sea to a Maryland port, which includes all vessels coming from other states. Therefore under this law a vessel plying between a Virginia port and a Maryland port is exempt from pilotage, unless it voluntarily chooses to employ a pilot; and a vessel coming from the port of any other state to a Maryland port is required to pay pilotage. It is submitted that this renders the statute invalid.

Guy v. Baltimore, 100 U. S. 434, 25 L. ed. 743; *Minneapolis Brewing Co. v. McGilivray*, 104 Fed. 258; *Broeck v. The John M. Welch*, 2 Fed. 364; *Booth v. Lloyd*, 33 Fed. 593.

The Virginia pilot law is in conflict with U. S. Rev. Stat. § 4237, U. S. Comp. Stat. 1901, p. 2903.

Williams v. The Lizzie Henderson, Fed. Cas. No. 17,726a; *Sprague v. Thompson*, 118 U. S. 90, 30 L. ed. 115, 6 Sup. Ct. Rep. 988; *Freeman v. The Undaunted*, 37 Fed. 662.

The constitutionality of an act must be judged, not by its intent, but by its effect.

Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Voight v. Wright*, 141 U. S. 62, 35 L. ed. 638, 11 Sup. Ct. Rep. 855; *Brimmer v. Rebman*, 138 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213.

Messrs. D. Tucker Brooke and John W. Daniel argued the cause, and, with **Messrs. R. C. Marshall and Fred Harper**, filed a brief for defendant in error:

The inhibition of U. S. Const. art. 1, § 9, clause 6, has no reference to state legislation.

Munn v. Illinois, 94 U. S. 135, 24 L. ed. 87; *Morgan's L. & T. R. & S. S. Co. v. Board of Health*, 118 U. S. 467, 30 L. ed. 242, 6 Sup. Ct. Rep. 1114; *Black, Const. Law*, 2d ed. pp. 303, 304; *Miller, U. S. Const.* p. 576.

The pilotage systems require diversities of plans to meet local necessities, and are local, not national, in their nature.

Ex parte McNeil, 13 Wall. 236, 20 L. ed. 624; *Pacific Mail S. S. Co. v. Joliffe*, 2 Wall. 450, 17 U. S. 805; *Sprague v. Thompson*, 118 U. S. 90, 30 L. ed. 115, 6 Sup. Ct. Rep. 988; *Olsen v. Smith*, 195 U. S. 332, ante, 224, 25 Sup. Ct. Rep. 52.

If a discriminating regulation be abrogated, all others not discriminating remain in operation.

Cooley v. Port Wardens, 12 How. 299, 13 L. ed. 996; *The Alameda v. Neal*, 32 Fed.

198 U. S.

331; *Olsen v. Smith* (Tex. Civ. App.) 68 S. W. 320; *Williams v. The Lizzie Henderson*, Fed. Cas. No. 17,726a; *Olsen v. Smith*, 195 U. S. 332, ante, 224, 25 Sup. Ct. Rep. 52.

Pilotage laws should be liberally construed for the public safety.

Smith v. Swift, 8 Met. 332; *The Charlton*, 8 Asp. Mar. L. Cas. 29.

A state may require pilotage between the sea and inland ports.

Cooley v. Port Wardens, 12 How. 299, 13 L. ed. 996; *Olsen v. Smith*, 195 U. S. 332, ante, 224, 25 Sup. Ct. Rep. 52.

Unquestionably a state may define the waters upon which pilotage is necessary; and this allegation has no legal consequence, and involves no manner of discrimination as to rates or anything else, as it applies to all vessels without other distinction than that made by the Federal statute.

Cooley v. Port Wardens, 12 How. 299, 13 L. ed. 996.

Mr. Justice **White** delivered the opinion of the court:

The law of the state of Virginia imposes compulsory pilotage on all vessels inward bound from sea through the Virginia capes, other than coasting vessels having a pilot's license, no matter to what port or point the vessel may be bound, and likewise imposes compulsory pilotage on all vessels outward-bound through the capes. The compulsory pilotage inward bound from the sea extends no further than to Newport News, Smith's Point, Yorktown, or Norfolk, and the compulsory pilotage outward bound through the [314] capes commences at said *points respectively. In the inland waters of Virginia, above the points named, compulsory pilotage does not prevail, but pilotage is regulated and rates therefor are provided, the duty being imposed, except where the statutes otherwise provide, of using only a licensed Virginia pilot if the services of a pilot are taken. Virginia Code of 1887, §§ 1963, 1965, 1966, 1978, and 1900. Reference is made in the brief of counsel for the defendant in error to Virginia colonial legislation (1775) imposing compulsory pilotage on vessels inward bound from sea through the capes, accompanied with the statement, which is unchallenged, that from that time to the present date there has been no period when compulsory pilotage regulations of a like nature have not prevailed in Virginia. The contentions of the plaintiff in error arising on this record assail the validity of the pilotage laws now in force. The controversy thus arose.

In August, 1902, the schooner, William Neely, engaged in the coastwise trade between New England and Virginia, Abram P. 198 U. S.

Thompson, master, when bound in from sea to Norfolk, was offered by Joseph J. Darden, a licensed Virginia pilot, his services, which were declined. Thereupon Darden, the pilot, sued Thompson, the master, in the court of law and chancery of Norfolk, for his pilotage charge. Thompson demurred on the ground that the Virginia statutes as to pilotage were void because repugnant to the Constitution and laws of the United States, for various reasons, which were specified in the demurrer. The trial court sustained the demurrer. Darden, taking the record to the court of appeals of Virginia, applied for a writ of error, which was not a matter of right. The court allowed the writ, heard the cause, and, for reasons expressed in a full and careful opinion, reversed the judgment, and remanded the cause for a new trial. 101 Va. 635, 44 S. E. 755. At the new trial Thompson reiterated, by way of offers of evidence and other proceedings, the objections which had been expressed in the demurrer, and preserved his rights by exceptions taken to the action of the trial court, which adjudged *against him. He then carried the record to the court of appeals and applied for a writ of error, which was refused, and thereupon this writ was sued out.

In the argument at bar seven grounds of error are stated, and in referring to them generally many minute suggestions are made concerning the pilotage statutes, by way of indicating that discrimination arises from them. They mainly relate to the statutes regulating pilotage in the internal waters. Whilst we have given these suggestions our attention, we content ourselves with saying that we deem them to be devoid of merit. The more so because, in the written argument, the discussion is expressly limited to the first, second, and fifth grounds of alleged error. These we proceed to consider.

1st. "This statute violates article 1, § 9, clause 6, of the Federal Constitution, which provides that no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another." In effect, this proposition denies the power of Congress to permit the several states to adopt pilotage regulations, despite the recognition of that authority by Congress as early as 1789 (Rev. Stat. 4235, U. S. Comp. Stat. 1901, p. 2903), and the repeated adjudications of this court recognizing and upholding the practice on the subject which has obtained from the beginning. *Olsen v. Smith*, 195 U. S. 332, ante, 224, 25 Sup. Ct. Rep. 52, and authorities there cited.

2d. "The Virginia pilot law is in conflict with § 4237 of the United States Revised Statutes (U. S. Comp. Stat. 1901, p. 2903).

The section in question was quoted and commented on in *Olsen v. Smith*, 195 U. S. 332, ante, 224, 25 Sup. Ct. Rep. 52, and avoids the provisions of all state regulations making "any discrimination in the rate of pilotage or half pilotage between vessels sailing between the ports of one state and vessels sailing between the ports of different states, or any discrimination against vessels propelled in whole or in part by steam, or against national vessels of the United States." It cannot be said that the pilotage charge for vessels bound in and out through the capes is, in and of itself, discriminatory, since it imposes a like compulsory pilotage [316] charge upon all vessels *bound in and bound out. Speaking of the requirements of the statute, the supreme court of appeals of Virginia said in its opinion in this case:

"By the provisions of the sections of the code quoted all vessels (except coastwise vessels with a pilot license) inward bound from the sea to Smith's Point, Yorktown, Newport News, or Norfolk, or any intermediate point, and all such vessels outward bound to the sea from Smith's Point, Yorktown, Newport News, or Norfolk, or any intermediate point, are subject to the compulsory regulations and rates therein provided. All vessels are subject to the same regulations, and under the same circumstances and conditions are required to pay the same fees."

The arguments made to support the assertion that the pilot laws conflict with the act of Congress are twofold. First. As the state of Virginia has no appreciable commerce from her own ports inward bound through the capes, therefore there is discrimination. Second. As Virginia has chosen by her legislation not to subject commerce on her internal waters to a compulsory charge for pilotage, therefore there is a discrimination in favor of commerce on the internal waters of Virginia, and against commerce bound in and out through the capes from and to the sea. In other words, the proposition is that the state of Virginia was without power to make an undiscriminating regulation as to pilotage for ships bound in and out through the capes, unless a like regulation was made applicable to all the internal waters within the state. This is attempted to be sustained by contending that the navigation of the internal waters of Virginia is more tortuous than is the navigation in and out of the capes, and other suggestions of a kindred nature.

But the unsoundness of the proposition is made manifest from its mere statement. In effect, it but denies the power of Virginia to regulate pilotage, and presupposes that courts are vested with authority to avoid the pilotage regulations adopted by the

states, which do not discriminate as to commerce *to which they apply, simply because [317] it is deemed they are unwise or unjust. As pointed out in *Olsen v. Smith*, an objection based on the assumed injustice of a pilotage regulation does not involve the power to make the regulation. Objections of this character, therefore, if they be meritorious, but concern the power of Congress to exercise the ultimate authority vested in it on the subject of pilotage.

3d. "The pilot law violates § 4236 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 2903), which provides: 'The master of any vessel coming into or going out of any port situate upon waters which are the boundary between two states, may employ any pilot duly licensed or authorized by the law of either of the states bounded on such waters to pilot the vessel to or from such port.'" It is said that whilst it may be difficult to say that the waters of the Chesapeake bay between the capes constitute a boundary, still it is possible to so conclude. We observe concerning this contention that it does not appear to have been raised in the courts below. It is accompanied with no suggestion that the state of Maryland has ever attempted to regulate pilotage between the capes of Virginia, to which the Virginia statute relates, or that any Maryland pilot offered his services. The proposition, therefore, rests upon a series of mere conjectures, which we cannot be called upon to investigate or decide.

Judgment affirmed.

ADELAIDE M. HARDING, *Plff. in Err.*,
v.

GEORGE F. HARDING.

(See S. C. Reporter's ed. 317-341.)

Judgments—full faith and credit—consent decree—conclusiveness of decree for wife's separate maintenance on the issue of her desertion.

1. An Illinois decree for the separate maintenance

NOTE.—On conclusiveness of judgments generally—see notes to *Sharon v. Terry*, 1 L. R. A. 572; *Bollong v. Schuyler Nat. Bank*, 3 L. R. A. 142; *Wiese v. San Francisco Musical Fund Soc.* 7 L. R. A. 577; *Morrill v. Morrill*, 11 L. R. A. 155; *Bank of United States v. Beverly*, 11 L. ed. U. S. 76; *Johnson Steel Street R. Co. v. Wharton*, 38 L. ed. U. S. 429; and *Southern P. R. Co. v. United States*, 42 L. ed. U. S. 355.

As to full faith and credit to be given to state records and judicial proceedings—see *Lindley v. O'Reilly*, 1 L. R. A. 79, and note; *Cumlington v. Belchertown*, 4 L. R. A. 131, and note; and *Rand v. Hanson*, 12 L. R. A. 574, and note. And see notes to *Wiese v. San Francisco Musical Fund Soc.* 7 L. R. A. 578; *Darby v. Mayer*, 6 L. ed. U. S. 367; and *Mills v. Duryee*, 3 L. ed. U. S. 411.

nance of the wife cannot be denied conclusiveness in the courts of another state on the question of her desertion, on the theory that it was rendered by consent, where to assume that it was a consent decree disregards the rule of public policy of Illinois and the express terms of the decree, and gives to the *ex parte* stipulation of the husband that the wife was living separate and apart from him without her fault the effect of a consent to the decree, while the Illinois courts regarded it as an admission concerning the state of the proof on the record, which, though rendering it unnecessary for the court to analyze the proof, did not deprive it of the power to make a judicial finding of the fact.

2. A decree for the separate maintenance of the wife in a suit brought under Ill. Laws 1877, p. 115, is not less *res judicata* in Illinois on the question of her desertion because it was rendered by consent, where the appellate court and the supreme court of that state have affirmed the decree and the finding therein made that the wife was living separate and apart from her husband without fault on her part.
3. A decree in favor of the wife in a suit for her separate maintenance under Ill. Laws 1877, p. 115, authorizing such relief where the wife is living separate and apart from her husband without her fault, is conclusive upon the husband in the courts of California on the issue whether the same separation constitutes willful desertion on her part.

[No. 222.]

Argued April 20, 1905. Decided May 15, 1905.

IN ERROR to the Supreme Court of the State of California to review a judgment which affirmed a judgment of the Superior Court of San Diego County, in that state, in favor of the husband in an action for divorce on the ground of desertion, in which an Illinois decree for the separate maintenance of the wife was pleaded as *res judicata*. *Reversed* and remanded for further proceedings.

See same case below, 140 Cal. 690, 74 Pac. 284.

The facts are stated in the opinion.

Mr. **Pliny B. Smith** argued the cause, and, with Mr. **John S. Miller**, filed a brief for plaintiff in error:

A point which was actually and directly in issue in a former suit, and was there judicially passed upon and determined by a domestic court of competent jurisdiction, cannot be again drawn into question in any future action between the same parties, or their privies, whether the causes of action in the two suits be identical or different.

2 Black, Judgm. § 504; *Stockton v. Ford*, 18 How. 418, 15 L. ed. 395; *Hopkins v. Lee*, 6 Wheat. 109, 5 L. ed. 218; *Smith v. Kernoehen*, 7 How. 198, 12 L. ed. 666; *Young v. Black*, 7 Cranch, 565, 3 L. ed. 440; *Gaines v. Miller*, 111 U. S. 395, 28 L. ed. 466, 4 198 U. S.

Sup. Ct. Rep. 426; *Eldred v. Michigan Ins. Bank*, 17 Wall. 545, 21 L. ed. 685; *Marine Ins. Co. v. Young*, 1 Cranch, 332, 2 L. ed. 126; *Thompson v. Roberts*, 24 How. 233, 16 L. ed. 648; *Goodrich v. Chicago*, 5 Wall. 566, 18 L. ed. 511; *Foster v. The Richard Busted*, 100 Mass. 412, 1 Am. Rep. 125.

A final decree in chancery is as conclusive as a judgment at law.

Shriver v. Lynn, 2 How. 43, 11 L. ed. 172; *Washington Bridge Co. v. Stewart*, 3 How. 413, 11 L. ed. 658; *Pennington v. Gibson*, 16 How. 65, 14 L. ed. 847; *Nations v. Johnson*, 24 How. 195, 16 L. ed. 628; *Bryan v. Bennett*, 113 U. S. 179, 28 L. ed. 908, 5 Sup. Ct. Rep. 407.

The issues in the California case and in the Illinois case were identical.

Miller v. Miller, 150 Mass. 111, 22 N. E. 765.

The courts of one state must allow to a judgment of a sister state the same effect that it has in the state where rendered.

Mills v. Duryee, 7 Cranch, 481, 3 L. ed. 411; *Renaud v. Abbott*, 116 U. S. 277, 29 L. ed. 629, 6 Sup. Ct. Rep. 1194. See also *Hilton v. Guyot*, 159 U. S. 113, 181, 40 L. ed. 95, 114, 16 Sup. Ct. Rep. 139.

While this court on writ of error to the supreme court of a state will not take judicial notice of the law of another state, yet where the court whose decision is under review does take judicial notice of the law of another state, this court will do the same.

Renaud v. Abbott, 116 U. S. 277, 29 L. ed. 629, 6 Sup. Ct. Rep. 1194; *Hanley v. Donoghue*, 116 U. S. 1, 29 L. ed. 535, 6 Sup. Ct. Rep. 242.

While the California court purported to give the Illinois decree the same effect it had in Illinois, yet if that court erred in applying the rule the jurisdiction here of the writ of error holds.

M'Elmoyle v. Cohen, 13 Pet. 312, 10 L. ed. 177; *Chicago & A. R. Co. v. Wiggins Ferry Co.* 108 U. S. 18, 27 L. ed. 636, 1 Sup. Ct. Rep. 614, 617; *Huntington v. Attrill*, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224.

The recital in the certificate of evidence cannot affect the decree. Nothing the court may say outside of the decree can change the effect of what the decree itself speaks.

Campbell v. Wilson, 195 Ill. 284, 63 N. E. 103.

A consent decree cannot be appealed from.

Armstrong v. Cooper, 11 Ill. 540; *Knobloch v. Mueller*, 123 Ill. 554, 17 N. E. 696; *Nashville, C. & St. L. R. Co. v. United States*, 113 U. S. 261, 28 L. ed. 971, 5 Sup. Ct. Rep. 460.

Even if the decree were a consent decree,

it would have the same binding effect as though it were a decree *in invitum*.

Knobloch v. Mueller, 123 Ill. 554, 17 N. E. 696; *O'Connell v. Chicago Terminal Transfer R. Co.* 184 Ill. 308, 56 N. E. 355; *Lagerquist v. Williams*, 74 Ill. App. 17.

A judgment entered, where upon trial a party waives proof of and formally admits a fact, is conclusive. A judgment rendered upon an admission of fact or by consent is as conclusive on the parties as though rendered upon a contest.

2 Black, Judgm. § 705; *Nashville, C. & St. L. R. Co. v. United States*, 113 U. S. 261, 28 L. ed. 971, 5 Sup. Ct. Rep. 460; *Burgess v. Seligman*, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10; *Thomson v. Wooster*, 114 U. S. 104, 29 L. ed. 105, 5 Sup. Ct. Rep. 788; *Bank of Georgia v. Higginbottom*, 9 Pet. 48, 9 L. ed. 46; *United States v. Parker*, 120 U. S. 89, 30 L. ed. 601, 7 Sup. Ct. Rep. 454.

The rule also applies to judgments by default.

Harshman v. County Court (United States ex rel. Harshman v. County Court) 122 U. S. 306, 30 L. ed. 1152, 7 Sup. Ct. Rep. 1171.

Also to judgments on demurrer.

Gould v. Evansville & C. R. Co. 91 U. S. 526, 23 L. ed. 416; *Bissell v. Spring Valley Twp.* 124 U. S. 225, 31 L. ed. 411, 8 Sup. Ct. Rep. 495.

It is not necessary to invoke the rule that, under the circumstances, this court may take judicial notice of the laws of Illinois.

The rule in California is that, in the absence of proof, the courts of California will presume that law to be the same as the law of California.

Shumway v. Leakey, 67 Cal. 458, 8 Pac. 12.

The presumption is even extended to the statute law of California.

Cavallaro v. Texas & P. R. Co. 110 Cal. 348, 52 Am. St. Rep. 94, 42 Pac. 918.

Applying the rule of California, a judgment by stipulation is conclusive as to all matters within the issue.

McCreery v. Fuller, 63 Cal. 30; *Partidge v. Shepard*, 71 Cal. 470, 12 Pac. 480.

Plaintiff in error did not waive the benefit of the Illinois decree by introducing other evidence in the California suit.

Donnell v. Wright, 147 Mo. 639, 49 S. W. 874; *Martin v. New York, N. H. & H. R. Co.* 103 N. Y. 626, 9 N. E. 505; *Barker v. St. Louis, I. M. & S. R. Co.* 126 Mo. 143, 26 L. R. A. 843, 47 Am. St. Rep. 646, 28 S. W. 866.

Other defenses than *res judicata* may be pleaded, and the plea of *res judicata*, nevertheless, sustained.

Stockton v. Ford, 18 How. 418, 15 L. ed. 395.

Mr. William H. Barnum argued the cause and filed a brief for defendant in error:

A party is not estopped by a judicial declaration made for the purpose of simplifying proceedings and for the common interest and convenience of all parties concerned, and which has neither misled nor damaged anyone.

Harris's Succession, 39 La. Ann. 443, 4 Am. St. Rep. 269, 2 So. 39.

Applying to this case the doctrine and substantially the very language of this court in *Gay v. Parpart*, 106 U. S. 679, 27 L. ed. 256, 1 Sup. Ct. Rep. 456, it is impossible to see how the doctrine of estoppel can operate in favor of plaintiff in error.

It is material to consider whether the admission is made independently and because it is true, or is merely conventional, entered between the parties from other causes than a conviction of its truth, and only as a convenient assumption for the particular purpose in hand.

1 Greenl. Ev. § 204; *Harris's Succession*, 39 La. Ann. 443, 4 Am. St. Rep. 269, 2 So. 39.

To suppose that the court did not make the stipulation the basis of the finding of its decree that the wife was and had been living separate and apart from her husband without her fault is to suppose that the court made such finding, not only upon no evidence whatever, but after the giving and taking of evidence on that subject before the master had been explicitly forbidden by the court's own order of reference. Such a supposition would not merely make the court do violence to its said order and to the stipulation thereby recognized, but would amount to an accusation that the court had condemned the defendant without a hearing, contrary to the first principles of the social compact and of the right administration of justice.

McVeigh v. United States, 11 Wall. 267, 20 L. ed. 81.

The stipulation to the effect that the wife was living apart without her fault is to be treated only as conventional, not as a statement made because it was true, or from any conviction of its truth, but only as a convenient assumption for the purpose in hand, the ending of litigation and adjustment of family differences. Hence, neither the stipulation nor the decree based on it can be held as an estoppel.

1 Greenl. Ev. § 204; *Harris's Succession*, 39 La. Ann. 443, 4 Am. St. Rep. 269, 2 So. 39. See also *Kelly v. Milan*, 21 Fed. 863.

The defense of estoppel is not available to plaintiff in error against the decree by

stipulation, under which she took vast advantages and suffered no disadvantage whatever.

Gay v. Parpart, 106 U. S. 679, 27 L. ed. 256, 1 Sup. Ct. Rep. 456.

The maintenance decree cannot be relied on as an estoppel, because it is not, in its nature, final, absolute, and unalterable, but is subject at any time to be changed, reduced, revoked, and extinguished by the court having jurisdiction of the cause in which the same was entered. Not only is this power of alteration and revocation expressly reserved in the decree itself, but independently of that, by reason of the nature of such decrees and causes, the same power of alteration and revocation inheres in the court according to the general current of authority.

Audubon v. Shufeldt, 181 U. S. 575, 45 L. ed. 1009, 21 Sup. Ct. Rep. 735; *Welty v. Welty*, 195 Ill. 340, 88 Am. St. Rep. 208, 63 N. E. 161; *Cutler v. Cutler*, 88 Ill. App. 464.

The issues in the two cases were not identical.

Wahle v. Wahle, 71 Ill. 513; *Umlauf v. Umlauf*, 117 Ill. 584, 57 Am. Rep. 880, 6 N. E. 455; *Burlen v. Shannon*, 3 Gray, 387.

Under well-settled legal principles and precedents, Mr. Harding, while entitled, if he chose, to make the wife's wilful desertion, after it had continued two years, a distinct issue in the maintenance case by filing an answer and prosecuting a cross bill distinctly and directly making it such an issue and praying for a divorce on that ground, was not obliged to do so, but might confine his defense wholly to the charge made by his wife, without thereby losing or surrendering his reserved right, whenever it suited his convenience, to ask for a divorce on the ground of wilful desertion, or any other good statutory ground which he may have had, and had the perfect right to reserve and to resort to any of said sufficient grounds, and, later on, procure his divorce therefor on proper and sufficient proofs.

Cromwell v. Sac County, 94 U. S. 351-371, 24 L. ed. 195-204; *Watts v. Watts*, 160 Mass. 464, 23 L. R. A. 187, 39 Am. St. Rep. 509, 36 N. E. 479.

Estoppel is laden with conditions and qualifications which must be strictly observed, without which it would sometimes operate harshly to exclude the truth. It must be an averment of a fact, precisely stated on one side, and traversed on the other, and found by the jury affirmatively or negatively, in direct terms, and not by way of inference.

Sawyer v. Woodbury, 7 Gray, 502, 66 Am. Dec. 518.

Smith v. McCool, 16 Wall. 563, 21 L. ed. 325, is a very strong case against estoppel by consent.

A party cannot rely upon a judicial determination of the issue by way of estoppel, and also upon proof of the facts upon which the determination is based. The necessary effect of the estoppel is to preclude all inquiry as to the truth of the matter determined; and when a party who is entitled to set up the estoppel does open the inquiry into the truth of the matter, he cannot complain if the other party pursues it without regard to the estoppel.

Megerle v. Ashe, 33 Cal. 74; *House v. Lockwood*, 43 N. Y. S. R. 750, 17 N. Y. Supp. 817; *Pearce v. Frantum*, 16 La. 414; Black, Judgm. last ed. *Waiver of Estoppel*. See also *Seymour v. Hubert*, 92 Pa. 499; *Mack v. Levy*, 60 Fed. 751; *Philadelphia, W. & B. R. Co. v. Howard*, 13 How. 335, 14 L. ed. 169; *Brady v. Nally*, 151 N. Y. 264, 45 N. E. 547.

An action for divorce, under the provisions of the California Civil Code relative to the matrimonial offense of desertion, cannot be cast into the same mold with an action for separate maintenance, under the Illinois statute; and therefore there is no identity of questions involved, within the meaning of the rules epitomized in *Beronio v. Ventura County Lumber Co.* 129 Cal. 236, 79 Am. St. Rep. 118, 61 Pac. 958.

To constitute estoppel by matter of record there must be entire identity of the issue decided and the issue to which the estoppel is sought to be applied.

Freeman v. Barnum, 131 Cal. 386, 82 Am. St. Rep. 355, 63 Pac. 691; *McDonald v. Bear River & A. Water & Min. Co.* 15 Cal. 145; *Williams v. Williams*, 63 Wis. 58, 53 Am. Rep. 253, 23 N. W. 110; *Aslin v. Par-kin*, 2 Burr. 666.

Certainty is essential to all estoppels.

Co. Litt. L. 3 C. 12, § 567; Bigelow, *Es-toppel*, 5th ed. 578.

The question turns upon whether the decree and finding in the case at bar were necessarily at variance with the judgment on the pleadings in the former case; otherwise there is no estoppel.

Bigelow, *Estoppel*, p. 77; *Brown v. New York*, 66 N. Y. 385; *Blair v. Bartlett*, 75 N. Y. 150, 31 Am. Rep. 455; *Nemetty v. Naylor*, 100 N. Y. 562, 3 N. E. 497; *Orr v. Mercer County Mut. F. Ins. Co.* 114 Pa. 387, 6 Atl. 696.

It must appear from the record that such question was raised and litigated.

Freeman v. Barnum, 131 Cal. 386, 82 Am. St. Rep. 355, 63 Pac. 691.

Findings outside the issues have no effect as to estoppel.

Lillis v. Emigrant Ditch Co. 95 Cal. 558,

38 Pac. 1108; *Russell v. Place*, 94 U. S. 606, 24 L. ed. 214; 1 Greenl. Ev. § 528; *McDonald v. Bear River & A. Water & Min. Co.* 15 Cal. 145. See also *Lewis's Appeal*, 67 Pa. 153; *Ford v. Ford*, 68 Ala. 141; *Cavanaugh v. Buehler*, 120 Pa. 441, 14 Atl. 391; *Williams v. Williams*, 63 Wis. 58, 53 Am. Rep. 253, 23 N. W. 110; *People ex rel. Reilly v. Johnson*, 38 N. Y. 63, 97 Am. Dec. 770.

The estoppel here would rest upon the mere inference from the allowance of alimony, that the matter was determined, and hence was tried and heard and properly decided; but before that can be done, the law not favoring estoppel, the truth is not shut out, except that it shall appear with certainty that such matter has been so determined, and also that it was within the issue shown by the pleadings.

People v. Frank, 28 Cal. 507. See also *Sawyer v. Boyle*, 21 Tex. 28; *Lentz v. Wallace*, 17 Pa. 412, 55 Am. Dec. 569; *Duchess of Kingston's Case*, 2 Smith Lead. Cas. 10th ed. p. 2013.

The question must have been submitted on its merits.

1 Greenl. Ev. § 530; *Gray v. Dougherty*, 25 Cal. 272.

The estoppel fails because the finding in the present case does not relate to the same time as the finding in the former case.

Aslin v. Parkin, 2 Burr. 666; *Bosquett v. Crane*, 51 Cal. 505.

If the language of a decree is general it may be restrained to the issues made in the case and to the subject-matter under consideration by the court.

McDonald v. Bear River & A. Water & Min. Co. 15 Cal. 145.

Mr. Justice **White** delivered the opinion of the court:

The law of Illinois (Laws of Illinois, 1877, p. 115) provided as follows:

"That married women who, without their fault, now live or hereafter may live separate and apart from their husbands, may have their remedy in equity in their own names, respectively, against their said husbands for a reasonable support and maintenance while they so live or have so lived separately and apart; and in determining the amount to be allowed the court shall have reference to the condition of the parties in life, and the circumstances of the respective cases; and the court may grant allowance to enable the wife to prosecute her suit, as in cases of divorce."

[325] *On February 3, 1890, Adelaide M. Harding filed her bill in the circuit court of the county of Cook against her husband, George F. Harding.

It was alleged that the parties were resi-

dents of the city of Chicago. In substance, in the bill and an amendment, it was charged that, without her fault, and in consequence of the cruel treatment of her husband, and of his adultery, the plaintiff had been obliged to live apart from him. It was prayed that the court decree that she was so living apart without her fault, that it would award her the custody of certain of the children of the marriage, and that the defendant be decreed to provide for the separate maintenance of the complainant and the support of the children. The answer and an amendment thereto admitted the marriage, the birth of the children, and the residence in Chicago, denied the charges of cruelty and other misconduct, and averred that the complainant was living apart solely through her own fault, and that she had refused to return after repeated requests, which were reiterated in the answer.

We shall hereafter, as far as possible, refer to the parties to that litigation, who are the parties to this suit, as the wife and the husband, respectively.

The court by an interlocutory order, fixed a sum to be paid by the husband for the fees of the solicitors of the wife, for the maintenance of the wife during the pendency of the cause, and for the support of the minor children.

The case was put at issue and much testimony was taken. With this testimony extant, and nearly three years after the commencement of the suit, on January 3, 1893, a document was filed in the papers of the cause, signed by the husband and by his solicitor. In substance the paper recited that, at the time of the commencement of the suit, the wife had in her hands a considerable amount of property and money belonging to the husband which was applicable to her maintenance, and that, when this sum was expended, the husband would feel it his duty to furnish further money to support the wife, *whatever might be the re-[326] suit of the cause. That the husband was confident of making a successful defense to the suit, but that it seemed to him it was best for the sake of peace and to avoid scandal to put an end to the litigation by consenting to a decree in favor of the wife for a separate maintenance, the paper further stating:

"Hence, I give my consent that a decree for separate maintenance shall be entered in favor of the plaintiff without finding or trial of the issue in this case. That this consent is not collusive is sufficiently shown by the length and character of the litigation. I further offer and stand ready to make such other or further or different stipulation by an amendment of the pleadings or otherwise, as may, in the opinion of your honor, be

required to make it unnecessary for the court to hear and decide upon the issues in evidence in this case after a long and expensive hearing. To this end I declare my willingness to stipulate, and I do hereby stipulate, that the plaintiff, at the time of the commencement of this suit, was living and ever since has been living separate and apart from her husband without her fault, and may take a decree with my consent for such sum as may be reasonable and just for her separate maintenance. This is the same offer which I have made by way of an attempt at compromise ever since the commencement of this suit, in which effort at compromise I have not hesitated to offer double the amount that, in my opinion, should be allowed for her separate maintenance by the court."

The wife, on January 17, 1893, filed a counter statement. She in substance declared that she had no previous knowledge of the intention of her husband to file the paper which he had submitted to the court; that she had always been confident of the justice of her cause and of maintaining the same, and that the testimony then taken in the cause gave her great certainty of the establishment of her rights; that she had always been willing to adjust the amount to be allowed for her separate maintenance, [327] provided there was a "finding and *decree of this court thereon that she was, at the time of the filing of the bill herein, living separate and apart from the defendant without fault on her part, and has been so living ever since." The statement then referred to certain negotiations which had been pending between the husband and wife on the subject of the amount of separate maintenance to be allowed, enumerated previous offers made by the husband on this subject, which she had been unwilling to accept, because the husband had insisted on either the dismissal of her suit, a decree in his favor, or an agreement which would not preclude him from suing for a divorce for desertion arising from her having separated from him. It was then stated, in substance, that, as interpreted by the wife, the paper filed by the husband waived the conditions which he had previously insisted upon, and assented to a decree finding that the separation was without her fault, and she was willing, for the sake of preventing further scandal, to accept the amount previously offered by the husband, although deeming the sum inadequate to her condition of life, "upon the decree finding that complainant was living separate and apart from defendant without fault on her part, being now promptly entered such as the said voluntary stipulation of the defendant justifies." No action appears to have been taken by the court upon

these two papers except in so far as may be inferred from the statements which follow.

In May, 1893, the court entered an order referring the cause to a master to take further evidence as to the amount of alimony, etc., to be awarded, "and upon other issues herein than the question as to whether complainant, at the time of the commencement of this suit, was, and since that time has been and is, living separate and apart from her husband, the defendant, without her fault, said defendant having admitted upon the record herein, and now admitting in open court, that the complainant was living separate and apart from him without fault on her part."

Nearly three years after the matter had been thus referred *to the master the order [328] of reference was amended *nunc pro tunc*, as of the date of the previous order, by substituting for the words "and now admitting in open court" the words "as by his written stipulation filed herein on January 3, 1893, and for the purpose of this trial only." A few months thereafter the master filed his report. Therein he stated his conclusions deduced from the evidence taken prior to 1894 on the subject of the right of the wife to her separate maintenance, and found, as a matter of fact, that her right was established by the proof. He also found that the wife was entitled to a stated sum for her separate maintenance and an additional sum for the support of the children. Exceptions were filed to the report, which were heard by the court, and a final decree was rendered on July 26, 1897. It was recited, among other things, in this decree that the court, "doth find that the said complainant, at the time of the commencement of this suit, was living, and ever since that time has lived, and is now living, separate and apart from her husband, the said defendant, without her fault, and that the equities of this cause are with the complainant." The decree awarded to the wife sums for her separate maintenance and for the support of the children up to the time of their becoming of age, and a further sum for the fees of the solicitors of the wife and other expenses of the litigation. The decree made no reference to the admission contained in the paper filed by the husband, nor was any statement made which limited the effect of the decree as a final adjudication of the rights of the parties. An exception, on behalf of the husband, was taken to each and every finding of the decree, and sixty days were allowed to prepare a certificate of evidence.

It would seem from the certificate of evidence, which was made several months afterwards, that, on the settlement of the decree, a controversy arose as to its terms,—the wife requesting the court to state in the de-

cree that all the charges made in the complaint and the amended complaint as to cruelty, adultery, etc., had been established [329] by the proof; the *husband insisting, to the contrary, that the charges had not been proven, and further asserting that it was not necessary to so find, because of his admission of record. The court said that it did not pass upon the question as to whether all the charges made in the complaint were true, because it regarded it as unnecessary "in view of the said paper of the defendant, filed herein January 3, 1893."

The husband prosecuted an appeal to the appellate court of Illinois for the first district. But before this appeal was perfected, and on August 31, 1897, he commenced in the superior court of San Diego, California, this suit against his wife for divorce. The marriage in 1855 and the residence in Chicago were alleged, but it was averred that ever since May 15, 1895, the plaintiff had been a resident of the state of California. The sole ground alleged for granting the divorce was wilful desertion by the wife in the month of February, 1890. The answer of the wife denied that the husband was a resident of California, and in a separate paragraph there was specially pleaded the proceedings and the decree of the Illinois court and the admission of the husband on the record therein as to the separation being without the fault of the wife, all of which, it was asserted, established by the thing adjudged that her living apart was justified and did not constitute desertion.

In the meanwhile, before the trial of the cause, the appeal prosecuted in the Illinois case by the husband was decided against him in the appellate court, and he took an appeal to the supreme court of Illinois, in which court the judgment was affirmed, with a modification as to the amount of the allowance for alimony, and the trial court changed the amount of its decree accordingly. The wife then, by an amended answer, again set up the decree in Illinois, as amended, as *res judicata*.

On the trial the wife introduced in evidence a certified copy of the record of the Illinois suit. The husband introduced, over the wife's objection and exception, a portion of the certificate of evidence, which had been [330] prepared for the purpose *of the appeal from the final decree in Illinois as originally entered. The court made findings of fact to the effect that the parties had been married in Illinois, that the husband was a bona fide resident of California, and that, on the first day of February, 1890, the wife had deserted her husband without just cause. As a conclusion of law it was deduced that the husband was entitled to a divorce, but that the court was without power in any way to

limit or affect the decree for separate maintenance rendered by the Illinois court. After the refusal of a new trial the wife appealed to the supreme court of California, and that court affirmed the decree. 140 Cal. 690, 74 Pac. 284.

The question is, Did the supreme court of California fail to give due faith and credit to the decree for separate maintenance rendered in favor of the wife in Illinois, which was pleaded by the wife as *res judicata*?

It is suggested in argument that that question cannot be passed upon, as the wife, besides pleading and relying upon the Illinois decree, defended on the merits, and by so doing waived the benefits of the alleged estoppel arising from the Illinois decree. The want of merit in the contention is at once demonstrated by the statement that the supreme court of the state of California, in its opinion in the cause, treated the question of estoppel by the Illinois judgment as being open, and actually determined it.

The supreme court of California decided that the Illinois decree was not conclusive in California as to the question of desertion, for the following reasons: That decree, the court held, was a consent decree, and being of that character it was not a bar in the state of Illinois. As it was held that the Illinois decree was only entitled in California, under the due faith and credit clause, to the effect which it would have in Illinois, it was hence decided that the Illinois decree did not constitute an estoppel in the courts of California. But we are of opinion that the premise upon which the supreme court of California proceeded was a mistaken one, and its conclusion *based thereon was erro-[331] neous, even if the correctness of the premise be conceded for the sake of the argument.

The conclusion of the supreme court of California, that the Illinois decree was solely based on the consent of the parties, and was consequently not the result of the action of the court, was based on the following: 1. The paper filed by the husband on January 3, 1893. 2. The recital in the amended order of reference that the admission that the wife was without fault had been made for the purpose of the trial only. 3. The statement of the trial judge, made in the certificate of evidence, that, in view of the admission on the record, he had not found it necessary to pass upon all the charges made in the complaint.

But the conclusion drawn by the court from these matters assumed that a decree for separate maintenance under the Illinois statute could have been a mere matter of consent, and did not require the ascertainment by the court of the facts made essential by the statute to justify such a decree.

That this was a mistaken conception of the Illinois law has been clearly pointed out by the supreme court of that state. In *Johnson v. Johnson*, 125 Ill. 510, 16 N. E. 891, an appeal from a decree for separate maintenance, the court said (p. 514, N. E. p. 892):

"To maintain her bill, it was necessary for the complainant to show not only that she had good cause for living separate and apart from her husband, but also that such living apart was without fault on her part. At common law the husband was liable in an action at law at the suit of any person furnishing to the wife necessities suitable to her condition in life, if the wife was residing apart from him because of his wilful and improper treatment of her, or by his consent. 2 Kent, Com. 146; *Evans v. Fisher*, 10 Ill. 571. No right of action existed in the wife; courts of equity refusing to take cognizance at her suit, and enforce the legal obligation of the husband to maintain her. 2 Story, Eq. Jr. § 1422. The statute was passed to remedy this defect in the law, and gave the right to the wife to maintain [332] her bill for separate maintenance, but *restricted the right to cases where the living separate and apart from the husband was without her fault. 'The fault' here meant and contemplated is a voluntary consenting to the separation, or such failure of duty or misconduct on her part as 'materially contributes to a disruption of the marital relation.' If she leave the husband voluntarily, or by consent, or if her misconduct has materially induced the course of action on the part of the husband upon which she relies as justifying the separation, it is not without her fault within the meaning of the law. *No encouragement can be given to the living apart of husband and wife. The law and good of society alike forbid it.* But a wife who is not herself in fault is not bound to live and cohabit with her husband if his conduct is such as to directly endanger her life, person, or health; nor where the husband pursues a persistent, unjustifiable, and wrongful course of conduct towards her, which will necessarily and inevitably render her life miserable, and living as his wife unendurable. Incompatibility of disposition, occasional ebullitions of passion, trivial difficulties, or slight moral obliquities, will not justify separation. If the husband voluntarily does that which compels the wife to leave him, or justifies her in so doing, the inference may be justly drawn that he intended to produce that result, on the familiar principle that sane men usually mean to produce those results which naturally and legitimately flow from their actions. And, if he so intended, her leaving him would, in the case put, be desertion on his part, and not by the wife."

198 U. S.

In the second place, even if the rule of public policy enunciated by the supreme court of Illinois be put out of view, the assumption that the Illinois decree was a consent decree, merely registering an agreement of the parties, disregards the form of that decree, and cannot be indulged in without failing to give effect to the very face of the decree, which adjudged that the separation of the wife from the husband was without her fault. This was an express finding by the court, and one which the law required to be judicially made.

*In the third place, if it be conceded that [333] the express terms of the decree could be overcome by considering matters contained in the record, but outside of the decree, the conclusion drawn by the supreme court of California from the consideration of such matters was, we think, a mistaken one. As we have said in stating the facts, after the bringing of the suit for separate maintenance, in which charges of the gravest character were made against the husband as to cruelty, adultery, etc., much testimony had been taken with regard to the charges. And it was in this state of the case that the *ex parte* stipulation of the husband was filed, in which he admitted that the wife was living separate and apart from him without her fault. The declaration in the statement that it was not collusively made eliminates the conception that the admission was made regardless of its truth, and independently of the facts shown by the testimony which had theretofore been taken in the cause. When it is observed that, shortly following the filing of this paper, the statement of the wife was filed, accepting the husband's admission as conceding that the proof established that the separation was not caused by her fault, and stating that she had refused the solicitation of the husband to discontinue the cause and accept an allowance to be made by him for her separate maintenance upon an agreement that so doing should not prejudice him if he sued for a divorce on the ground of desertion, it becomes impossible to hold that the decree was a mere registering of an agreement between the parties, and not the judicial action of the court. Certainly, when the papers filed by the husband and wife are considered, there is no room for the contention that a judicial finding was not made. True, the paper filed by the husband expressed his desire to avoid such a finding, but instead of consenting to this proposition, the paper filed by the wife insisted that she was entitled to the finding, that she had always refused to waive it, and that she demanded it. The court obviously considered that the wife was entitled to the right which she thus claimed, since

1073

it made the very finding upon which the [334] wife insisted, and which the *paper filed by the husband sought to avoid, and the conduct of the husband, in excepting to the finding as made by the court demonstrates that he regarded it as a judicial determination of the issue of absence of fault on the part of the wife. And the modified order of reference gives rise but to the inference that, in view of the admission of the husband, it was not deemed necessary, for the purpose of the trial, to take further testimony in respect to the conceded fact, or for the master to report in detail concerning the evidence as to the misconduct of the husband which led to the separation. This also explains the statement of the judge, made in the certificate of evidence, as to the controversy regarding the terms of the decree, and his refusal to find that all the charges made in the bill had been proven. This view of the matters relied upon by the California court was one expressly adopted by both the appellate court and by the supreme court of Illinois in deciding the appeal taken by the husband. On that appeal, as we have said, he complained of the action of the court, including the finding that the wife was living separate without fault on her part. 79 Ill. App. 590, 180 Ill. 481, 54 N. E. 587.

Both of the Illinois courts, in considering the objection that the trial court was without power to make a finding concerning the absence of fault on the part of the wife because of the consent manifested by the paper filed by the husband, treated that paper not as a mere consent to a decree in relation to that subject, but as an admission concerning the state of the proof in the record, which, whilst it rendered it unnecessary for the court to analyze the proof, did not deprive it of the power to make a judicial finding of the fact. It is to be observed, also, that both courts held that on the issue as to the custody of the minor children and the sum to be allowed for separate maintenance, the inquiry into the conduct of the husband was relevant and required an analysis of the testimony,—an analysis which embraced necessarily those elements of proof which entered into the question of the causes of the separation.

But if it be considered that, in any aspect, [335] the decree under *review was a consent decree, we are of opinion that the cases relied upon by the supreme court of California (*Wadhams v. Gay*, 73 Ill. 417; *Farwell v. Great Western Teleg. Co.* 161 Ill. 522, 44 N. E. 891) are not authoritative upon the proposition that such decree would not, in the courts of Illinois, have the effect of *res judicata*. The first of the cases—considered

by this court in *Guy v. Parpart*, 106 U. S. 689, 27 L. ed. 260, 1 Sup. Ct. Rep. 456, *et seq.*—dealt merely with the right of a court of equity to refuse to lend its aid to enforce an incomplete and ineffective decree in partition proceedings, because to do so would be inequitable. In the second of the cases it was but decided that a fraudulent decree might be set aside in a court of equity.

The general rule in Illinois undoubtedly is that a consent decree has the same force and effect as a decree *in invitum*. *Knobloch v. Mueller*, 123 Ill. 554, 17 N. E. 696; *O'Connell v. Chicago Terminal Transfer R. Co.* 184 Ill. 308, 325, 56 N. E. 355. Thus, in *Knobloch v. Mueller*, the court said (123 Ill. 565, 17 N. E. 699):

"Decrees of courts of chancery, in respect of matters within their jurisdiction, are as binding and conclusive upon the parties and their privies as are judgments at law; and a decree by consent in an amicable suit has been held to have an additional claim to be considered final. *Allason v. Stark*, 9 Ad. & El. 255. Decree so entered by consent cannot be reversed, set aside, or impeached by bill of review or bill in the nature of a bill of review, except for fraud, unless it be shown that the consent was not in fact given, or something was inserted, as by consent, that was not consented to. 2 Dan. Ch. Pr. 1576; *Webb v. Webb*, 3 Swanst. 658; *Thompson v. Maxwell Land-Grant & R. Co.* 95 U. S. 391, 24 L. ed. 481; *Armstrong v. Cooper*, 11 Ill. 540; *Cronk v. Trumble*, 66 Ill. 432; *Haas v. Chicago Bldg. Soc.* 80 Ill. 248; *Atkinson v. Manks*, 1 Cow. 693; *Winchester v. Winchester*, 121 Mass. 127; *Allason v. Stark*, 9 Ad. & El. 225; *Alexander v. Ramsay*, 5 Bell, App. 69. See, also, note to *Duchess of Kingston's Case*, 2 Smith, Lead. Cas. *826 *et seq.* It is the general doctrine that such a decree is not reversible upon an appeal or writ of *error, or by bill of review for error. *Armstrong v. Cooper*, 11 Ill. 540."

And the assertion that the particular matters relied upon in this cause are of such a character as to take this case out of the rule just stated is conclusively shown to be without merit by the decision of the appellate court and the supreme court of Illinois, affirming the decree of separation and the finding therein made.

In the argument at bar there is a ground taken which was not referred to in the opinion of the supreme court of California, which, it is insisted, shows that that court was right in its decision, although the reasoning of its opinion may be conceded to have been erroneous. That ground is this: In Illinois, it is contended, it has been settled that a decree in a suit for separate

maintenance is not *res judicata* in a suit for divorce on the ground of desertion, and *vice versa*; therefore the Illinois decree should not have been given in California any greater effect. Two cases are relied upon. *Wahle v. Wahle*, 71 Ill. 510, and *Umlauf v. Umlauf*, 117 Ill. 584, 57 Am. Rep. 880, 6 N. E. 455. But these cases do not sustain the proposition based on them. In the *Wahle Case* the husband had sued his wife for divorce on the ground of abandonment, and she, in addition to answering, had filed a cross bill charging the husband with cruelty and adultery, and praying for separate maintenance. The principal cause was first heard and decided adversely to the husband. Subsequently the cross bill was heard and a decree of dismissal was rendered. This was alleged to be error, on the ground that the verdict of the jury on the issue of divorce, in favor of the wife, was a judicial determination, establishing the facts alleged in her cross bill, and justifying her in living apart from her husband. But the supreme court of Illinois held that as the verdict of the jury in the divorce suit was general, and did not indicate upon what particular finding it was based, the court could not know upon what fact the jury were induced to find as they did, and that in consequence the bill did not necessarily establish that the

[337] separation of the *parties was without fault on the part of the wife, since the verdict might have proceeded upon either of the following grounds: 1, that the abandonment was for less than two years; 2, that it was by mutual consent; or, 3, that it was induced by the acts of the husband, whatever might have been the fault of the wife.

In *Umlauf v. Umlauf*, the wife filed a bill for separate maintenance but, failing to establish her right, the bill was dismissed. Subsequently the husband filed a bill for divorce, charging wilful desertion by the wife from the date of the filing of her bill against him for separate maintenance. Upon the hearing of the divorce case the court admitted in evidence, against the objection of the wife, the pleadings and the decree against her in the suit for separate maintenance, and also excluded all evidence on her part tending to disprove the charge of desertion. From a judgment granting the divorce the wife appealed. The supreme court of Illinois prefaced its consideration of the question with the following statement (p. 584, Am. Rep. p. 881, N. E. p. 456):

"No principle is better settled than that, where a question proper for judicial determination is directly put in issue, and finally determined in a legal proceeding by a

court having competent authority and jurisdiction to hear and determine the same, such decision and determination of the question will be deemed final and conclusive upon the parties and their privies in all future litigation between them in which the same question arises, so long as the judgment remains unreversed or is not otherwise set aside."

But the court held that these elementary principles did not apply, because the decree against the wife in the separate maintenance suit was general, and might have been entered solely upon the ground that the wife was not without fault, leaving undecided the question whether the husband was in any way at fault, and, therefore, there was not identity, and resulting *res judicata*.

The inappositeness of these cases to the present one becomes *obvious when it is re-[338] called that in this case there was a decree not against, but in favor of, the wife in the maintenance suit, which decree necessarily conclusively settled that the separation was for cause and was without fault on the part of the wife, and therefore was not a wilful desertion of the husband by the wife, which is the precise issue in the divorce case now here.

In the brief of counsel it is stated that, under the law of California, if a wife is living apart from her husband under circumstances which do not constitute desertion, yet such living apart may become desertion if the husband in good faith invites the wife to return, and she does not do so. In this connection reference is made to certain requests proffered by the husband for the wife to return, which, it is urged, caused the separation to become desertion under the California law. But, conceding, without deciding, that the California law is as asserted, the proposition of fact upon which the argument rests amounts simply to denying all effect to the Illinois decree. This follows, because all the requests to return referred to were made in Illinois before the entry of the final decree in the suit for separate maintenance, were referred to in the answer in that case, and were adversely concluded by the judgment which was rendered. *Johnson v. Johnson*, 125 Ill. 510, 16 N. E. 891.

Having thus disposed of all the contentions based upon the assumed consent under the decree for separate maintenance or the asserted limitations to such a decree, based upon the law of Illinois, we are brought to consider the final question, which is, Was the decree in favor of the wife for separate maintenance, entered in the Illinois case, conclusive upon the husband in the courts

of California of the issue of wilful desertion? That the issue of wilful desertion present in the divorce action was identical with the issue of absence without fault, presented in the Illinois maintenance suit, is manifest. The separation, asserted by the wife in her bill for separate maintenance to have been without her fault, was averred to have taken place on February 1, 1890, and [339] such separation *was stated by the husband in his answer to the bill to have been an abandonment and desertion of him. The wilful desertion charged in the complaint in this action for divorce was averred to have been committed "on or about the month of February, 1890, and to have been continuous thereafter." And the identity between the two is further demonstrated by the circumstance that the evidence taken in the Illinois case bearing upon the cause for the separation was used upon the trial in this case. The question in each suit, therefore, was whether the one separation and living apart was by reason of the fault of the wife. From the standpoint of a decree in favor of the wife in the suit for separate maintenance the issues raised and determined were absolutely identical.

The controversy before us is, in some respects, like that which was considered in *Barber v. Barber*, 21 How. 582, 16 L. ed. 226. There a bill was filed in a Federal court in Wisconsin to enforce judgment for alimony under a decree of separation *a mensa et thoro*, rendered against a husband in New York. It was shown by the evidence that, to avoid the payment of the alimony, the husband had left the state of New York, the matrimonial domicile, and taken up his residence in the state of Wisconsin, where he obtained a decree of divorce on the ground of desertion by the wife. Whilst this court refrained from expressing an opinion as to the legality of the Wisconsin decree of divorce obtained under these circumstances, it enforced the New York judgment for alimony, and held it to be binding. And that it was considered that the judgment in New York legalizing the separation precluded the possibility that the same separation could constitute wilful desertion of the husband by the wife plainly appears from the following excerpt from the opinion—*italics mine* (p. 588, L. ed. p. 228):

"It also appears from the record that the defendant had made his application to the court in Wisconsin for a divorce *a vinculo* from Mrs. Barber without having disclosed to that court any of the circumstances of the divorce case in New York, and that, *contrary to the truth, verified by that* [340] *record*, he *asked for the divorce on account of his wife having wilfully abandoned him."

So, also, the courts of Massachusetts have

held the fact to be that a separation legalized by judicial decree was a conclusive determination that the same separation was not wilful desertion. Thus, in *Miller v. Miller*, 150 Mass. 111, 22 N. E. 765, explicitly approved in *Watts v. Watts*, 160 Mass. 464, 23 L. R. A. 187, 39 Am. St. Rep. 509, 36 N. E. 479, after holding that an adjudication of a probate court that a wife is living apart from her husband for justifiable cause was a bar to an action by the husband for divorce on the ground of utter desertion, the court, speaking of the decree of the probate court, said:

"The fact determined by it is inconsistent with the necessary allegation in the libel that the libelee previously had utterly deserted the libellant, and was then continuing such desertion. Utter desertion, which is recognized by the statute as a cause for divorce, is a marital wrong. Because the deserter is a wrongdoer, the law gives the deserted party a right to a divorce. If a wife leaves her husband for a justifiable cause it is not utter desertion within the meaning of the statute, and a wife who has utterly deserted her husband, and is living apart from him in continuance of such desertion, cannot be found to be so living for justifiable cause. *Pidge v. Pidge*, 3 Met. 257, 261; *Fera v. Fera*, 98 Mass. 155; *Lyster v. Lyster*, 111 Mass. 327. The court should have ruled as requested by the libelee, that the decree of the probate court was a bar to the maintenance of this libel. Exceptions sustained."

We are of opinion that the final decree of July 26, 1897, entered in the circuit court of Cook county, Illinois, in legal effect established that the separation then existing, and which began contemporaneously with the filing of the bill in that cause in February, 1890, was lawful, and therefore conclusively operated to prevent the same separation from constituting a wilful desertion by the wife of the husband. From these conclusions it necessarily follows that the issue presented in *this action for divorce was [341] identical with that decided in the suit in Illinois for separate maintenance. This being the case it follows that the supreme court of California, in affirming the judgment of divorce, failed to give to the decree of the Illinois court the due faith and credit to which it was entitled, and thereby violated the Constitution of the United States.

The judgment of the Supreme Court of California must therefore be reversed, and the cause be remanded for further proceedings not inconsistent with this opinion.

And it is so ordered.

Mr. Justice **Brown** concurs in the result.

DELAWARE, LACKAWANNA, & WEST-
ERN RAILROAD COMPANY, *Plff. in*
Err.,

v.

COMMONWEALTH OF PENNSYLVANIA.

(See S. C. Reporter's ed. 341-361.)

*Taxation of capital stock—including value
of tangible property situated in other
states—due process of law.*

Including in the appraisalment of the capital stock of a domestic corporation, for purposes of taxation, under Pa. Laws 1891, p. 229, the value of coal mined by it within the state, but situated in other states, there awaiting sale when the appraisalment was made, deprives the corporation of its property without due process of law.

[No. 208.]

*Argued April 10, 1905. Decided May 15,
1905.*

IN ERROR to the Supreme Court of the State of Pennsylvania to review a judgment which affirmed a judgment of the Court of Common Pleas in and for the County of Dauphin, in that state, denying the claim of a domestic corporation that the appraising officers, in valuing its capital stock for taxation, should have deducted the value of the coal mined by it within the state, which was situated in other states, there awaiting sale at the time the appraisalment was made. *Reversed* and remanded for further proceedings.

See same case below, 206 Pa. 645, 56 Atl. 69.

Statement by Mr. Justice **Peckham**:

The plaintiff in error brings this case here to review the judgment of the supreme court of Pennsylvania (206 Pa. 645, 56 Atl. 69), in favor of that state, on a question raised by the plaintiff in error as to its liability to taxation by the state upon certain coal of the value of \$1,702,443, belonging to the plaintiff in error, which had been mined in Pennsylvania, and which, prior to the appraisalment of the value of the capital stock of the company, pursuant to the Pennsylvania statute, for taxation in Pennsylvania, had been transported to and was situated in other states, awaiting sale.

The case arises under proceedings provided for by the Pennsylvania statute for appraising, for the purposes of taxation, the value of the capital stock of corporations, such as the plaintiff in error, for the year ending in November, 1899. The statute under which the appraisalment was made was passed June 8, 1891 (amendment of act of

1889), printed on page 229 *et seq.* of the Laws of Pennsylvania for that year. The sections of the act in question are 4 and 5, and are reproduced in the margin.†

*In appraising the value of the capital [343] stock of the plaintiff in error, pursuant to

†Sections of the act of June 8, 1891.

Sec. 4. That hereafter, except in the case of banks, savings institutions, and foreign insurance companies, it shall be the duty of the president, chairman, or treasurer of every corporation having capital stock, every joint-stock association and limited partnership whatsoever, now or hereafter organized or incorporated by or under any law of this commonwealth, and of every corporation, joint-stock association, and limited partnership whatsoever, now or hereafter incorporated or organized by or under the laws of any other state or territory of the United States, or by the United States, or by any foreign government, and doing business in and liable to taxation within this commonwealth, or having capital or property employed or used in this commonwealth by or in the name of any limited partnership, joint-stock association, company, or corporation whatsoever, association or associations, copartnership or copartnerships, person or persons, or in any other manner, to make a report in writing to the auditor general, in the month of November, one thousand eight hundred and ninety-two, and annually thereafter, stating specifically:

First. Total authorized capital stock.

Second. Total authorized number of shares.

Third. Number of shares of stock issued.

Fourth. Par value of each share.

Fifth. Amount paid into the treasury on each share.

Sixth. Amount of capital paid in.

Seventh. Amount of capital on which dividend was declared.

Eighth. Date of each dividend declared during said year ended with the first Monday of November.

Ninth. Rate per centum of each dividend declared.

Tenth. Amount of each dividend during the year ended with the first Monday in said month.

Eleventh. Gross earnings during the year.

Twelfth. Net earnings during said year.

Thirteenth. Amount of surplus.

Fourteenth. Amount of profit added to sinking fund during said year.

Fifteenth. Highest price of sales of stock between the first and fifteenth days of November aforesaid.

Sixteenth. Highest price of sales of stock during the year aforesaid.

Seventeenth. Average price of sales of stock during the year; and in every case any two of the following-named officers of such corporation, limited partnership, or joint-stock association, namely: The president, chairman, secretary, and treasurer, and after being duly sworn or affirmed to do and perform the same with fidelity, and according to the best of their knowledge and belief, shall, between the first and fifteenth days of November of each year, estimate and appraise the capital stock of the said company at its actual value in cash, not less, however, than the average price which said stock sold for during said year, and not less than the price or value indicated or measured by net earnings or by the amount of profit made and either declared in dividends or car-

NOTE.—On the taxation of capital stock of corporations in the United States—see note to State Board v. People, 58 L. R. A. 513.

that statute, it is contended by it that the appraising officers should have deducted [344] from the value *of the stock the value of the coal mined in Pennsylvania by the company and owned by it, but situated in other states, there awaiting sale, and beyond the [345] jurisdiction of the state of *Pennsylvania at the time the appraisal was made. This contention was overruled by the state courts.

The facts upon which the judgment rests were found by the court, and are as follows:

"1. The Delaware, Lackawanna, & Western Railroad Company was organized under the special act of the general assembly of Pennsylvania approved March 11, 1853, by the consolidation of the Liggetts Gap Railroad Company, incorporated under the act of April 7, 1832, whose name was, by the act of April 14, 1851, changed to Lackawanna & Western Railroad Company, and the Delaware & Cobbs Gap Railroad Company, incorporated by the act of April 7, 1849. Into the Delaware, Lackawanna, & Western Railroad Company, as formed by the merger of the Lackawanna & Western Railroad Company and the Delaware & Cobbs Gap Railroad Company, were merged, December 27, 1865, the Keyser Valley Railroad Company; August 12, 1870, the Nanticoke Coal & Coke Company; and June 17, 1870, the

Lackawanna & Bloomsburg Railroad Company. The company, as authorized by special act of Pennsylvania legislature, has its general office and treasury in the city and state of New York, though its corporate home is in Pennsylvania. It is authorized by law to own coal lands in Pennsylvania, and to mine, buy, and sell coal and convey the same to market; and, in addition to its business of owning and operating an extensive system of railroads, is engaged in the business of mining, buying, and selling coal. The proper officers of the company returned and appraised its capital stock as of the actual value, between the first and fifteenth days of November, 1899, of \$48,470,000, and in making up the claim of the state for taxes for said year, the auditor general made no deductions whatever, but charged tax at 5 mills upon said aggregate valuation of \$48,470,000, the said tax amounting to \$242,350. Amongst other property in addition to its railroad, the company owned coal located at points outside of Pennsylvania, in New York, Illinois, and other states, of the value of \$1,702,443, and, as already stated, *no deduction was made by the audi-[346] tor general in his statement of account against the company for or with respect to this coal. All taxes assessed against the

ried into surplus or sinking fund, and when the same shall have been so truly estimated and appraised they shall forthwith forward to the auditor general a certificate thereof, accompanied with a copy of their said oath or affirmation, signed by them, and attested by a magistrate or other person duly qualified to administer the same: *Provided*, That if the auditor general and state treasurer, or either of them, is not satisfied with the appraisal and valuation so made and returned, they are hereby authorized and empowered to make a valuation thereof based upon the facts contained in the report herein required, or upon any information within their possession or that shall come into their possession, and to settle an account on the valuation so made by them for the taxes, penalties, and interest due the commonwealth thereon, with right to the company dissatisfied with any settlement so made against it to appeal therefrom in the manner now provided by law; and in the event of the neglect or refusal of the officers of any corporation, company, joint-stock association, or limited partnership for a period of sixty days to make the report and appraisal to the auditor general as herein provided, it shall be the duty of the auditor general and state treasurer to estimate a valuation of the capital stock of such defaulting corporation, company, joint-stock association, or limited partnership, and settle an account for taxes, penalty and interest thereon, from which settlement there shall be no right of appeal.

Sec. 5. That every corporation, joint-stock association, limited partnership, and company whatsoever, from which a report is required under the twentieth section hereof, shall be subject to and pay into the treasury of the commonwealth annually a tax at the rate of 5 mills upon each dollar of the actual value of its whole

capital stock, of all kinds, including common, special, and preferred, as ascertained in the manner prescribed in said twentieth section, and it shall be the duty of the treasurer or other officers having charge of any such corporation, joint-stock association, or limited partnership, upon which a tax is imposed by this section, to transmit the amount of said tax to the treasury of the commonwealth within thirty days from the date of the settlement of the account by the auditor general and state treasurer: *Provided*, That for the purpose of this act interests in limited partnership or joint-stock associations shall be deemed to be capital stock, and taxable accordingly: *Provided, also*, That corporations, limited partnerships, and joint-stock associations liable to tax on capital stock under this section, shall not be required to make report or pay any further tax on the mortgages, bonds, and other securities owned by them in their own right, but corporations, limited partnership and joint-stock associations holding such securities as trustees, executors, administrators, guardians, or in any other manner, shall return and pay the tax imposed by this act upon all securities so held by them as in the case of individuals: *And provided further*, That the provisions of this section shall not apply to the taxation of the capital stock of corporations, limited partnerships and joint-stock associations, organized exclusively for manufacturing purposes, and actually carrying on manufacturing within the state, excepting companies engaged in the brewing or distilling of spirits or malt liquors, and such as enjoy and exercise the right of eminent domain: *Provided further*, In case of fire and marine insurance companies the tax imposed by this section shall be at the rate of 3 mills upon each dollar of the actual value of the whole capital stock.

company for 1899 in other states, on coal located there, have been paid, according to the belief, and so far as the secretary of the company can now, May 25, 1901, recall.

"There were other items in dispute in addition to the coal, and they were covered by defendant's appeal, but the attorney general, on behalf of the commonwealth, and counsel for the defendant, entered into an agreement in writing as follows, viz.:

"And now, to wit, April 10, 1901, it is hereby agreed that the jury shall deduct, and not include in its verdict, any tax upon \$1,702,444, being the value of coal held and owned at points in states other than Pennsylvania, according to the facts as set forth in the depositions of Fred. F. Chambers and W. H. Truesdale, defendant's treasurer and president, respectively, hereto attached and made part hereof. The said deduction having been made, final judgment shall be entered upon the verdict of the jury in favor of the commonwealth, and against the defendant. The question of defendant's liability to the commonwealth of Pennsylvania for taxes upon or in respect of said coal held, owned, and stored at points in states other than Pennsylvania, is hereby reserved, and it is agreed that it shall be submitted for the determination of the court. If the court shall be of the opinion that, upon the facts stated in the aforesaid depositions of Fred. F. Chambers and W. H. Truesdale, attached to and made part hereof, the defendant is liable for tax to the commonwealth of Pennsylvania upon coal thus held, owned, and stored at points in states other than Pennsylvania, then judgment shall be entered in favor of the commonwealth, and against the defendant, for the further sum of \$8,512.21, being 5 mills upon the said \$1,702,443, the value of the said coal, to which amount there shall be added the usual attorney general's commission of 5 per cent, either of the parties to be at liberty to file exceptions to, and appeal from, the decision [347] of the court upon the said reserved *point with like effect as if the case had been tried by the court without a jury, under the act of April 22, 1874.'"

"3. The case having been submitted to the jury, a verdict was rendered as follows, viz.:
Tax \$111,250 00
Less 5 mills on coal, \$1,702,-
443.00 8,512 21

\$102,737 79

Less payment on account 100,000 00

\$2,737 79

Add attorney general's commis-
sion of 5 per cent 136 88

Verdict for \$2,874 67

"The judgment entered upon said verdict has been paid by defendant, leaving open only the one question submitted to the court, as aforesaid, of the defendant's liability to taxation with respect to capital stock invested in coal located outside of Pennsylvania.

"4. The facts agreed upon by counsel for the commonwealth and the company are set forth in the affidavits of W. H. Truesdale, president, and Fred. F. Chambers, the secretary and treasurer of the company, and, in so far as they relate to the reserved question, are as follows, viz.:

"Under powers conferred by special charter previous to the adoption of the present Constitution of Pennsylvania, the Delaware, Lackawanna, & Western Railroad Company is largely engaged in the mining and purchasing of anthracite coal in Pennsylvania, nearly all of which coal it transports to points without said state, and there sells. By far the greater part of this coal is transported from the mines for immediate delivery at points in other states, and is not kept or held in stock in said other states longer than is necessary for the purpose of transferring possession from this company to the purchaser; but at certain points in other states, as, for instances, at Buffalo, New York, and at Chicago, Illinois, the company *keeps constantly on hand a stock of [348] coal for purposes of sale, the same being stored in yards or upon docks maintained by the company for that purpose. The coal thus on hand awaiting sale between the first and fifteenth days of November, 1899, the date when the company's capital stock is required by law to be appraised for taxation, was of the value of not less than \$1,702,443, and was included in the valuation of the company's capital stock upon which tax was charged in the auditor general's account. The coal thus on hand at that date was approximately the amount usually kept in stock at such points. The said coal when shipped from Pennsylvania was destined to said points in other states, with no intention of ever returning the same to Pennsylvania. On the contrary, said coal was intended to, and did, become part of the general mass of property in said other states, and the company is there annually taxed upon or in respect to the same, and was so taxed for 1899. When the coal thus kept in stock in the states of New York, Illinois, and other states outside of Pennsylvania, is sold, the proceeds are returned to the company's treasury in the city and state of New York.

"In 1899 the company sold and delivered coal at points outside of the state of Pennsylvania of the aggregate value of not less than \$18,587,258, but this was either contracted for before it left the mines or deliv-

ered upon, or within a comparatively short time after, its arrival at the points in other states to which it was to be delivered. What I have said above was with reference only to coal kept in stock at points outside of Pennsylvania for purposes of sale.'

"5. The corporation defendant is authorized by law to transact business and to hold lands in other states for depot, wharfage, and coal-yard accommodations, and to make such agreements and contracts with corporations and individuals of other states as may be necessary and expedient for the transporting and vending of coal mined and purchased by it, and defendant is also authorized to have and maintain its general office and place of business, and to hold its [349] stockholders' *meeting, in the state of New York, and to have as president, directors, and other officers nonresidents of the state of Pennsylvania. The company is taxable upon the value of the property represented by its capital stock, and not upon the amount of the latter."

Mr. M. E. Olmsted argued the cause, and, with *Messrs. W. W. Ross* and *A. C. Stamm*, filed a brief for plaintiff in error:

The tax claimed is a tax on property.

Com. v. New York, P. & O. R. Co. 188 Pa. 169, 41 Atl. 594; *Com. v. Standard Oil Co.* 101 Pa. 145; *Bank of Commerce v. New York*, 2 Black, 620, 17 L. ed. 451; *Bank Tax Case (New York ex rel. Bank of Commonwealth v. Tax & A. Comrs.)* 2 Wall. 200, 17 L. ed. 793.

It was neither within the intent nor within the power of the legislature of Pennsylvania to impose a tax upon tangible property not within her territorial limits or the protection of her laws.

Com. v. Delaware, L. & W. R. Co. 145 Pa. 96, 22 Atl. 157; *Com. v. Pennsylvania Coal Co.* 5 Pa. Co. Ct. 89 note; *Com. v. National Transit Co.* 5 Pa. Co. Ct. 89 note; *Com. v. Westinghouse Electric & Mfg. Co.* 151 Pa. 265, 24 Atl. 1107, 1111; *Com. v. American Dredging Co.* 122 Pa. 386, 1 L. R. A. 237, 2 Inters. Com. Rep. 221, 9 Am. St. Rep. 116, 15 Atl. 443.

The coal in question ceased to be taxable by the state of Pennsylvania the instant the cars into which it was loaded at the mine began to move upon their interstate journey, and it became taxable the instant it reached the state of its destination and was there placed in stock awaiting sale. It had then become part of the general mass of property of that state.

Brown v. Houston, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; *Pittsburg & S. Coal Co. v. Bates*, 156 U. S. 577, 39 L. ed. 538, 5 Inters. Com. Rep.

30, 15 Sup. Ct. Rep. 415; *United States v. E. C. Knight Co.* 156 U. S. 1-13, 39 L. ed. 325-329, 15 Sup. Ct. Rep. 249; *Kelley v. Rhoads*, 188 U. S. 1, 47 L. ed. 359, 23 Sup. Ct. Rep. 259; *Diamond Match Co. v. Ontonagon*, 188 U. S. 82, 47 L. ed. 394, 23 Sup. Ct. Rep. 266; *Finley v. Philadelphia*, 32 Pa. 381.

The taxation of property having its situs in another state is in violation of the Federal Constitution.

M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; *St. Louis v. Wiggins Ferry Co.* 11 Wall. 423, 20 L. ed. 192; *Hays v. Pacific Mail S. S. Co.* 17 How. 596, 15 L. ed. 254; *State Tax on Foreign-held Bonds*, 15 Wall. 300, 21 L. ed. 179; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305, 166 U. S. 185, 41 L. ed. 965, 17 Sup. Ct. Rep. 604; *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70, 43 L. ed. 899, 19 Sup. Ct. Rep. 599.

Mr. Hampton L. Carson argued the cause, and, with *Mr. Frederic W. Fleitz*, filed a brief for defendant in error:

The legislature has a general power of taxation, which is necessary for the existence and preservation of the government. It is one of the legislative powers conferred by the Constitution of Pennsylvania upon the general assembly, and it may be exercised to any extent to which the state may choose to carry it, not in violation of the powers granted to the Federal government, or the restrictions set forth in the state Constitution.

Sharpless v. Philadelphia, 21 Pa. 160, 59 Am. Dec. 759.

The legislature may tax the same subject once, twice, or oftener. Such power is not prohibited by the Constitution, but, on the contrary, is conferred on that body by the general grant of power in the Constitution, the only feature required being that the intention must be clear.

Com. v. Fall Brook Coal Co. 156 Pa. 488, 26 Atl. 1071; *Com. v. Lehigh Coal & Nav. Co.* 162 Pa. 603, 29 Atl. 664.

Tangible property at times is to be treated as practically intangible, because of its roving character. Thus vessels engaged in foreign or interstate commerce have their situs at their port of registry, and are taxable there; and shares of stock in national banks located in this state, owned by nonresidents of this state, are taxable here. Vessels, if unregistered, have their situs for taxation in the state which is the domicile of their owner.

Com. v. Standard Oil Co. 101 Pa. 119; *Pullman's Palace Car Co. v. Com.* 107 Pa.

156; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; *Com. v. American Dredging Co.* 122 Pa. 386, 1 L. R. A. 237, 2 Inters. Com. Rep. 221, 9 Am. St. Rep. 116, 15 Atl. 443; *Com. v. Delaware, L. & W. R. Co.* 145 Pa. 96, 22 Atl. 157; *Com. v. Pennsylvania Coal Co.* 197 Pa. 551, 47 Atl. 740.

With regard to property which sprang into being from the loins of the state, and the legal domicile of which is still within the state because of its transitory character, the proceeds or value returning to the treasury of the corporation, and necessarily enhancing the value of the capital stock, that value cannot be excluded in a computation of the actual value of the capital stock, upon which the tax is laid.

Com. v. American Dredging Co. 122 Pa. 386, 1 L. R. A. 237, 2 Inters. Com. Rep. 221, 9 Am. St. Rep. 116, 15 Atl. 443; *Com. v. Pennsylvania Coal Co.* 197 Pa. 551, 47 Atl. 740.

This tax has always been levied upon capital stock according to the value of the property which it represents.

Com. v. Standard Oil Co. 101 Pa. 119; Whitworth, Taxn. chap. 1, § 14, pp. 59-140; Eastman, Taxn. chap. 3, title *Tax on Capital Stock*; *Com. v. New York, P. & O. R. Co.* 188 Pa. 169, 41 Atl. 594; *Com. v. Pennsylvania Coal Co.* 197 Pa. 551, 47 Atl. 740.

The capital stock tax claimed is not a tax laid, or sought to be laid, directly upon tangible property beyond the territorial limits of Pennsylvania or the protection of her laws. Deductions from the value of the capital stock of a Pennsylvania corporation cannot be allowed for property which has not acquired a foreign situs because of its return in value to the treasury of the company. It is the value of the stock that is taxed, and not the property representing that value.

Com. v. American Dredging Co. 122 Pa. 386, 1 L. R. A. 237, 2 Inters. Com. Rep. 221, 9 Am. St. Rep. 116, 15 Atl. 443; *Com. v. Montgomery Lead & Zinc Co.* 5 Pa. Co. Ct. 89; *Com. v. Standard Oil Co.* 101 Pa. 119; *Com. v. Pennsylvania Coal Co.* 197 Pa. 551, 47 Atl. 740.

Before the coal had started on its journey the right of Pennsylvania to tax capital stock into the value of which the value of the coal had entered had attached, and could not be divested.

[352] *Mr. Justice Peckham, after making the foregoing statement, delivered the opinion of the court:

The supreme court of Pennsylvania bases its decision in this case on the authority of *Com. v. Pennsylvania Coal Co.* 197 Pa. 551, 198 U. S.

47 Atl. 740, which it regards as controlling upon the question involved. The right to include the value of the coal in question in the valuation of the capital stock of the company is based upon the construction given by the supreme court of Pennsylvania to the Pennsylvania statute of 1891, and this court is concluded by that construction. *People v. Weaver*, 100 U. S. 539, 541, 25 L. ed. 705, 706.

The only question for this court to determine is whether, in refusing to deduct the value of the coal mined in Pennsylvania, and which, at the time of the appraisalment, was situated outside the jurisdiction of the state, from the value of the capital stock, the state court denied any right of the plaintiff in error which was protected by the Federal Constitution.

The coal itself, when the appraisalment of the value of the capital stock was made, was concededly beyond the jurisdiction of the state of Pennsylvania. It was taxable (and in fact was taxed) in the states where it rested for the purpose of sale, at the time when the appraisalment in question was made. *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091. In that case the court held that the coal was properly taxed by the state of Louisiana, though it had but lately arrived from the state of its origin (Pennsylvania), and was, at the time of the taxation, awaiting sale in Louisiana, and was, in fact, soon thereafter, sold and taken out of the country to a foreign state. It was said that the coal, on arrival at New Orleans for the purpose of sale, at once became intermingled with the general property of the state of Louisiana, and was taxable like any other tangible property therein. In *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475, the question was relative to the validity of the tax on the lumber imposed in the state of its origin, as that state had taxed the lumber before it had actually left the state, although it was *intended for transportation to another state for sale. It was held that the tax was proper, so long, and so long only, as such transportation had not yet actually commenced. After that the state had no right to tax it. In the case at bar the coal had been transported to and was actually resting in another state for sale when the appraisalment was made, and, under the foregoing cases, it was then intermingled with property in the foreign state where it rested, and was at that time liable to taxation therein. The right of the foreign state to tax under such circumstances was again upheld in *Pittsburg & S. Coal Co. v. Bates*, 156 U. S. 577, 39 L. ed. 538, 5 Inters. Com. Rep. 30, 15 Sup. Ct. Rep. 415, where the coal was taxed while awaiting sale in such state.

See *Kelley v. Rhoads*, 188 U. S. 1, 47 L. ed. 359, 23 Sup. Ct. Rep. 259; *Diamond Match Co. v. Ontonagon*, 188 U. S. 82, 47 L. ed. 394, 23 Sup. Ct. Rep. 266. We must, therefore, take it as plain, under the foregoing decisions, that this coal, at the time of the appraisalment of the value of the capital stock for taxation by Pennsylvania, had become intermingled with the mass of property in the other states, to which portions of it had respectively been sent, and that it was a proper subject for taxation for both state and local purposes in such states. Where the proceeds of the sale might go when the coal was sold, whether into the treasury of the company, at its offices in New York city, or indirectly to the state of its incorporation, is not important. The coal had not been sold when the appraisalment of the value of the capital stock was made, and at that time it was outside the jurisdiction of the state of Pennsylvania. A tax on that coal, *eo nomine*, or specifically, could not then be laid by that state, as counsel concede.

Now, was this tax, in substance and effect, laid upon the coal which was beyond the jurisdiction of Pennsylvania? The supreme court of Pennsylvania has held that a tax on the value of the capital stock is a tax on the property and assets of the corporation issuing such stock. *Com. v. Standard Oil Co.* 101 Pa. 119, 145; *Fox's Appeal*, 112 Pa. 354, 4 Atl. 149; *Com. v. Delaware, S. & S. R. Co.* 165 Pa. 44, 30 Atl. 522, 523. This court has also frequently held that a tax on [354] the *value of the capital stock of a corporation is a tax on the property in which that capital is invested, and in consequence no tax can thus be levied which includes property that is otherwise exempt. *New York ex rel. Bank of Commerce v. Tax Comrs.* 2 Black, 620, 17 L. ed. 451; *Bank Tax Case* (*New York ex rel. Bank of Commonwealth v. Tax & A. Comrs.*) 2 Wall. 200, 17 L. ed. 793; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 25, 35 L. ed. 613, 617, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; *Fargo v. Hart*, 193 U. S. 490, 498, 499, 48 L. ed. 761, 764, 765, 24 Sup. Ct. Rep. 498.

The cases of the taxation upon the value of the capital stock of the banks, or on a valuation equal to the amount of their capital stock paid in or secured to be paid in, as reported in 2 Black and 2 Wall., *supra*, involved the question of the taxation of United States bonds and other securities of the United States, in which the capital of the banks was invested, which were exempt from taxation; but the holding of the court was that those bonds and securities were in fact taxed by a tax upon the value of the capital of the bank, which was invested in such bonds and securities. Of course, the

distinction between the capital stock of a corporation, and the shares into which it may be divided and held by individual shareholders, is borne in mind and recognized, and nothing herein affects that distinction. The question here is simply as to the value of the capital stock with reference to the assessment and taxation upon the corporation itself which issues it, and has nothing to do with the individual shareholder. *Van Allen v. Assessors* (*Churchill v. Utica*) 3 Wall. 573, 18 L. ed. 229; *Bank of Commerce v. Tennessee*, 161 U. S. 134-146, 40 L. ed. 645-649, 16 Sup. Ct. Rep. 456.

Counsel for defendant in error find no fault with the principle stated in *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091, and that line of cases, nor with the general proposition laid down in the other cases cited, that a tax on the value of the capital stock is a tax on the property of the corporation in which the capital is invested. They deny, however, their applicability to the facts of this case. They concede that the courts of Pennsylvania have held that tangible property, permanently located outside of the state, for the use and benefit of the corporation, and owned by it, is exempt from taxation under this statute. *They [355] also concede that it was never within the intent or the power of the legislature to impose a tax upon tangible property when held outside of the territorial limits of the state; but they insist that this tax is not *eo nomine* or specifically upon tangible property outside the state, and they contend that the state has the right to consider the value of the coal as having entered into the value of the capital stock as soon as it was mined, and that the state then had the right to treat the coal as one of the items that went into the value of the capital stock, just the same as they contend for the right to so treat the money realized from the coal upon its sale in the foreign state when it has been returned to the state, and has gone into the surplus fund. The position of the defendant in error, then, is this: The tax in question is not a tax upon coal, treated as tangible property and a tangible asset, specifically subject to tax, but is a tax upon the value of the capital stock of the Pennsylvania corporation at the fixed rate of 5 mills for each dollar of the actual value of the whole capital stock, including bonds, mortgages, moneys at interest, franchises, and property of other kinds, and that the statute in question does not impose a tax on the coal itself. Counsel do not contend that a tax on the value of the capital stock of a corporation is not a tax on its property in a certain sense, but they contend that, while a tax on capital stock is a property tax, yet the property of the corporation, for the pur-

pose of taxation, is reached through the tax imposed *directly* upon the stock (197 Pa. 553, 47 Atl. 740), and that there is a distinction between a tax on capital stock and a direct tax on personal property. Therefore tangible property situated outside the state, under the circumstances set forth in this case, is not directly taxed by a tax on the value of the capital stock, or, at least, there is no specific tax upon it, and the tax is not illegal. It is also said that, by reason of the alleged transitory character of the coal, it has never, in law, lost its original domicil, which still remains in Pennsylvania, and is subject to be there included in the value of the capital stock of the corporation.

[356] *The asserted transitory nature of this property does not seem to us to be material. At the time of the appraisalment it had been transported beyond the jurisdiction of the state, never to return in kind, but was intended to be sold in the foreign state. Such property is entirely unlike the property involved in *Com. v. American Dredging Co.* 122 Pa. 386, 1 L. R. A. 237, 2 Inters. Com. Rep. 221, 9 Am. St. Rep. 116, 15 Atl. 443. That property consisted of vessels, or scows, or tugs, only temporarily out of the state of Pennsylvania, for the purpose of engaging in business, and liable to return to the state at any time, and was without any actual situs beyond the jurisdiction of the state itself. However temporary the stay of the coal might be in the particular foreign states where it was resting at the time of the appraisalment, it was definitely and forever beyond the jurisdiction of Pennsylvania. And it was within the jurisdiction of the foreign states for purposes of taxation, and in truth it was there taxed. We regard this tax as, in substance and fact, though not in form, a tax specifically levied upon the property of the corporation, and part of that property is outside and beyond the jurisdiction of the state which thus assumes to tax it. This is not a question as between direct or indirect taxation, such as arises under the Federal Constitution when Congress lays and collects taxes by virtue of the power given it by that instrument. No question of uniformity or apportionment of taxes arises here. The question now discussed is simply whether, under this statute of the state, property of the corporation is, in substance and effect, taxed while it is beyond the jurisdiction of the state, and is never to return. When the Federal Constitution says no tax or duty shall be laid on articles exported from any state, such articles cannot be taxed, directly or indirectly, and a tax on foreign bills of lading is void because it, in effect, is a tax on exports.

198 U. S.

Fairbank v. United States, 181 U. S. 283-289, 45 L. ed. 862-865, 21 Sup. Ct. Rep. 648.

So, if the state cannot tax tangible property permanently outside the state, and having no situs within the state, it cannot attain the same end by taxing the enhanced value of the *capital stock of the corpora- [357] tion which arises from the value of the property beyond the jurisdiction of the state.

We think the state court is right in deducting, as it does, the value of the tangible property, when permanently held in another state, and we think that for the same reason the same rule should obtain in the case of tangible property situated as this coal was. We cannot see the distinction, so far as the question now before the court is concerned, between a tax assessed upon property, *eo nomine*, or specifically, when outside the state, and a tax assessed against the corporation upon the value of its capital stock to the extent of the value of such property, and which stock represents, to that extent, that very property. If the property itself could not be specifically taxed, because outside the jurisdiction of the state, how does the tax become legal by providing for assessing the tax on the value of the capital stock to the extent it represents that property, and from which the stock obtains its increased value? Can the mere name of the tax alter its nature in such case? If so, the way is found for taxing property wholly beyond the jurisdiction of the taxing power by calling it a tax on the value of capital stock, or something else which represents that property. Such a tax, in its nature, by whatever name it may be called, is a tax upon the specific property which gives the added value to the capital stock.

Although the coal may have entered into the value of the capital stock when mined, the question is whether the value of the stock in November, 1899, when the appraisalment was directed by the statute to be made, should not be decreased by deducting the value of the coal therefrom which was not in the state at the time of the appraisalment. We think it should; otherwise the tax amounts in substance to a specific tax on the coal. Taking the different prices of the stock at different times in the year, and the average price thereof, and otherwise following the provisions of the statute, simply makes a way of finding the value of the stock between the 1st and 15th of November in each year. That is the material *time [358] when the value is to be ascertained, and at that time this coal was not in the state. An appraisalment thus made, which includes such property, is, to that extent, without jurisdiction, and illegal. It is true that, in general, an appraisalment of, or an assess-

1083

ment of a tax upon, value, is a decision upon a question of fact, and a difference of opinion as to the value between the assessing officer and the court is immaterial, and the decision of the former is final. But where the appraisement is arrived at by including therein tangible property which is beyond the jurisdiction of the state, and which, therefore, the assessing officers had no jurisdiction to appraise (and none could be given them by the statute), such an appraisement or assessment is absolutely illegal, as made without jurisdiction.

The next question is whether there is a right to relief in a case like this, founded upon the provisions of the Federal Constitution. We think there is. The collection of a tax under such circumstances would amount to the taking of property without due process of law, and a citizen is protected from such taking by the 14th Amendment. In *Louisville & J. Ferry Co. v. Kentucky*, 188 U. S. 385, 47 L. ed. 513, 23 Sup. Ct. Rep. 463, the ferry company was operating a ferry across the Ohio river between Jeffersonville, in Indiana, and Louisville, in Kentucky, under two franchises, one granted by the proper authorities of Indiana for maintaining a ferry across that river from the Indiana shore to the Kentucky shore, and the other granted by the state of Kentucky to carry on a ferry business from the Kentucky to the Indiana shore. The tax was laid by Kentucky upon the company, a part of which the company insisted was a tax upon it by reason of its ownership of the Indiana franchise, which it contended was property situated in Indiana, and beyond the jurisdiction of Kentucky. The courts of Kentucky held that, under the statute, "the board of valuation and assessment did not attempt to assess or tax its revenues coming from the exercise of its franchise in the transportation of persons and property over the Ohio river. But under certain sections [359] of the Kentucky statutes it assessed *the value of appellant's franchise, which is its intangible property. The board did not assess, or attempt to assess, the property, either tangible or intangible, which it owned in the state of Indiana." This court stated: "It thus appears from the admitted facts and from the opinion of the court below that the state board, in its valuation and assessment of the franchise derived by that company from Kentucky, included the value of the franchise obtained from Indiana for a ferry from its shore to the Kentucky shore. In short, as stated by the court of appeals, the value of the franchise of the ferry company was fixed 'as if it conducted all its business in the territorial limits of the state of Kentucky,' making no deduction for the value of the franchise ob-

tained from Indiana." It was held that the franchise granted by Indiana to maintain a ferry from the Indiana shore was wholly distinct from the franchise obtained from Kentucky to maintain the ferry from the Kentucky shore, although the enjoyment of both was essential to a complete ferry right for transportation of persons and property across the river both ways. And each franchise was property entitled to the protection of the law. After holding that the privilege of maintaining a ferry in Kentucky from the Indiana shore to the Kentucky shore was a franchise derived from Indiana, and as that franchise was a valuable right of property, the question arose whether it was within the power of Kentucky to tax it, directly or indirectly, and this court said: "It is said that the Indiana franchise has not been taxed, but only the franchise derived from Kentucky; that the tax is none the less a tax on the Kentucky franchise, because of the value of that franchise being increased by the acquisition by the Kentucky corporation of the franchise granted by Indiana. This view sacrifices substance to form. If the board of valuation and assessment, for purposes of taxation, had separately valued and assessed at a given sum the franchise derived by the ferry company from Kentucky, and had separately valued and assessed at another given sum the franchise obtained from Indiana, the result would have been *the same as if it had as-[360] sessed, as it did assess, the Kentucky franchise as an unit upon the basis of its value as enlarged or increased by the acquisition of the Indiana franchise." And again: "We recognize the difficulty which sometimes exists in particular cases in determining the situs of personal property for purposes of taxation, and the above cases have been referred to because they have gone into judgment, and recognize the general rule that the power of the state to tax is limited to subjects within its jurisdiction, or over which it can exercise dominion. No difficulty can exist in applying the general rule in this case; for, beyond all question, the ferry franchise derived from Indiana is an incorporeal hereditament, derived from and having its legal situs in that state. It is not within the jurisdiction of Kentucky. The taxation of that franchise or incorporeal hereditament by Kentucky is, in our opinion, a deprivation by that state of the property of the ferry company, without due process of law, in violation of the 14th Amendment of the Constitution of the United States; as much so as if the state taxed the real estate owned by that company in Indiana." And in conclusion it was said: "We decide nothing more than it is not competent for Kentucky, under the charter grant-

ed by it, and under the Constitution of the United States, to tax the franchise which its corporation, the ferry company, lawfully acquired from Indiana, and which franchise or incorporeal hereditament has its situs, for purposes of taxation, in Indiana."

It is plain that in the case at bar the coal had lost its situs in Pennsylvania by being transported from that state to foreign states for the purposes of sale, with no intention that it should ever return to its state of origin. It was, therefore, as much outside the jurisdiction of the state of Pennsylvania to tax it as was the Indiana franchise in the case just cited, and it has been taxed just as directly and specifically under the facts stated in this case as was the Indiana franchise taxed in Kentucky by the valuation of the Kentucky franchise, which value was increased by the [361] value of the franchise created *by Indiana. Taxation of the coal in this case deprived the owner of its property without due process of law, as is held in the above case, and the owner is entitled to the protection of the 14th Amendment, which prevents the taking of its property in that way.

The judgment of the Supreme Court of Pennsylvania is reversed, and the cause remanded for further proceedings not inconsistent with the opinion of this court.

Reversed.

The CHIEF JUSTICE dissented.

LEE L. CLARK, Robert N. Bennett, T. F. Carlisle, Lincoln Carlisle, and Richard Carlisle, *Plffs. in Err.*,
v.

E. J. NASH.

(See S. C. Reporter's ed. 361-370.)

Eminent domain—condemnation for public use.

The peculiar local conditions in Utah justify, as authorizing condemnation for a public use, a statute of that state under which an individual landowner may condemn a right of way across his neighbor's land for the enlargement of an irrigation ditch therein, in order to enable him to obtain water from a stream in which he has an interest, to irrigate his land, which otherwise would remain absolutely valueless.

[No. 218.]

NOTE.—As to what is a public use which will justify the exercise of the power of eminent domain—see notes to *Pittsburg, W. & K. R. Co. v. Benwood Iron Works*, 2 L. R. A. 680; *Barre R. Co. v. Montpelier & W. River R. Co.* 4 L. R. A. 785; and *Sweet v. Rechel*, 40 L. ed. U. S. 183.

198 U. S. U. S., Book 49.

Argued April 19, 20, 1905. Decided May 15, 1905.

IN ERROR to the Supreme Court of the State of Utah to review a judgment which affirmed a judgment of the District Court for the County of Utah, condemning a right of way in favor of an individual landowner across his neighbor's land, for the enlargement of an irrigation ditch to enable him to irrigate his land. *Affirmed.*

See same case below, 27 Utah, 158, 101 Am. St. Rep. 953, 75 Pac. 371.

Statement by Mr. Justice Peckham:

*This action was brought by the defend-[362] ant in error, Nash, to condemn a right of way so called, by enlarging a ditch for the conveying of water across the land of plaintiffs in error, for the purpose of bringing water from Fort Canyon creek, in the county and state of Utah, which is a stream of water flowing from the mountains near to the land of the defendant in error, and thus to irrigate his land.

The plaintiffs in error demurred to the complaint upon the ground that the same did not state facts sufficient to constitute a cause of action against them. The demurrer was overruled, and the defendants then waived all time in which to answer the complaint, and elected to stand on the demurrer. Thereafter there was a default entered against the defendants, and each of them, for failing to answer, and the case was, under the practice in Utah, then tried and evidence heard on the complaint of the plaintiff, showing the material facts as stated in the complaint. The trial court found the facts as follows:

"That the plaintiff during all the times mentioned in said complaint, to wit, from the first day of January, 1902, down to the present time inclusive, was, has been, and now is the owner of, in possession of, and entitled to the possession of, the south half of the northwest quarter of section 24, in township 4 south of range 1, east of Salt Lake meridian, in Utah county, state of Utah.

"That Fort Canyon creek is a natural stream of water flowing from the mountains on the north of plaintiff's said land, in a southerly direction to and near to plaintiff's said land.

"That said land of plaintiff above described is arid land and will not produce without artificial irrigation, but that, with artificial irrigation, the same will produce abundantly of grain, vegetables, fruits, and hay.

"That the defendants own land lying north of and adjacent to plaintiff's said land, and said defendants have constructed

[363] and are maintaining and jointly own a water ditch which divides a portion of the said waters of the said Fort Canyon creek on the west side of said creek (being the side on which *the plaintiff's said land is situated), at a point about one mile north of plaintiff's said land, in section 13 of said township, down to a point within a hundred feet of plaintiff's said land, which said ditch is begun on the defendants' land and runs in a southerly direction over said defendants' land and onto and over the lands of the said defendants to said point about a hundred feet of plaintiff's said land.

"The plaintiff is the owner of, and entitled to the use of, sufficient of the remainder of the flow of the waters of the said Fort Canyon creek to irrigate his said land, and that the irrigation of said land by the waters of said creek, and the uses of the said waters in the irrigation of the said lands of the defendant, is, under the laws of this state, declared to be, and the same is, a public use.

"That the said waters of said Fort Canyon creek cannot be brought upon the said plaintiff's said land by any other route except by and through the ditch of the defendants, owing to the canyon through which said ditch runs being such as to only be possible to build one ditch.

"That plaintiff has no other way of irrigating his said land except by the use of the waters of said Fort Canyon creek, and that unless plaintiff is allowed to enlarge the ditch of the defendants, and have a right of way through said ditch for the flow of the waters of said Fort Canyon creek, down to the plaintiff's said land, that said land of plaintiff will be valueless and the waters of said Fort Canyon creek will not be available for any useful purpose.

"That said ditch of defendants is a small ditch, about 18 inches wide and about 12 inches deep; that if the plaintiff is permitted to widen said ditch one foot more it will be sufficient in dimensions to carry plaintiff's said water, to which he is entitled, to his said land, and the same can and will be put to a beneficial and public use, in the irrigation of the soil on plaintiff's said land hereinbefore described.

[364] "That on the 16th day of January, 1902, and while the said defendants were not in the actual use of their said ditch, *and while the widening of said ditch at said time would not in any manner interfere with said defendants, other than the act of widening of same, the plaintiff requested of the said defendants the right to so widen the said ditch of the said defendants so to make it one foot wider, for the purpose of using the same to carry the water of the plaintiff on to his said land from said creek, and at said

time and place offered to pay to said defendants all damages which the said defendants might suffer by reason of said enlargement, and offered to pay his proportion of the maintenance of keeping the same in repair, and asked of said defendants a right to continue the use of said ditch in common with said defendants, and to use the same so as not to interfere with the use of said ditch by said defendants, and it further appearing to the court that the said plaintiff is now and has ever since been willing to pay said damage and all damage incident thereto, and to pay his just proportion of the cost of maintaining said ditch. That the said defendants then and there and ever since have refused to permit plaintiff to enlarge said ditch or to use the same, or in any manner to interfere with the same.

"And it further appearing to the court that the said defendants would suffer damages by reason of the enlarging of said ditch one foot in width, in the sum of \$40.00, and no more. And that the said plaintiff has deposited with the clerk of this court, to be paid to the order of the said defendants, the sum of \$40.00, in full payment of such damages. That the land of the defendants not sought to be condemned by plaintiff would suffer no injury or damage.

"And it further appearing from said evidence that said ditch of the defendants can be widened by the plaintiff one foot more without injury to defendants or to said ditch, and that said widening of said ditch and the use thereof by the plaintiff will not in any manner interfere with the free and full use thereof by the defendants for the carrying of all waters of the said defendants."

Upon these facts the court found the following—

"Conclusions of Law.

*"The court finds and decides that the [365] plaintiff is entitled to a decree of this court condemning a right of way through defendants' said ditch, to the extent of widening said ditch one foot more than its present width, and to a depth of said ditch as now constructed through the entire length thereof down to plaintiff's said land, for the purpose of carrying his said waters of said Fort Canyon creek to the land of the plaintiff for the purpose of irrigation, and is entitled to an easement therein to the extent of the enlarging of said ditch, and for the purposes aforesaid, and to have a perpetual right of way to flow waters therein to the extent of the said enlargement.

"That the defendants are entitled to have and recover from the said plaintiff the sum of \$40.00 damages for injury sustained by reason of the enlargement and improvement

above stated and such right of way and easement.

"That the plaintiff is required to contribute to the cost and expense of maintaining and keeping the said ditch in repair in an amount and proportion bearing the same relation to the whole amount of cost and expense as the waters he flows therein bears to the whole amount flowed therein both by the plaintiff and defendants.

"That the plaintiff recover no costs herein and judgment is hereby ordered to be entered accordingly."

Judgment having been entered upon these findings, the defendants appealed to the supreme court of the state, where, after argument, the judgment was affirmed. 27 Utah, 158, 101 Am. St. Rep. 953, 75 Pac. 371.

Mr. J. W. N. Whitecotton argued the cause and filed a brief for plaintiffs in error:

The use for which this condemnation is allowed is not a public use within the meaning of the 14th Amendment to the Constitution of the United States.

Lewis, Em. Dom. 1st ed. § 158; *Taylor v. Porter*, 4 Hill, 140, 40 Am. Dec. 274; *Re Eureka Basin Warehouse & Mfg. Co.* 96 N. Y. 42; *Re Tuthill*, 49 L. R. A. 781 and note, 163 N. Y. 133, 79 Am. St. Rep. 574, 57 N. E. 303; *Sholl v. German Coal Co.* 118 Ill. 427, 57 Am. Rep. 379, 10 N. E. 199; *Lorenz v. Jacob*, 63 Cal. 73; *Lindsay Irrig. Co. v. Mehrtens*, 97 Cal. 680, 32 Pac. 802; *Fallsburg Power & Mfg. Co. v. Alexander*, 101 Va. 98, 61 L. R. A. 129, 99 Am. St. Rep. 855, 43 S. E. 194; *Gaylord v. Sanitary District*, 204 Ill. 576, 63 L. R. A. 582, 98 Am. St. Rep. 235, 68 N. E. 522; *Healy Lumber Co. v. Morris*, 33 Wash. 490, 63 L. R. A. 820, 99 Am. St. Rep. 964, 74 Pac. 681; *Missouri P. R. Co. v. Nebraska*, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130; *Anderson*, Law Dict. *Public*; Webster, Dict. *Public*; Standard Dict. *Public*; *Anderson*, Law Dict. *Private*; Webster, Dict. *Private*; Standard Dict. *Private*; *Bankhead v. Brown*, 25 Iowa, 540; *Re Albany Street*, 11 Wend. 151, 25 Am. Dec. 618; *Concord R. Co. v. Greely*, 17 N. H. 47; *Bloodgood v. Mohawk & H. River R. Co.* 18 Wend. 9, 31 Am. Dec. 313; *Beckman v. Saratoga & S. R. Co.* 3 Paige, 73, 22 Am. Dec. 679; *Witham v. Osburn*, 4 Or. 318, 18 Am. Rep. 287; *Hepburn's Case*, 3 Bland, Ch. 95; *Hoye v. Swan*, 5 Md. 237; *Dunn v. Charleston*, Harp. L. 189; *Osborn v. Hart*, 24 Wis. 89, 1 Am. Rep. 161; *Tyler v. Beacher*, 44 Vt. 648; *Dickey v. Tennison*, 27 Mo. 373; *Clack v. White*, 2 Swan, 540; *Sadler v. Langham*, 34 Ala. 311; *Valley City Salt Co. v. Brown*, 7 W. Va. 191; *New Central Coal Co. v. George's Creek Coal & I. Co.* 37 Md. 537; 198 U. S.

Varner v. Martin, 21 W. Va. 534; *Bangor & P. R. Co. v. McComb*, 60 Me. 290; *McCandless's Appeal*, 70 Pa. 210; *Embury v. Conner*, 3 N. Y. 511, 53 Am. Dec. 325; *Scudder v. Trenton Delaware Falls Co.* 1 N. J. Eq. 694, 23 Am. Dec. 756; *Robinson v. Swope*, 12 Bush, 21; *Harding v. Funk*, 8 Kan. 315; *Jenal v. Green Island Draining Co.* 12 Neb. 163, 10 N. W. 547; *Waddell's Appeal*, 84 Pa. 90; *Brown v. Beatty*, 34 Miss. 227; *Hand Gold Min. Co. v. Parker*, 59 Ga. 419; *McQuillen v. Hatton*, 42 Ohio St. 202.

No counsel for defendant in error.

Mr. Justice **Peckham**, after making the foregoing statement, delivered the opinion of the court:

The plaintiffs in error contend that the proposed use of the enlarged ditch across their land for the purpose of conveying water to the land of the defendant in error alone is not a public use, and that, therefore, the defendant in error has no constitutional or other right to condemn the land, or any portion of it, belonging to the plaintiffs in error, for that purpose. They argue that, although the use of water in the state of Utah for the purposes of mining or irrigation or manufacturing may be a public use where the right to use it is common to the public, yet that no individual has the right to condemn land for the purpose of conveying water in ditches across his neighbor's land, for the purpose of irrigating his own land alone, even where there is, as in this case, a state statute permitting it.

In some states, probably in most of them, the proposition contended for by the plaintiffs in error would be sound. But whether a statute of a state permitting condemnation by an individual for the purpose of obtaining water for his land or for mining should be held to be a condemnation for a public use, and, therefore, a valid enactment, may depend upon a number of considerations relating to the situation of the state and its possibilities for land cultivation, or the successful prosecution of its mining or other industries. Where the use is asserted to be public, and the right of the individual to condemn land for the purpose of exercising such use is founded *upon or is [368] the result of some peculiar condition of the soil or climate, or other peculiarity of the state, where the right of condemnation is asserted under a state statute, we are always, where it can fairly be done, strongly inclined to hold with the state courts, when they uphold a state statute providing for such condemnation. The validity of such statutes may sometimes depend upon many different facts, the existence of which would make a public use, even

by an individual, where, in the absence of such facts, the use would clearly be private. Those facts must be general, notorious, and acknowledged in the state, and the state courts may be assumed to be exceptionally familiar with them. They are not the subject of judicial investigation as to their existence, but the local courts know and appreciate them. They understand the situation which led to the demand for the enactment of the statute, and they also appreciate the results upon the growth and prosperity of the state which, in all probability, would flow from a denial of its validity. These are matters which might properly be held to have a material bearing upon the question whether the individual use proposed might not in fact be a public one. It is not alone the fact that the land is arid and that it will bear crops if irrigated, or that the water is necessary for the purpose of working a mine, that is material; other facts might exist which are also material,—such as the particular manner in which the irrigation is carried on or proposed, or how the mining is to be done in a particular place where water is needed for that purpose. The general situation and amount of the arid land or of the mines themselves might also be material, and what proportion of the water each owner should be entitled to; also the extent of the population living in the surrounding country, and whether each owner of land or mines could be, in fact, furnished with the necessary water in any other way than by the condemnation in his own behalf, and not by a company, for his use and that of others.

[369] These, and many other facts not necessary to be set forth *in detail, but which can easily be imagined, might reasonably be regarded as material upon the question of public use, and whether the use by an individual could be so regarded. With all of these the local courts must be presumed to be more or less familiar. This court has stated that what is a public use may frequently and largely depend upon the facts surrounding the subject, and we have said that the people of a state, as also its courts, must, in the nature of things, be more familiar with such facts, and with the necessity and occasion for the irrigation of the lands, than can any one be who is a stranger to the soil of the state, and that such knowledge and familiarity must have their due weight with the state courts. *Fallbrook Irrig. District v. Bradley*, 164 U. S. 112, 159, 41 L. ed. 369, 388, 17 Sup. Ct. Rep. 56. It is true that in the *Fallbrook Case* the question was whether the use of the water was a public use when a corporation sought to take land by condemnation under a state statute, for the purpose of making reservoirs

and digging ditches to supply landowners with the water the company proposed to obtain and save for such purpose. This court held that such use was public. The case did not directly involve the right of a single individual to condemn land under a statute providing for that condemnation.

We are, however, as we have said, disposed to agree with the Utah court with regard to the validity of the state statute which provides, under the circumstances stated in the act, for the condemnation of the land of one individual for the purpose of allowing another individual to obtain water from a stream in which he has an interest, to irrigate his land, which otherwise would remain absolutely valueless.

But we do not desire to be understood by this decision as approving of the broad proposition that private property may be taken in all cases where the taking may promote the public interest and tend to develop the natural resources of the state. We simply say that in this particular case, and upon the facts stated in the findings of the court, and having reference to the conditions already stated, we are of opinion that the use is a *public one, although the taking [370] of the right of way is for the purpose simply of thereby obtaining the water for an individual, where it is absolutely necessary to enable him to make any use whatever of his land, and which will be valuable and fertile only if water can be obtained. Other landowners adjoining the defendant in error, if any there are, might share in the use of the water by themselves taking the same proceedings to obtain it, and we do not think it necessary, in order to hold the use to be a public one, that all should join in the same proceeding, or that a company should be formed to obtain the water which the individual landowner might then obtain his portion of from the company by paying the agreed price, or the price fixed by law.

The rights of a riparian owner in and to the use of the water flowing by his land are not the same in the arid and mountainous states of the West that they are in the states of the East. These rights have been altered by many of the Western states by their constitutions and laws, because of the totally different circumstances in which their inhabitants are placed, from those that exist in the states of the East, and such alterations have been made for the very purpose of thereby contributing to the growth and prosperity of those states, arising from mining and the cultivation of an otherwise valueless soil, by means of irrigation. This court must recognize the difference of climate and soil, which render necessary these different laws in the states so situated.

We are of opinion, having reference to

the above peculiarities which exist in the state of Utah, that the statute permitting the defendant in error, upon the facts appearing in this record, to enlarge the ditch, and obtain water for his own land, was within the legislative power of the state, and the judgment of the state court affirming the validity of the statute is therefore affirmed.

Mr. Justice **Harlan** and Mr. Justice **Brewer** dissented.

[371] *UNITED STATES, Thomas Simpson, and White Swan, Appts.,
v.

LINEAS WINANS and Audubon Winans, Partners, Doing Business under the Firm Name of Winans Brothers.

(See S. C. Reporter's ed. 371-384.)

Indians — fishing rights under treaty — rights of riparian owners — power of state over shore lands.

1. The right of taking fish "at all usual and accustomed places in common with the citizens of the territory" of Washington, and of "erecting temporary buildings for curing them," secured to the Yakima Indians by the treaty of 1859, survives the private acquisition of lands bordering on the Columbia river by grants from the United States or state of Washington.
2. Patents issued by the Land Department to lands bordering on the Columbia river, though absolute in form, can grant no exemption from the fishing rights secured to the Yakima Indians by the treaty of 1859.
3. Fishing rights in the Columbia river, secured to the Yakima Indians by the treaty of 1859, which provided for the extinguishment of the Indian title to the lands occupied and claimed by them, preparatory to opening the lands for settlement, are not subordinate to the powers acquired by the state of Washington in and over the shore lands on its admission into the Union.

[No. 180.]

Argued April 3, 4, 1905. Decided May 15, 1905.

A PPEAL from the Circuit Court of the United States for the District of Washington to review a decree dismissing a bill to enjoin any obstruction of the fishing rights in the Columbia river, secured to the Yakima Indians by the treaty of 1859. *Reversed* and remanded for further proceedings.

The facts are stated in the opinion.

NOTE — On the right to fish — see note to *State v. Shaw*, 60 L. R. A. 481.

198 U. S.

Solicitor General Hoyt argued the cause and filed a brief for appellants:

The United States is bound, on the highest compulsions and sanctions controlling human institutions, to deal with the Indians on the most liberal doctrines of construction and the most generous rules of duty and obligation to inferiors known to our national principles and in international law.

Fletcher v. Peck, 6 Cranch, 87, 3 L. ed. 162; *Johnson v. M'Intosh*, 8 Wheat. 543, 5 L. ed. 681; *Cherokee Nation v. Georgia*, 5 Pet. 1, 8 L. ed. 25; *United States v. Cook*, 19 Wall. 591, 22 L. ed. 210; *Worcester v. Georgia*, 6 Pet. 515, 8 L. ed. 483.

An Indian treaty should be construed not according to the technical meaning of the words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.

Jones v. Meehan, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1; *Worcester v. Georgia*, 6 Pet. 515, 8 L. ed. 483; *Choctaw Nation v. United States*, 119 U. S. 1, 30 L. ed. 306, 7 Sup. Ct. Rep. 75.

In this country the presumption is against the existence of an exclusive fishery.

Weston v. Sampson, 8 Cush. 347, 54 Am. Dec. 764; *Carson v. Blazer*, 2 Binn. 475, 4 Am. Dec. 463; *Yard v. Carman*, 3 N. J. L. 937; *Melvin v. Whiting*, 7 Pick. 79; 1 Pin-grey, Real Prop. 107, 108; Washb. Easements & Servitudes, 533.

The riparian owners on principal rivers of a state have not an exclusive right to fish, but the right is vested in the state and is open to all.

Carson v. Blazer, 2 Binn. 475, 4 Am. Dec. 463; *Shrunk v. Schuylkill Nav. Co.* 14 Serg. & R. 71.

The rule is otherwise in non-navigable rivers. The right of the owner of adjoining lands extends to the middle of a stream, but under such restraints as the government may impose. The right of regulating the subject, whether in navigable or other streams, resides in the state.

Waters v. Lilley, 4 Pick. 145, 16 Am. Dec. 333; *Com. v. Chapin*, 5 Pick. 199, 16 Am. Dec. 386.

The states hold the absolute right to all navigable waters within their territorial limits, including the soil under them and the fisheries therein (*Smith v. Maryland*, 18 How. 71, 15 L. ed. 269; *Manchester v. Massachusetts*, 139 U. S. 240, 35 L. ed. 159, 11 Sup. Ct. Rep. 559; *Shively v. Bowlby*, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548) subject only to the rights which the Constitution provides shall be exercised by the general government in the regulation of commerce (*Martin v. Waddell*, 16 Pet. 367, 10 L. ed. 997; *McCready v. Virginia*, 94 U.

1089

S. 391, 24 L. ed. 248; *Holyoke Water-Power Co. v. Lyman*, 15 Wall. 500, 21 L. ed. 133).

It has been held that the public has the right to take fish in navigable waters below high-water mark, though upon soil belonging to an individual.

Bickel v. Polk, 5 Harr. (Del.) 325.

The ownership of submerged lands is not a mere easement, but a title in fee, subject, however, to the public rights of navigation and fishery.

Shively v. Bowlby, 152 U. S. 1, 19, 38 L. ed. 331, 14 Sup. Ct. Rep. 548.

A grant of the land under navigable water does not impair the common right of fishing therein (*Hogg v. Beerman*, 41 Ohio St. 81, 52 Am. Rep. 71); and, as the owner of lands adjoining public waters has no exclusive right of fishing there, he cannot, in a grant of such lands, reserve the right of fishing in the adjoining waters, disconnected with the shore.

Sloan v. Biemiller, 34 Ohio St. 492.

The state may grant to individuals the exclusive right of fishing in any of the navigable waters of the state (*McCready v. Virginia*, 94 U. S. 391, 24 L. ed. 248; *Lowndes v. Huntington*, 153 U. S. 1, 38 L. ed. 615, 14 Sup. Ct. Rep. 758), provided vested rights are not infringed thereby (*Hathaway v. Thomas*, 16 Gray, 290).

The public right of fishing in navigable waters extends to high-water mark.

Shively v. Bowlby, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548.

A patent does not invariably and inevitably convey an absolute title beyond all inquiry and free of every condition.

Eldridge v. Trezevant, 160 U. S. 452, 40 L. ed. 490, 16 Sup. Ct. Rep. 345; *Ruch v. New Orleans*, 43 La. Ann. 275, 9 So. 473; *Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 224; *Packer v. Bird*, 137 U. S. 661, 34 L. ed. 819, 11 Sup. Ct. Rep. 210; *Hardin v. Jordan*, 140 U. S. 372, 35 L. ed. 430, 11 Sup. Ct. Rep. 808, 838; *Shively v. Bowlby*, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548.

Mr. Charles H. Carey argued the cause, and, with *Messrs. F. P. Mays*, and *Huntington & Wilson*, filed a brief for appellees:

Upon the acquisition of the original Oregon territory, now including Oregon, Washington, and parts of other states, the United States became invested with the fee of all the lands and waters included therein. The Indian title, as against the United States, was merely a right to perpetual occupancy of the land, with the privilege of using it as the Indians saw fit, until such right of occupancy had been surrendered to the government; and the Indian title to the reservations was of no higher character.

United States v. Alaska Packers' Asso. 79 Fed. 157; *Spalding v. Chandler*, 160 U. S.

394, 407, 40 L. ed. 469, 474, 16 Sup. Ct. Rep. 360.

The Indian title, even to the lands included in their reservation, is subject to the paramount control and power of Congress in the enactment of laws for the sale and disposal of the public lands.

United States v. Alaska Packers' Asso. 79 Fed. 157; *Spalding v. Chandler*, 160 U. S. 394, 407, 40 L. ed. 469, 474, 16 Sup. Ct. Rep. 360; *United States v. Winans*, 73 Fed. 72; *Missouri, K. & T. R. Co. v. Roberts*, 152 U. S. 114, 38 L. ed. 377, 14 Sup. Ct. Rep. 496.

Under the treaty of 1859 the Indians neither reserved nor acquired a title by occupancy to the lands bordering their usual and customary fishing grounds. They acquired merely an executory license or privilege, applying to no certain and defined places, and revocable at the will of the United States, to fish, hunt, and build temporary houses upon public lands, in common with white citizens, upon whom the law has conferred no title by occupancy whatever.

United States v. Winans, 73 Fed. 72; *United States v. Alaska Packers' Asso.* 79 Fed. 152; *Ward v. Race Horse*, 163 U. S. 504, 41 L. ed. 244, 16 Sup. Ct. Rep. 1076.

The treaty of 1859 imposed no restraint upon the power of the United States to sell the lands in controversy; and such a sale, under the settled policy of the government, was a result naturally to come from the advance of the white settlements along the river; and it cannot be assumed that the government intended by general expressions in the treaty to tie up the development of the fishing industry through a long stretch of the waters of the Columbia.

Ward v. Race Horse, 163 U. S. 504, 41 L. ed. 244, 16 Sup. Ct. Rep. 1078.

The grant of the lands bordering the Columbia river at such fishing places deprived the white citizens of all rights to go over, across, or upon them for the purpose of fishing or erecting buildings, or other purposes; and the Indian rights, being of no higher nature, were likewise revoked and extinguished.

Ibid.; *United States v. Winans*, 73 Fed. 72; *The James G. Swan*, 50 Fed. 108; *United States v. Alaska Packers' Asso.* 79 Fed. 157.

Upon the admission of the state of Washington into the Federal Union upon an equal footing with the original states, she became possessed, as an inseparable incident to her dominion and sovereignty, of all the rights as to sale of the shore lands on navigable rivers, and the regulation and control of fishing therein, that belonged to the original states.

Shively v. Bowlby, 152 U. S. 1, 38 L. ed.

331, 14 Sup. Ct. Rep. 567; *Hardin v. Jordan*, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838.

The title to the shore and lands under water is incidental to the sovereignty of a state,—a portion of the royalties belonging thereto,—and held in trust for the public purposes of navigation and fishery, and cannot be retained or granted out to individuals by the United States; and it depends upon the law of such state to determine to what extent the state has prerogatives of ownership. Control and regulation shall be exercised, subject only to the paramount authority of Congress with regard to public navigation and commerce.

Hardin v. Jordan, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838; *Shively v. Bowlby*, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 565.

Evidence of Indians present at the time of the execution of the treaty between the representatives of the United States government and the federated bands of Indians known as the Yakima Nation, in 1855, is incompetent and inadmissible, when such evidence would tend to vary the plain stipulations of the treaty.

Anderson v. Lewis, 1 Freem. Ch. (Miss.) 178; *Little v. Watson*, 32 Me. 214.

Mr. Justice **McKenna** delivered the opinion of the court:

This suit was brought to enjoin the respondents from obstructing certain Indians of the Yakima Nation, in the state of Washington, from exercising fishing rights and privileges on the Columbia river, in that state, claimed under the provisions of the treaty between the United States and the Indians, made in 1859.

There is no substantial dispute of facts, or none that is important to our inquiry.

The treaty is as follows:

"Article 1. The aforesaid confederated tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied and claimed by them. . . .

"Article 2. There is, however, reserved from the lands above ceded, for the use and occupation of the aforesaid confederated tribes and bands of Indians, the tract of land included within the following boundaries: . . .

"All of which tract shall be set apart, and, so far as necessary, surveyed and marked out, for the exclusive use and benefit of said confederated tribes and bands of Indians as an Indian reservation; nor shall

[378] any white man, excepting those *in the employment of the Indian Department, be permitted to reside upon the said reservation

198 U. S.

without permission of the tribe and the superintendent and agent. And the said confederated tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty. In the meantime it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States, and upon any ground claimed or occupied, if with the permission of the owner or claimant.

"Guaranteeing, however, the right to all citizens of the United States to enter upon and occupy as settlers any lands not actually occupied and cultivated by said Indians at this time, and not included in the reservation above named. . . .

"Article 3. And provided that, if necessary for the public convenience, roads may be run through the said reservation; and, on the other hand, the right of way, with free access from the same to the nearest public highways, is secured to them, as also the right, in common with citizens of the United States, to travel upon all public highways.

"The exclusive right of taking fish in all the streams where running through or bordering said reservation is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the territory, and of erecting temporary buildings for curing them, together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land. . . .

"Article 10. And provided that there is also reserved and set apart from the lands ceded by this treaty, for the use and benefit of the aforesaid confederated tribes and bands, a tract of land not exceeding in quantity one township of six miles square, situated at the forks of the Pisquouse or Wenatchapam river, and known as the 'Wenatchapam fishery,' which said reservation shall be surveyed and marked out whenever the President may direct, and be subject to the same provisions and restrictions as other Indian reservations." 12 Stat. at L. 951.

*The respondents or their predecessors in [379] title claim under patents of the United States the lands bordering on the Columbia river, and under grants from the state of Washington to the shore land which, it is alleged, fronts on the patented land. They also introduced in evidence licenses from the state to maintain devices for taking fish, called fish wheels.

At the time the treaty was made the fishing places were part of the Indian country, subject to the occupancy of the Indians, with all the rights such occupancy gave.

The object of the treaty was to limit the occupancy to certain lands, and to define rights outside of them.

The pivot of the controversy is the construction of the second paragraph. Respondents contend that the words "the right of taking fish at all usual and accustomed places in common with the citizens of the territory" confer only such rights as a white man would have under the conditions of ownership of the lands bordering on the river, and under the laws of the state, and, such being the rights conferred, the respondents further contend that they have the power to exclude the Indians from the river by reason of such ownership. Before filing their answer respondents demurred to the bill. The court overruled the demurrer, holding that the bill stated facts sufficient to show that the Indians were excluded from the exercise of the rights given them by the treaty. The court further found, however, that it would "not be justified in issuing process to compel the defendants to permit the Indians to make a camping ground of their property while engaged in fishing." 73 Fed. 72. The injunction that had been granted upon the filing of the bill was modified by stipulation in accordance with the view of the court.

Testimony was taken on the issues made by the bill and answer, and upon the submission of the case the bill was dismissed, the court applying the doctrine expressed by it in *United States v. Alaska Packers' Asso.* 79 Fed. 152; *United States v. The James G. Swan*, 50 Fed. 108, expressing its views as follows:

[380] *"After the ruling on the demurrer the only issue left for determination in this case is as to whether the defendants have interfered or threatened to interfere with the rights of the Indians to share in the common right of the public of taking fish from the Columbia river, and I have given careful consideration to the testimony bearing upon this question. I find from the evidence that the defendants have excluded the Indians from their own lands, to which a perfect, absolute title has been acquired from the United States government by patents, and they have more than once instituted legal proceedings against the Indians for trespassing, and the defendants have placed in the river in front of their lands fishing wheels for which licenses were granted to them by the state of Washington, and they claim the right to operate these fishing wheels, which necessitates the exclusive possession of the space occupied by the wheels. Otherwise the defendants have not molested the Indians nor threatened to do so. The Indians are at the present time on an equal footing with the citizens of the United

States who have not acquired exclusive proprietary rights, and this it seems to me is all that they can legally demand with respect to fishing privileges in waters outside the limits of Indian reservations under the terms of their treaty with the United States."

The remarks of the court clearly stated the issue and the grounds of decision. The contention of the respondents was sustained. In other words, it was decided that the Indians acquired no rights but what any inhabitant of the territory or state would have. Indeed, acquired no rights but such as they would have without the treaty. This is certainly an impotent outcome to negotiations and a convention which seemed to promise more, and give the word of the nation for more. And we have said we will construe a treaty with the Indians as "that unlettered people" understood it, and "as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection," and counterpoise the inequality "by the superior justice*which looks only to the[381] substance of the right, without regard to technical rules." [*Choctaw Nation v. United States*] 119 U. S. 1, 30 L. ed. 306, 7 Sup. Ct. Rep. 75; [*Jones v. Meehan*] 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1. How the treaty in question was understood may be gathered from the circumstances.

The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them,—a reservation of those not granted. And the form of the instrument and its language was adapted to that purpose. Reservations were not of particular parcels of land, and could not be expressed in deeds, as dealings between private individuals. The reservations were in large areas of territory, and the negotiations were with the tribe. They reserved rights, however, to every individual Indian, as though named therein. They imposed a servitude upon every piece of land as though described therein. There was an exclusive right of fishing reserved within certain boundaries. There was a right outside of those boundaries reserved "in common with citizens of the territory." As a mere right, it was not exclusive in the Indians. Citizens might share it, but the

Indians were secured in its enjoyment by a special provision of means for its exercise. They were given "the right of taking fish at all usual and accustomed places," and the right "of erecting temporary buildings for curing them." The contingency of the future ownership of the lands, therefore, was foreseen and provided for; in other words, the Indians were given a right in the land,—the right of crossing it to the river,—the right to occupy it to the extent and for the purpose mentioned. No other conclusion would give effect to the treaty. And the right was intended to be continuing [382] against the United States *and its grantees as well as against the state and its grantees.

The respondents urge an argument based upon the different capacities of white men and Indians to devise and make use of instrumentalities to enjoy the common right. Counsel say: "The fishing right was in common, and aside from the right of the state to license fish wheels, the wheel fishing is one of the civilized man's methods, as legitimate as the substitution of the modern combined harvester for the ancient sickle and flail." But the result does not follow that the Indians may be absolutely excluded. It needs no argument to show that the superiority of a combined harvester over the ancient sickle neither increased nor decreased rights to the use of land held in common. In the actual taking of fish white men may not be confined to a spear or crude net, but it does not follow that they may construct and use a device which gives them exclusive possession of the fishing places, as it is admitted a fish wheel does. Besides, the fish wheel is not relied on alone. Its monopoly is made complete by a license from the state. The argument based on the inferiority of the Indians is peculiar. If the Indians had not been inferior in capacity and power, what the treaty would have been, or that there would have been any treaty, would be hard to guess.

The construction of the treaty disposes of certain subsidiary contentions of respondents. The Land Department could grant no exemptions from its provisions. It makes no difference, therefore, that the patents issued by the Department are absolute in form. They are subject to the treaty as to the other laws of the land.

It is further contended that the rights conferred upon the Indians are subordinate to the powers acquired by the state upon its admission into the Union. In other words, it is contended that the state acquired by its admission into the Union "upon an equal footing with the original states," the power to grant rights in or to dispose of the shore lands upon navigable streams, and such power is subject only to 198 U. S.

the *paramount authority of Congress with[383] regard to public navigation and commerce. The United States, therefore, it is contended, could neither grant nor retain rights in the shore or to the lands under water.

The elements of this contention and the answer to it are expressed in *Shively v. Bowlby*, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548. It is unnecessary, and it would be difficult, to add anything to the reasoning of that case. The power and rights of the states in and over shore lands were carefully defined, but the power of the United States, while it held the country as a territory, to create rights which would be binding on the states, was also announced, opposing the *dicta* scattered through the cases, which seemed to assert a contrary view. It was said by the court, through Mr. Justice Gray:

"Notwithstanding the *dicta* contained in some of the opinions of this court, already quoted, to the effect that Congress has no power to grant any land below high-water mark of navigable waters in a territory of the United States, it is evident that this is not strictly true.

"By the Constitution, as is now well settled, the United States having rightfully acquired the territories, and being the only government which can impose laws upon them, have the entire dominion and sovereignty, national and municipal, Federal and state, over all the territories, so long as they remain in a territorial condition. *American Ins. Co. v. 356 Bales of Cotton*, 1 Pet. 511, 542, 7 L. ed. 243, 255; *Benner v. Porter*, 9 How. 235, 242, 13 L. ed. 119, 122; *Cross v. Harrison*, 16 How. 164, 193, 14 L. ed. 889, 901; *First Nat. Bank v. Yankton County*, 101 U. S. 129, 133, 25 L. ed. 1046, 1047; *Murphy v. Ramsey*, 114 U. S. 15, 44, 29 L. ed. 47, 57, 5 Sup. Ct. Rep. 747; *Church of Jesus Christ, L. D. S. v. United States*, 136 U. S. 1, 42, 43, 34 L. ed. 478, 490, 491, 10 Sup. Ct. Rep. 792; *McAllister v. United States*, 141 U. S. 174, 181, 35 L. ed. 693, 695, 11 Sup. Ct. Rep. 949."

Many cases were cited. And it was further said:

"We cannot doubt, therefore, that Congress has the power to make grants of lands below high-water mark of navigable waters in any territory of the United States, whenever it becomes necessary to do so in order to perform international *obligations, or to[384] effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states, or to carry out other public purposes appropriate to the objects for which the United States hold the territory."

The extinguishment of the Indian title,

opening the land for settlement, and preparing the way for future states, were appropriate to the objects for which the United States held the territory. And surely it was within the competency of the nation to secure to the Indians such a remnant of the great rights they possessed as "taking fish at all usual and accustomed places." Nor does it restrain the state unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enable the right to be exercised.

The license from the state, which respondents plead, to maintain a fishing wheel, gives no power to them to exclude the Indians, nor was it intended to give such power. It was the permission of the state to use a particular device. What rights the Indians had were not determined or limited. This was a matter for judicial determination regarding the rights of the Indians and rights of the respondents. And that there may be an adjustment and accommodation of them the Solicitor General concedes and points out the way. We think, however, that such adjustment and accommodation are more within the province of the circuit court in the first instance than of this court.

Decree reversed, and the case remanded for further proceedings in accordance with this opinion.

Mr. Justice **White** dissents.

[385]*CHICAGO, MILWAUKEE, & ST. PAUL
RAILWAY COMPANY, *Appt.*.

v.

UNITED STATES.

(See S. C. Reporter's ed. 385-389.)

Postoffice—railway mail routes—compensation—adjustment.

The adjustment of compensation to a railway company for carrying the mails, made by the Postmaster General in the exercise of his authority under U. S. Rev. Stat. § 4002, U. S. Comp. Stat. 1901, p. 2719, to arrange the railway routes upon which the mail is to be carried, and to adjust and readjust compensation, may be confined, where an extension is made beyond the terminal of an established mail route, to the extension alone, without readjusting the compensation for the whole route as extended.

[No. 198.]

Submitted April 6, 1905. Decided May 15, 1905.

A PPEAL from the Court of Claims to review the dismissal of a petition by a
1094

railway company to recover compensation for carrying the mails. *Affirmed.*

The facts are stated in the opinion.

Messrs. George R. Peck, W. W. Dudley, and L. T. Michener submitted the cause for appellant.

Assistant Attorney General Pradt and Mr. John Q. Thompson submitted the cause for appellee.

Mr. Justice **McKenna** delivered the opinion of the court:

The appellant, a Wisconsin corporation, filed a petition in the court of claims, August 25, 1896, which it amended July 19, 1900, and by which it sought recovery from the United States of the sum of \$9,101.08, for compensation for carrying the mails from Milwaukee, Wisconsin, to Republic, Michigan, and thence to Champion, Michigan.

The services were rendered by the Milwaukee & Northern Railroad Company. Appellant's ownership was derived from that company, as alleged in the petition, as follows:

"Your petitioner further avers that on the 30th day of September, 1890, it became the purchaser, and thereupon it *became the [386] lawful owner, by assignment and transfer, of all of the capital stock of the said Milwaukee & Northern Railroad Company; that on the 1st day of October, 1890, the board of directors of the Milwaukee & Northern Railroad Company was reorganized by the election of persons who were either directors or officers of the petitioner, and the offices were filled by the election of persons who were officers of its company, with the solitary exception of the president of the Milwaukee & Northern Railroad Company; that from the 30th day of September, 1890, until the 26th day of June, 1893, that company operated the railroad as a separate organization and in the name of the Milwaukee & Northern Railroad Company; that on the 26th day of June, 1893, pursuant to a vote of the stockholders of the Milwaukee & Northern Railroad Company, the latter company executed a deed to the petitioner, whereby it conveyed to petitioner all its railroads, railways, rights of way, depot grants, tracks, bridges, etc., and also all other property and choses in action whatsoever, both real and personal, of the said Milwaukee & Northern Railroad Company, and all its rights, privileges, and corporate franchises connected with or relating to such railroad, or to the construction, maintenance, use, or operation of the same. And that thereafter, to wit, August 28, 1893, the Milwaukee & Northern Railroad Company held its last stockholders' meeting and its last directors' meeting, and since that time

it has not exercised any corporate functions or powers, nor has it pretended to do anything of the sort."

The United States demurred to the petition on the grounds that (1) "The claim came to the claimant, if at all, by a pretended assignment, which, as to the United States, was void; (2) the allegations of the amended petition did not state facts sufficient to constitute a claim against the United States." The demurrer was sustained and the petition dismissed, whereupon this appeal was taken.

[387] The demurrer presented the questions of the validity of the assignment and the merits of the claim. We rest our decision *on the latter. We express no opinion of the validity of the assignment.

The Milwaukee & Northern Railroad ran from Milwaukee, Wisconsin, to Republic, Michigan, a distance of 255.37 miles. Under the authority given him by law, "to arrange the railway routes on which mail is carried" (§ 3997 of the Revised Statutes of the United States, U. S. Comp. Stat. 1901, p. 2717), the Postmaster General designated the road from Milwaukee to Republic as postal route No. 139,016, and compensation was fixed for carrying the mails thereon. On February 4, 1890, the road was extended to Champion, Michigan, a distance of 8.89 miles. Provision was made for the extension by an order dated February 4, 1890, which directed that service should be extended from Republic to Champion, increasing distance 9.16 miles, less .27 miles, making a net increase of 8.89 miles, "in accordance with distance circular, and with the understanding that the rate of compensation on this extension will be adjusted in a subsequent order, in accordance with law."

On December 1, 1890, the following order was made and directed to the general manager of the railroad:

Sir: The compensation for the transportation of mails, etc., on route No. 139,016, between Milwaukee, Wisconsin, and Champion, Michigan, has been fixed from September 23, 1890, to June 30, 1891 (unless otherwise ordered), under acts of March 3, 1873 [17 Stat. at L. 556, chap. 231], July 12, 1876 [19 Stat. at L. 78, chap. 179], and June 17, 1878 [20 Stat. at L. 140, chap. 259], upon returns showing the amount and character of the service for thirty successive working days, commencing September 23, 1890, at the rate of \$35,022.37 per annum, being \$132.53 per mile for 264.26 miles.

From February 24 to September 22, 1890, pay is allowed at the rate of \$1,178.19 per annum, being \$132.53 per mile for 8.89 miles extension between Republic and Champion, Michigan.

198 U. S.

This adjustment is subject to future orders and to fines and deductions.

It will be observed that this order purports to fix the compensation on route 139,016 between Milwaukee and Champion.

The dates designated are somewhat confusing. However, *in two days another order [388] was issued and directed to the company, which reads as follows:

Sir: The compensation for the transportation of mails, etc., on route No. 139,016, between Republic and Champion, Michigan, has been fixed from February 24, 1890, to June 30th, 1891 (unless otherwise ordered), under acts of March 3, 1873, July 12, 1876, and June 17, 1878, upon returns showing the amount and character of the service for thirty successive working days, commencing September 23, 1890, at the rate of \$1,178.19 per annum, being \$132.53 per mile for 8.89 miles extension.

This adjustment is subject to future orders and to fines and deductions.

The first order revoked the compensation for carrying the mails from Milwaukee to Republic, which had been fixed, and was manifestly a mistake. The second order was intended to correct the mistake, and confine the adjustment to the extension from Republic to Champion.

The contention of appellant is that the Postmaster General had no power to issue the second order, but was required by § 4002 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 2719) to fix compensation for the whole route as extended. The appellant urges in support of the contention, not only the provision of the section, but the practice and usage of the Post Office Department. Section 4002 is as follows:

"The Postmaster General is authorized and directed to readjust the compensation hereafter to be paid for the transportation of mails on railroad routes upon the conditions and at the rates hereinafter mentioned:

"First. That the mails shall be conveyed with due frequency and speed; and that sufficient and suitable room, fixtures, and furniture, in a car or apartment properly lighted and warmed, shall be provided for route agents to accompany and distribute the mails.

"Second. That the pay per mile per annum shall not exceed the following rates, namely: On routes carrying their whole *length an average weight of mails per day [389] of two hundred pounds, fifty dollars; five hundred pounds, seventy-five dollars; one thousand pounds, one hundred dollars; one thousand five hundred pounds, one hundred

and twenty-five dollars; two thousand pounds, one hundred and fifty dollars; three thousand five hundred pounds, one hundred and seventy-five dollars; five thousand pounds, two hundred dollars, and twenty-five dollars additional for every additional two thousand pounds, the average weight to be ascertained, in every case, by the actual weighing of the mails for such a number of successive working days, not less than thirty, at such times, after June thirtieth, eighteen hundred and seventy-three, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct."

The section does not sustain the appellant's contention. The Postmaster General is given the power to arrange the railway routes upon which the mail is to be carried, and to adjust and readjust compensation. The orders of December 1 and December 3, respectively, reserved this power, and the only limitations on its exercise, expressed in § 4002, is as to the manner of ascertaining the rate, which is to be by the average weight of the mails. There is nothing in the section which requires the abrogation of prior contracts when an extension is made beyond the terminal of an established route, or precludes provision for the extension alone. A contract may not be forced upon a railway. It may accept, however, and become bound by the action of the Post Office Department. *Eastern R. Co. v. United States*, 129 U. S. 391, 32 L. ed. 730, 9 Sup. Ct. Rep. 320. The record does not show any protest against the order of December 3. Its terms were unmistakable, and, as counsel for the government observes, "it may be justly inferred" that the railroad company "viewed the order of December 3 in the same light, and as having the same force and effect, as intended by the postal authorities."

Judgment affirmed.

[390] *ALICE I. BIRRELL, *Plff. in Err.*,

v.

NEW YORK & HARLEM RAILROAD COMPANY and New York Central & Hudson River Railroad Company. (No. 202.)

PATRICK KIERNES, Executor and Trustee of John Kiernes, Deceased, *Plff. in Err.*,

v.

NEW YORK & HARLEM RAILROAD COMPANY and New York Central & Hudson River Railroad Company. (No. 203.)

(See S. C. Reporter's ed. 390-392.)

Contracts—impairment of obligation—effect of judicial decisions.

These cases are governed by the decision in *Muhlker v. New York & Harlem Railroad Company, ante*, 872.

[Nos. 202, 203.]

Argued April 27, 28, 1905. Decided May 15, 1905.

IN ERROR to the Supreme Court of the State of New York to review two judgments dismissing the complaints in actions by abutting owners for damages for the erection of, and for an injunction against the continuance of, an elevated railroad structure in the adjoining street, which judgments were entered pursuant to the mandates of the Court of Appeals of that state, on reversing the judgments of the Appellate Division of the Supreme Court, First Department, which had affirmed the judgments of the Supreme Court of the County of New York, granting the relief sought. *Reversed* and remanded for further proceedings.

See same case below (No. 202) in Appellate Division, 60 App. Div. 630, 70 N. Y. Supp. 1135; in Court of Appeals, 173 N. Y. 644, 66 N. E. 1105.

See same case below (No. 203) in Appellate Division, 60 App. Div. 630, 70 N. Y. Supp. 1141; in Court of Appeals, 173 N. Y. 642, 66 N. E. 1110.

The facts are stated in the opinion.

Mr. Alfred B. Cruikshank argued the cause, and, with *Messrs. Atwater & Cruikshank*, filed a brief for plaintiffs in error.

Mr. Ira A. Place argued the cause, and, with *Mr. Thomas Emery*, filed a brief for defendants in error.

Mr. Edward Winslow Paige also argued the cause for defendants in error.

Mr. Justice McKenna delivered the opinion of the court:

Plaintiffs in error are owners of property on Park avenue in the city of New York, and brought these actions in the supreme court of the county of New York against the defendants in error for damages for the erection of, and for an injunction against the continuance of, the viaduct described in *Muhlker v. New York & H. R. Co.* 197 U. S. 544, *ante*, 872, 25 Sup. Ct. Rep. 522. The supreme court found that the viaduct and the operation of trains thereon were and had been, from certain dates which were mentioned, a continuous trespass upon the easements of light, air, and access appurtenant to the property of plaintiffs in error, and that they sustained damages, respectively,

NOTE.—As to what laws are void as impairing obligation of contracts—see notes to *Franklin County Grammar School v. Bailey*, 10 L. R. A. 405; *Fletcher v. Peck*, 3 L. ed. U. S. 162;

as follows: Birrell in the sum of \$3,360, depreciation in the rental value of her property, and the sum of \$7,050, damages to the fee; Patrick Kierns, as executor and trustee [391] of *John Kierns, deceased, in the sum of \$1,296, depreciation of rental value of his property, and \$2,525, injury to the fee. Money judgments were entered for the depreciation of the rental value of the respective properties, and it was decreed that unless the right was acquired by the defendants to maintain the structure and operate the railroad by the payment of the sums awarded for the damages to the fee, injunctions should become operative against the structure and railroad. The judgments were affirmed by the appellate division, but were reversed by the court of appeals. Upon the return of the cases to the supreme court judgments were entered dismissing the complaints, and these writs of error were then sued out.

In the *Birrell Case* the court of appeals [173 N. Y. 644, 66 N. E. 1105] contented itself with a simple reversal of the judgment; in the *Keirns Case* a *per curiam* opinion was filed as follows:

"Judgment reversed and the complaint dismissed without costs, upon the authority of *Fries v. New York & H. R. Co.* 169 N. Y. 270, 62 N. E. 358, and *Muhlker v. New York & H. R. Co.* 173 N. Y. 549, 66 N. E. 558."

Judge Vann filed a concurring opinion, which he concluded as follows:

"I concurred in the dissenting opinion of Judge Cullen in the *Fries Case* and should have concurred in that of Judge Bartlett in the *Muhlker Case* had I sat when it was argued, but I regard the question as now settled, and by the rule of *stare decisis* I am compelled to vote for reversal." [173 N. Y. 642, 66 N. E. 1110.]

The *Muhlker Case* came to this court and was reversed (197 U. S. 544, *ante*, 872, 25 Sup. Ct. Rep. 522). There are some differences in the facts in the cases at bar from that case, but none, in our judgment, which withdraw them from the principles there expressed. And, as we have seen, a substantial identity in the cases was pronounced by the courts of New York.

Counsel, it is true, have submitted some additional considerations based on the act of 1892, under which the viaduct was erect-

ed, and on other laws of New York, to which considerations *we have given due attention, [392] but we do not think they demand or would justify a change of our ruling.

It follows, therefore, that the judgments should be and they are hereby reversed, and the causes remanded for further proceedings not inconsistent with this opinion.

The CHIEF JUSTICE, Mr. Justice **White**, Mr. Justice **Peckham**, and Mr. Justice **Holmes** dissent.

SAVANNAH, THUNDERBOLT, & ISLE OF HOPE RAILWAY OF SAVANNAH, GEORGIA, *Plff. in Err.*,
v.

MAYOR AND ALDERMEN OF THE CITY OF SAVANNAH.

(See S. C. Reporter's ed. 392-399.)

Taxation of street railways—equal protection of the laws—contracts—impairment of obligation.

1. A street railway company is not denied the equal protection of the laws by a municipal tax on its business at a rate of \$100 per mile or fraction of a mile of its trackage in the city streets because a steam railway, making an extra charge for local deliveries of freight brought over its road from outside the city, is not subjected to this tax.
2. No exemption from the municipal taxation of the business of a street railway company results from provisions in its agreement with the municipality preserving its easements for railway purposes in land to be conveyed by it to the city, and granting it the right to lay down, construct, maintain, and operate its railway through certain streets, subject to the control and regulation of the mayor and aldermen.

[No. 238.]

Argued April 28, May 1, 1905. Decided May 15, 1905.

IN ERROR to the Supreme Court of the State of Georgia to review a judgment which affirmed a judgment of the Superior Court of Chatham County, in that state, entered on a verdict of the jury in favor of defendant in a suit to restrain the collection

NOTE.—As to the validity of class legislation—see *State v. Goodwill*, 6 L. R. A. 621, and note; and *State v. Loomis*, 21 L. R. A. 789, and note.

As to constitutional equality of privileges, immunities, and protection—see *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* 14 L. R. A. 579, and note.

That exemption from taxation, whether a contract or not is not implied—see note to *Tucker v. Ferguson*, 22 L. ed. U. S. 805.

McCanna & F. Co. v. Citizens' Trust & Surety Co. 24 C. C. A. 20; and *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co.* 35 C. C. A. 12.

As to the change of decision of a state court as an unconstitutional impairment of a contract—see notes to *Allen v. Allen*, 16 L. R. A. 646; and *Los Angeles v. Los Angeles City Water Co.* 44 L. ed. U. S. 886.

of a municipal tax upon the business of a street railway company. *Affirmed.*

See same case below, 115 Ga. 137, 41 S. E. 592.

The facts are stated in the opinion.

Mr. David C. Barrow argued the cause, and, with *Mr. George A. King*, filed a brief for plaintiff in error:

This court will recognize the definition of the class as contained in the taxing act, and the classification must be justified under such definition.

Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 296, 42 L. ed. 1037, 1043, 18 Sup. Ct. Rep. 594; *Pacific Exp. Co. v. Seibert*, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250.

No distinction is to be made between an electric railroad and a commercial railroad, if they both do a local business.

Savannah, T. & I. H. R. Co. v. Savannah, 112 Ga. 164, 37 S. E. 393; *Augusta v. Central R. Co.* 78 Ga. 119.

Where the classification is based not upon the kind of business carried on, but upon the special privileges granted, it must appear, in order to sustain the classification, that the enjoyment of the privileges places the person taxed in a separate and distinct class by reason of such privilege. The taxing power cannot base its classification on the privilege granted, and impose a burden therefor, without going further and seeing to it that none are omitted from the burden, whatever their business may be or whatever they may be called, who enjoy the same privileges.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 157, 41 L. ed. 666, 669, 17 Sup. Ct. Rep. 255; *Merchants' & M. Bank v. Pennsylvania*, 167 U. S. 461, 465, 42 L. ed. 236, 238, 17 Sup. Ct. Rep. 829; *Hayes v. Missouri*, 120 U. S. 68, 71, 30 L. ed. 578, 580, 7 Sup. Ct. Rep. 305; *Soon Hing v. Crowley*, 113 U. S. 703, 709, 28 L. ed. 1145, 1147, 5 Sup. Ct. Rep. 730; *Billings v. Illinois*, 188 U. S. 97, 47 L. ed. 400, 23 Sup. Ct. Rep. 272; *Pacific Exp. Co. v. Seibert*, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250.

This court has recognized the principle that, in determining whether or not corporations belong to the same class, it is necessary to consider whether they are held by the taxing power as equally responsible and liable in other matters relating to their business.

Missouri P. R. Co. v. Mackey, 127 U. S. 205, 210, 32 L. ed. 107, 109, 8 Sup. Ct. Rep. 1161; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26-29, 32 L. ed. 585, 586, 9 Sup. Ct. Rep. 207.

The prohibition of the Constitution against the impairment of the obligations

of contracts applies to implied, as well as express, contracts.

Fisk v. Jefferson Police Jury, 116 U. S. 131, 29 L. ed. 587, 6 Sup. Ct. Rep. 329; *Fitzgerald & M. Constr. Co. v. Fitzgerald*, 137 U. S. 98, 112, 34 L. ed. 608, 613, 11 Sup. Ct. Rep. 36.

This court has frequently decided that the whole contract must be brought into view, and interpreted with reference to the nature of the obligations between the parties and the intentions they have manifested in forming them.

O'Brien v. Miller, 168 U. S. 287, 297, 42 L. ed. 469, 473, 18 Sup. Ct. Rep. 140; *Goddard v. Foster*, 17 Wall. 123, 142, 143, 21 L. ed. 589, 595; *Black v. United States*, 91 U. S. 267, 269, 23 L. ed. 324, 325.

Where the court, from all the circumstances surrounding the contract, and the consideration, and the acts of the parties, implies certain stipulations or terms, it does not thereby vary the contract or introduce new terms into it, but declares that certain acts unexplained by the compact impose certain duties, and that the parties had stipulated for their performance.

Ogden v. Saunders, 12 Wheat. 341, 342, 6 L. ed. 650.

The city having accepted the benefits under the contract with the plaintiff in error, this ordinance, imposing a tax for the privilege of using those streets named in the contract, impairs the obligations of the same.

Chicago v. Sheldon, 9 Wall. 50, 19 L. ed. 594; *St. Louis v. Western U. Teleg. Co.* 63 Fed. 68; *Iron Mountain R. Co. v. Memphis*, 37 C. C. A. 410, 96 Fed. 113; *Mercantile Trust & Deposit Co. v. Collins Park & B. R. Co.* 101 Fed. 347.

In *Detroit v. Detroit Citizens' Street R. Co.* 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410, and in *Cleveland v. Cleveland City R. Co.* 194 U. S. 517, 48 L. ed. 1102, 24 Sup. Ct. Rep. 756, it was held that an ordinance of a city council providing for an extension of the tracks of a street railway, and fixing the rate of fare, constituted a contract, and that that contract was impaired, in violation of the Constitution of the United States, by a subsequent ordinance which undertook to reduce the rate of fare.

The exception from the grant to the city, of the easement of use, left such easement in the plaintiff in error as of his former right or title.

Ashcroft v. Eastern R. Co. 126 Mass. 196, 198, 30 Am. Rep. 672.

Where a tax assessment includes property not legally assessable, and the part of the tax assessed upon the latter property cannot be separated from the other part, the entire tax assessment is invalid.

Santa Clara County v. Southern P. R. Co. 118 U. S. 394-415, 30 L. ed. 118-125, 6 Sup. Ct. Rep. 1132; *California v. Central P. R. Co.* 127 U. S. 1, 29, 45, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; *Central P. R. Co. v. California*, 162 U. S. 163, 40 L. ed. 927, 16 Sup. Ct. Rep. 766 (dissenting opinion).

The burden is on the taxing power to show that the illegal portion of the tax can be separated from the legal.

Santa Clara County v. Southern P. R. Co. 118 U. S. 415, 30 L. ed. 124, 6 Sup. Ct. Rep. 1132.

Mr. William Garrard argued the cause and filed a brief for defendant in error:

The city of Savannah has never entered into any agreement with the plaintiff in error which will be violated, in terms or in spirit, by the imposition of this business tax.

Weils v. Savannah, 181 U. S. 539, 540, 45 L. ed. 991, 21 Sup. Ct. Rep. 697; *New Orleans City & Lake R. Co. v. New Orleans*, 143 U. S. 192, 36 L. ed. 121, 12 Sup. Ct. Rep. 406; *Los Angeles v. Southern P. R. Co.* 67 Cal. 433, 7 Pac. 819; *Wyandotte v. Corrigan*, 35 Kan. 21, 10 Pac. 99; *Florida C. & P. R. Co. v. Columbia*, 54 S. C. 266, 32 S. E. 408; Dill. Mun. Corp. 4th ed. § 789; *Denver City R. Co. v. Denver*, 21 Colo. 350, 29 L. R. A. 610, 52 Am. St. Rep. 239, 41 Pac. 826.

If, as alleged by petitioner, there is no state law in Georgia authorizing the adoption of the ordinance in question by the municipality of Savannah, then there is in this case no Federal question at all, and this court is without jurisdiction.

Hamilton Gaslight & Coke Co. v. Hamilton, 146 U. S. 258-266, 36 L. ed. 963-967, 13 Sup. Ct. Rep. 90; *Barney v. New York*, 193 U. S. 430, 48 L. ed. 737, 24 Sup. Ct. Rep. 502; *Western U. Teleg. Co. v. Ann Arbor R. Co.* 178 U. S. 239, 44 L. ed. 1052, 20 Sup. Ct. Rep. 867; *Savannah v. Holst*, 65 C. C. A. 449, 132 Fed. 901.

The plaintiff in error may claim that this ordinance was unauthorized by law, but its remedy was in the state courts,—not here.

Walston v. Nevin, 128 U. S. 582, 32 L. ed. 546, 9 Sup. Ct. Rep. 192.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill in equity, brought by the plaintiff in error to restrain the collection of a municipal tax by the defendants. The bill sets forth, among other grounds, that the tax impairs the obligation of a contract, and also is an attempt to take the plaintiff's property without due process of law, contrary to the Constitution of the United States. According to the bill and the fifth

assignment of error there is no law of the state of Georgia which authorizes the imposition of the tax. Were this true, the foundation of our jurisdiction would be gone, and this writ of error should be dismissed. See *Barney v. New York*, 193 U. S. 430, 48 L. ed. 737, 24 Sup. Ct. Rep. 502. But although the plaintiff has taken inconsistent positions, and has confused questions for the state court alone with those which may be brought here, still, since it has shown a clear intent to raise the Federal question from the beginning, since the bill, in another place, alleges that the tax is an authority exercised under the state of Georgia, and other assignments of error present the points, and since the state court has decided that the tax was authorized, we shall not stop the case at the outset. See *Hamilton Gaslight & Coke Co. v. Hamilton*, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. Rep. 90.

The tax imposed under an ordinance of March 22, 1899, providing, by way of amendment to one of the year before, that "street railway companies, whether under the control of another company or not, in lieu of the specific tax heretofore required, shall pay to the city of Savannah, for the privilege of doing business in the city, and for the use of the streets of the city, at the rate of \$100 per mile or fraction of a mile of track used in the city of Savannah by said railroad company." The plaintiff is a street railroad company, commonly known as *such, and the great part of its business [397] and revenue is due to the use of the streets of Savannah by its electric passenger street cars. One of its grounds of attack is that the Central of Georgia Railway Company, a steam railway, is not subjected to the tax, and yet that it also does business in the streets of the city by transporting freights from its regular station to various side tracks, and charges an additional or local price. The plaintiff contends that a classification which distinguishes between an ordinary street railway and a steam railroad making an extra charge for local deliveries of freight brought over its road from outside the city is contrary to the 14th Amendment, and void.

The other ground on which the validity of the tax is denied is a contract made between the plaintiff and respondent on November 4, 1897, amended in April, 1898, and on July 27, 1898. It is contended that this contract implies that the plaintiff is to have the use of the streets without further charges than those which it imposes.

The trial court refused a preliminary injunction, and its decree was affirmed by the supreme court (112 Ga. 164, 37 S. E. 393), which decided that this was a business tax,

lawfully imposed, and that the plaintiff did not stand like the Central of Georgia Railway, which, as was held in *Augusta v. Central R. Co.* 78 Ga. 119, is subject to taxation by the state alone. On final hearing a verdict was directed for the defendant, and a decree was entered making the same the decree of the court. This also was affirmed by the supreme court. 115 Ga. 137, 41 S. E. 592. The case then was brought here.

[398] The merits of the case are pretty nearly disposed of by the statement. The argument on the first point is really a somewhat disguised attempt to go behind the decision of the state court that the tax is a tax on business, and to make out that it is a charge for the privilege of using the streets. We see no ground on which we should criticize or refuse to be bound by the local adjudication. The difference between the two railroads is obvious, and warrants the diversity in the mode *of taxation. The Central of Georgia Railway may be assumed to do the great and characteristic part of its work outside the city, while the plaintiff does its work within the city. If the former escapes city taxation, it does so only because its main business is not in the city, and the states reserves it for itself.

As to the contract, if the city had attempted to bargain away its right to tax, probably it would have been acting beyond its power. *Augusta Factory v. Augusta*, 83 Ga. 734, 743, 10 S. E. 359. However, it made no such attempt. It is enough to say that it uses no language to that effect, or words which even indirectly imply that exemption for the future was contemplated. *Wells v. Savannah*, 181 U. S. 531, 539, 540, 45 L. ed. 986, 21 Sup. Ct. Rep. 697, 107 Ga. 1, 32 S. E. 669; *New Orleans City & Lake R. Co. v. New Orleans*, 143 U. S. 192, 36 L. ed. 121, 12 Sup. Ct. Rep. 406. But we will go a little more into detail.

The contract was made on a petition of the plaintiff stating its desire to make changes in its line of track "for the purpose of operating its railroad more economically and to better advantage, and at the same time affording more adequate facilities to the public." Various changes were agreed on in the way of moving old tracks and laying down new ones. Among other particulars the railroad agreed to convey, or cause to be conveyed, certain lands in Bolton street and Whitaker street, "preserving, of course, the easement of the said street railway company over said land for its railway purposes." In the last amendment to the contract an extension is agreed to, "and the right to lay down, construct, maintain, and operate said railway through said streets, as before stated, is granted, subject to the control and regulation of the said

mayor and aldermen, the same as other lines of railway, as provided in said contract of November 4th, 1897." It is said that these phrases exempt at least so much of the road as they cover, and that therefore the tax is void as a whole, because it does not appear what proportion of it is attributable to unexempted portions.

*This kind of argument seems to assume [399] that the tax is a tax on the right to use the streets, and not a tax on the business. But a sufficient answer is that none of the expressions quoted import any exemption from taxation whatever, if it was within the power of the city to grant it. See *New Orleans City & Lake R. Co. v. New Orleans*, 143 U. S. 192, 36 L. ed. 121, 12 Sup. Ct. Rep. 406. We are of opinion that the plaintiff's case fails on every ground.

Decree affirmed.

CIMIOTTI UNHAIRING COMPANY and
John W. Sutton, *Petitioners*,

v.

AMERICAN FUR REFINING COMPANY
and Max Mischke.

(See S. C. Reporter's ed. 399-416.)

Patents — infringement of combination claim—mechanical departure—nonuse of essential element.

1. No infringement of the combination claim in the Sutton patent, No. 383,258, for an improvement upon machines for plucking furs, results from the use of a machine which, in lieu of the "fixed stretcher bar" made a distinct feature of the claim, substitutes a movable one, operated by an entirely different mechanism, capable of accomplishing a much larger amount of work within a given time.
2. A machine which has no mechanical equivalent of the stationary toothed card above the stretcher bar, which is made an essential part of the mechanism described by the combination claim of the Sutton patent, No. 383,258, for an improvement upon machines for plucking furs, does not infringe such claim.

[No. 192.]

Argued March 17, 1905. Decided May 15, 1905.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Third Circuit to review a decree which re-

NOTE.—On what constitutes infringement of patent—see notes to *Royer v. Coupe*, 36 L. ed. U. S. 1073; and *Dashleil v. Grosvenor*, 40 L. ed. U. S. 1025.

versed a decree of the Circuit Court for the District of New Jersey, enjoining an alleged infringement of a patent for an improvement upon machines for plucking furs, and remanded the cause to the Circuit Court with directions to dismiss the bill. *Affirmed.*

See same case below, 59 C. C. A. 357, 123 Fed. 869.

The facts are stated in the opinion.

Mr. Louis C. Raegener argued the cause and filed a brief for petitioners.

Mr. Henry Schreiter argued the cause and filed a brief for respondents.

Mr. Justice Day delivered the opinion of the court:

This action was begun in the circuit court of the United States for the district of New Jersey for the purpose of enjoining the alleged infringement of certain letters patent of the United States, issued to John W. Sutton, and bearing date of May 22, 1888, number 383,258, for a certain new and useful invention or improvement upon machines for plucking furs.

[400] *In the circuit court a decree was rendered granting an injunction (120 Fed. 672); upon appeal to the circuit court of appeals for the third circuit this judgment was reversed, and the cause was remanded to the circuit court with directions to dismiss the bill. 59 C. C. A. 357, 123 Fed. 869.

The case was brought here upon writ of certiorari to review the judgment of the circuit court of appeals.

The patent in controversy has been frequently sustained in the Federal courts (95 Fed. 474; 108 Fed. 82; 53 C. C. A. 2301, 115 Fed. 498; and 53 C. C. A. 161, 115 Fed. 507), and its validity is not contested here. The question presented to us is one of infringement. The invention which is the subject-matter of the controversy relates to machinery for unhairing pelts, and particularly, and perhaps, exclusively, so far as practical use is concerned, sealskins or "coney" skins. The latter are skins of French or Belgian rabbits, which, under the name of "electric" sealskins, have been put upon the market, and have been largely sold and used as substitutes for the genuine seal-skin. It is said that only an expert can tell the difference between the finished coney and the genuine sealskin.

It is disclosed in the testimony that sealskins, before they are fit for the market, are required to be submitted to a process by which the long hairs, sometimes called "water hairs," are separated from the fur, and clipped or plucked from the pelt. Up to about the year of 1881 the removal of such hairs was effected by hand, the pelt being stretched over the finger, by blowing down

on the fur a part was made, and the hairs were clipped out by means of scissors. This was necessarily a slow *and laborious process. An improvement was made in this art by the Cimiottis, predecessors of the petitioner, by the introduction of an air blast for the purpose of separating the fur, which invention was the subject of a patent to them, number 240,007, under date of April 12, 1881. In 1888 the Sutton patent in suit was issued, in which was introduced a rotating brush apparatus for the purpose of separating the fur, as will be hereinafter more particularly shown. Of his invention, Sutton said in the specifications:

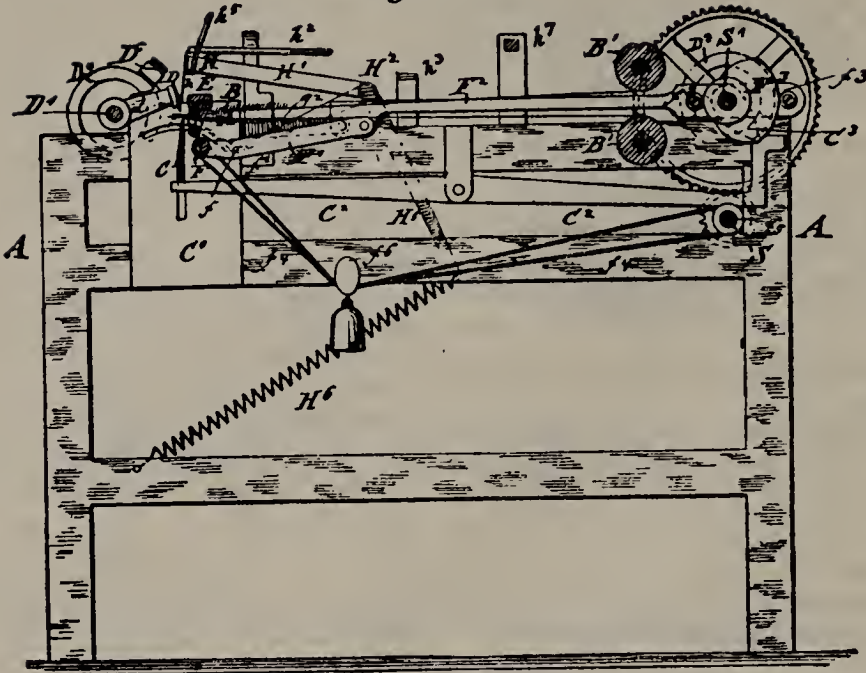
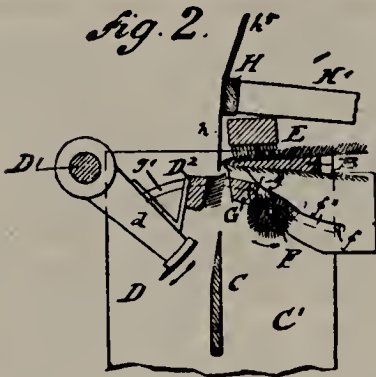
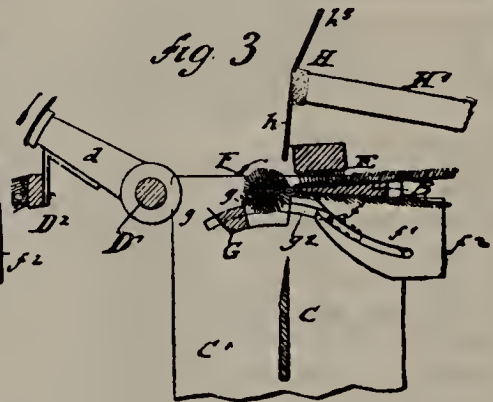
"This invention relates to an improved machine for plucking sealskins and other furs, so as to remove the stiff water hair therefrom without injuring the soft hair or wool of the same.

"The machine is more especially designed with a view to overcome some of the defects and insufficiencies of the plucking machines heretofore in use, and produce the plucking of the skins at the lower parts of the neck and shoulders, where the hairs point outwardly and backwardly and are the most difficult to pluck, as they lie down close to the skin when the same is drawn over the stretcher bar.

"My invention is further designed to dispense with a blast fan or other air-forcing devices, and produce the removing of the water hairs entirely by mechanical means, which are operated by power, so that a quick and uniform plucking of the skin takes place.

"The invention consists of a machine for plucking seal and other skins, which comprises a fixed stretcher bar, means for stretching and intermittently feeding the skin over said stretcher bar, a fixed card above the stretcher bar near the edge of the same, a rotary separating brush that is intermittently moved up in front of the stretcher bar, an oscillating guard below the stretcher bar, a rotary cutting knife and a vertically-reciprocating cutting knife working in conjunction with the rotary knife for cutting off the stiff projecting hairs, said rotary cutting knife being provided with a card supported back of the knife, all of which parts are operated from a common *driving shaft, so as to produce for each rotation of the same the cutting off or plucking of the hairs projecting from that part of the skin in front of the stretcher bar."

The invention was illustrated by certain drawings, some of which are here given, which, together with the description, illustrate the operation of the machine, so far as necessary for the purposes of this case.

fig. 1*fig. 2.**fig. 3*

[403] *Referring to the drawings, the inventor says (in part):

"A represents the supporting frame of my improved machine for plucking seal and other skins. On the frame A is supported a fixed transverse stretcher bar, B, which is tapered to a narrow edge, over which the skin to be plucked is stretched. The skin is applied by tapes to the rollers B' B' which are intermittently actuated by gear wheels operated by a pawl-and-ratchet-wheel mechanism from the driving shaft S, as customary in plucking machines of this class. By the gear wheels and the pawl-and-ratchet mechanism the skin is fed intermittently for a small portion of its length over the front edge of the stretcher bar, it being unwound from the upper and wound up on the lower

feed roller. Below the edge of the stretcher bar is arranged a vertically-reciprocating knife C, which moves in slots or ways of fixed guide plates C', and which is operated by fulcrumed levers C'', the rear ends of which are engaged by cams C'' on a cam shaft, S', that is supported above the driving shaft S in suitable bearings of the frame A.

"In front of and at some distance from the stretcher bar B is supported a shaft, D', in bearings of the frame A, said shaft being provided with radial arms *d d*, to which the rotary knife D is attached, which, in conjunction with the vertically-reciprocating knife C, serves to cut off the water hairs projecting from that part of the skin in front of the edge of the stretcher bar B.

To the arms of the rotary knife D, and at some distance back of the latter, is applied a carding brush, D², which acts on that part of the skin that is fed forward over the edge of the stretcher bar immediately after the hairs of the next preceding section of the skin have been cut off. The shaft D' of the cutting knife D is rotated from the cam shaft S', by means of an intermediate longitudinal shaft, S², and two sets of miter wheels, D³, D⁴.

[404] "Immediately above the stretcher bar B is arranged a stationary card, E, which is attached to the ends of the stretcher bar B by means of thumb screws. (Not shown in drawings.) *The points of the teeth of the card E are close to but do not touch the surface of the skin, so that the hair and fur are both straightened as the skin is fed forward. The teeth of the card E hold down the fine fur, but permit the stiff hairs to stand up between the teeth, owing to the slow forward movement of the skin, which gives the hairs sufficient time to adjust themselves.

"Below the stretcher bar B is arranged a rotary separating brush, F, which is supported in oscillating arms F', that are guided by pins f, in arc-shape slots f' of fixed guide plates f², as shown clearly in Figs. 1, 2, and 3, the oscillating arms F' being pivoted to horizontally-reciprocating connecting rods F², which are provided with yokes f³, having anti-friction rollers at their rear ends, and acted upon by cams F⁴ on the cam shaft S', the cams being so shaped and timed that the forward and upward motion of the brush F takes place at the proper time.

"The brush F receives rotary motion from two belts, f⁴, which pass over pulleys f⁵ on the shaft S' and the brush shaft, and which are kept taut by weighted idlers f⁶, as shown clearly in Fig. 1.

"The brush F is made of soft bristles and is rotated at a speed of one hundred and fifty revolutions per minute. The soft bristles allow the stiff hairs to stand, while the quick motion of the brush bends the soft hair in downward direction and brushes it below the stretcher bar, so that it can be taken up and held in position by the soft-rubber wipers g of an oscillating guard bar, G, which moves in arc-shaped slots g' of the guide plates C'."

The operation of the machine is thus described.

"The skin is placed in the machine by being attached to the feed rollers and drawn tightly over the edge of the stretcher bar, so as to lie close to the upper and lower surface of the same. The skin is put in in such a manner that the head end is foremost. The stiff hairs in seal skins point

198 U. S.

toward the tail, except at the lower part of the neck and shoulders. These *parts are [405] at the sides of the head end of the skin, as the skin is split open at the under side. At these parts of the skin the hairs point outwardly and backwardly and are the most troublesome to cut or pluck, as they lie down close to the skin when it is drawn over the stretcher bar. A sharp and quick rub over these parts of the skin from the edge toward the center of the skin is therefore necessary, so as to straighten up the hairs and present them to the action of the cutting knives. When the skin is in place, the stationary card E is drawn backward a few times over that part of the skin that is upon the stretcher bar B, so as to card back the fur and hair and produce thereby a parting of the fur at that part of the skin then covering the edge of the stretcher bar. One half of the fur upon that section of skin will, by the parting, be kept above and the other half below the edge of the stretcher bar. This permits the hair upon that section of the skin in front of the edge of the stretcher bar to rise through the fur and keep its place with less trouble than when more fur is acted upon. When the fur and hair have been carded back by the card E, the same is fastened to the stretcher bar by thumb screws. The card is set back from the edge of the stretcher bar to a distance a little more than one half of the length of the fur for the purpose of holding the fur and preventing it from moving forward until the forward motion of the skin takes place. The card at the back of the rotary knife passes then over the skin in front of the edge of the stretcher bar and draws out all the fur and hair on that section, so that the fur and hairs so drawn out assume their natural positions,—that is, the positions which they would have if the skin were drawn over the edge of the stretcher bar without anything for holding back the fur and hair. As soon as the card at the back of the rotary knife has passed over the section of the skin in front of the stretcher bar the rubbers are quickly moved over the same toward the center, whereby the hairs that lie down sidewise are raised and pointed outwardly, causing them to stand upright. The rotary separating brush is then quickly *moved upward and forward and re- [406] volved in front of the skin at the edge of the stretcher bar, so as to separate the fur from the hairs, brushing down the former and leaving the stiff hair standing out. The rotary separating brush is then quickly moved backward and downward, so as to carry with it the separated fur, which is then held in position by the oscillating guard that follows the brush and carries the fur still farther back and holds it in position.

while the vertical knife is raised and shears off, in conjunction with the rotary knife, the forward-projecting hairs, as shown in Fig. 1. The separating brush, after it has accomplished its work, is lowered sufficiently so as not to touch the skin at all, except when it is in front of the working-edge of the stretcher bar. The next section of the skin is now moved by the feed rollers over the edge of the stretcher bar, and the same operation of the parts produced by the next rotation of the driving shaft, and so on until the skin is finished."

The great merit of this invention is said to consist in the use of the brush, applied by means of the mechanism shown, so as to brush down the fur, and permit the long hairs, which should be removed, and which rise at the edge of the stretcher bar, when the pelt is drawn over it, to be acted upon by the knives when the fur is brushed away, so as not to be injured.

In determining the construction to be given to the claim in suit, which is alleged to be infringed, it is necessary to have in mind the nature of this patent, its character as a pioneer invention or otherwise, and the state of the art at the time when the invention was made. It is well settled that a greater degree of liberality and a wider range of equivalents are permitted where the patent is of a pioneer character than when the invention is simply an improvement, may be the last and successful step, in the art theretofore partially developed by other inventors in the same field. Upon this subject it was said by this court (*Westinghouse v. Boyden Power Brake Co.* 170 U. S. 537, 42 L. ed. 1136, 18 Sup. Ct. Rep. 707, quoted with approval in *Singer Mfg. Co. v. Cramer*, 192 U. S. 265, 48 L. ed. 437, 24 Sup. Ct. Rep. 291):

[407] "To what liberality of construction these claims are entitled depends to a certain extent upon the character of the invention, and whether it is what is termed in ordinary parlance a 'pioneer.' This word, although used somewhat loosely, is commonly understood to denote a patent covering a function never before performed, a wholly novel device, or one of such novelty and importance as to mark a distinct step in the progress of the art, as distinguished from a mere improvement or perfection of what had gone before. Most conspicuous examples of such patents are: The one to Howe of the sewing machine; to Morse of the electric telegraph; and to Bell of the telephone. The record in this case would indicate that the same honorable appellation might safely be bestowed upon the original air-brake of Westinghouse, and perhaps also upon his automatic brake. In view of the fact that the invention in this case was never put into

successful operation, and was, to a limited extent, anticipated by the Boyden patent of 1883, it is perhaps an unwarrantable extension of the term to speak of it as a 'pioneer,' although the principle involved subsequently and through improvements upon this invention became one of great value to the public."

While it may be admitted that the Sutton patent was a distinct step in the art, and is entitled to protection as a valuable invention, nevertheless it cannot be said to be a pioneer patent in any just sense. In the English Lake patent of 1881, of which more will be said hereafter, there is doubtless a suggestion of the use of brushes for the purpose of separating the fur from the long hair to be removed. And so in the Covert patent of 1884, which was the subject of consideration by Judge Wheeler in the case of *Cimiotti Unhairing Co. v. Mischke*, 98 Fed. 297. In that case it was said that Covert's patent had been mechanically, but not commercially, successful, and that in lieu of a rotating separating brush, shown in Sutton's patent, Covert used a revolving cloth-covered cylinder, and it was held that this was not equivalent to the separating brush, and Sutton's invention was an advance upon anything theretofore shown. Of [408] the Covert patent Judge Coxe, in the course of an able opinion sustaining the Sutton patent (*Cimiotti Unhairing Co. v. American Unhairing Mach. Co.* 53 C. C. A. 230, 234, 115 Fed. 498, 502), said:

"Covert came nearer than anyone else to a successful machine. He had but one more step to take, and here he became bewildered and went astray. He missed the apparently simple arrangement of the rotary brush, which alone was necessary. It will not do to say that the prior art showed such a brush. Every element of the combination in controversy was unquestionably old, but there was nothing in the prior art to suggest a rotary brush working in the environment shown in the Sutton patent. There was nowhere a rotary brush making a 'part' on a keen-edged stretcher bar and brushing the fur down and out of the reach of the cutting knives during the moment necessary to the removal of the stiff hairs. It is the presence of this element in the combination which produces a new result and entitles its originator to protection."

In the same case, Judge Wallace (p. 237, Fed. p. 508), in his concurring opinion, says:

"I do not think the machine of the Sutton patent a prodigious advance upon that of the prior Covert patent, and I think a higher degree of merit has been attributed to it than it deserves; but it was enough

of an advance to be patentable, and to deserve protection against an infringing machine which appropriates it."

Furthermore, it appears that while the Cimiottis acquired an exclusive license under the Sutton patent in 1888, the same was not put into commercial use until the introduction of coney skins as a substitute for sealskins, about the year 1890. During this time the Cimiottis were unhairing a large number of skins, and preferred to continue to use the air-blast machine of their own invention while paying tribute to Sutton. It was the introduction of the coney industry, in 1890, that gave stimulus to the use of such mechanisms as those used by the Cimiottis and the respondent in this [409] case. We think it fair *to say that this record discloses an invention of merit, entitled to some range of equivalents in determining the question of infringement, but it is not one of those broad, initiative inventions where original thought has been embodied in a practical mechanism, which the courts have been ever zealous to protect, and to which a wide range of equivalents has been accorded.

Due weight is given to the Sutton patent when it is given credit for dispensing with the plate which Covert had in addition to the brush, and which he supposed would carry down the fur away from the cutting mechanism, but which Sutton has accomplished in giving, in a measure, at least, this added function to the brush of not only parting the fur, but carrying it down and away in preparation for the clipping by the knives. Any one who accomplishes the same purpose by substantially the same mechanism, using the elements claimed in Sutton's patent, may be held to be an infringer.

Sutton has taken the step which marks the difference between a successfully operating machine and one which stops short of that point, and that advance entitles him to the protection of a patent.

The argument here is confined, as to the alleged infringement, to the eighth claim of the Sutton patent, which is as follows:

"8. The combination of a fixed stretcher bar, means for intermittently feeding the skin over the same, a stationary card above the stretcher bar, a rotary separating brush below the same, and mechanism, substantially as described, whereby the rotary brush is moved upward and forward into a position in front of the stretcher bar, substantially as set forth."

The elements of this claim are five in number: 1, a fixed stretcher bar; 2, means for intermittently feeding the skin over the same; 3, a stationary card above the stretcher bar; 4, a rotary separating brush

below the same; 5, mechanism whereby the rotary brush is moved upward and forward into a position in front of the stretcher bar, "substantially as set forth."

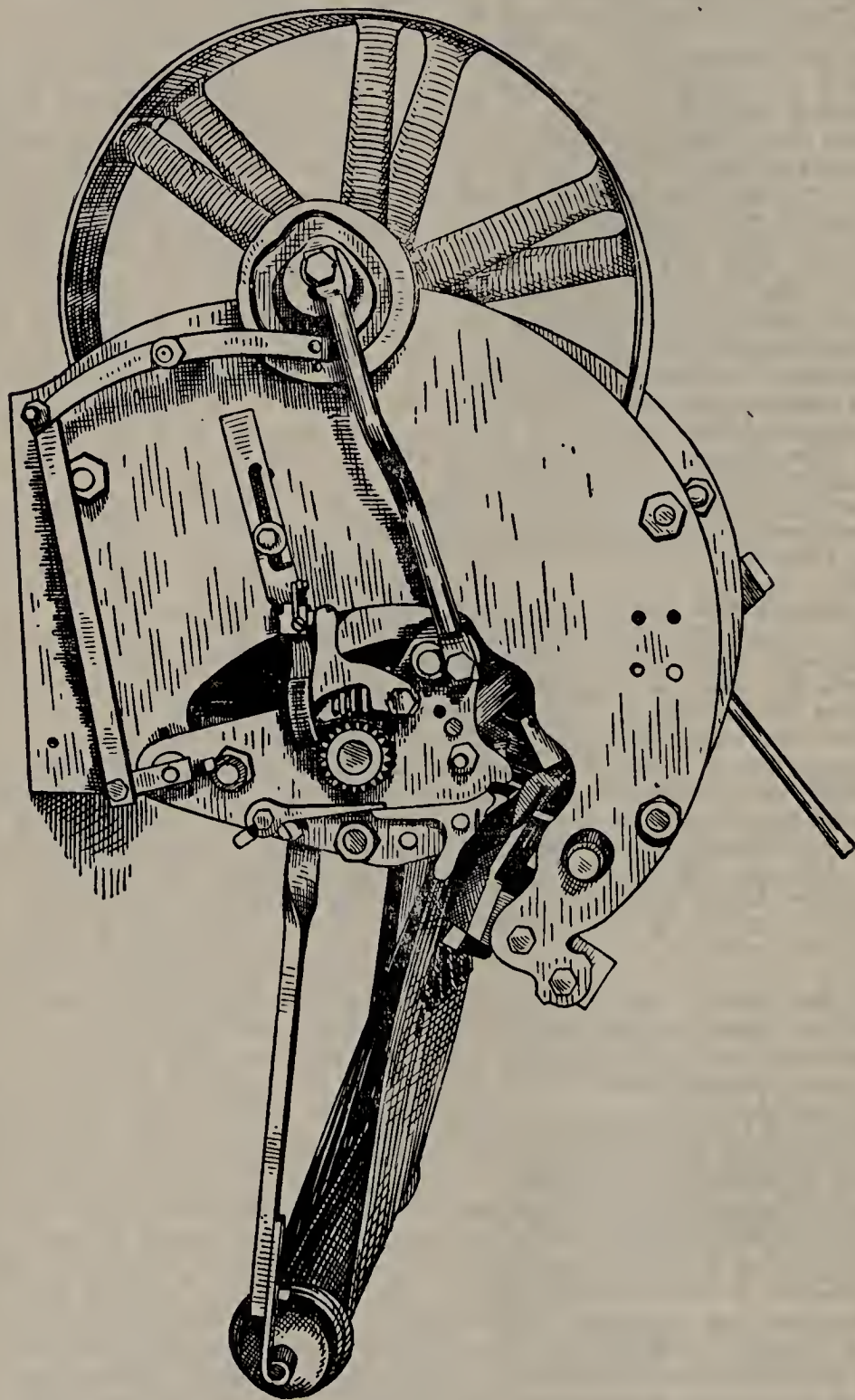
*In making his claim the inventor is at [410] liberty to choose his own form of expression, and while the courts may construe the same in view of the specifications and the state of the art, they may not add to or detract from the claim. And it is equally true that, as the inventor is required to enumerate the elements of his claim, no one is an infringer of a combination claim unless he uses all the elements thereof. *Shepard v. Carrigan*, 116 U. S. 593-597, 29 L. ed. 723, 724, 6 Sup. Ct. Rep. 493; *Sutler v. Robinson*, 119 U. S. 530-541, 30 L. ed. 492-495, 7 Sup. Ct. Rep. 376; *McClain v. Ortmyer*, 141 U. S. 419-425, 35 L. ed. 800-802, 12 Sup. Ct. Rep. 76; *Wright v. Yuengling*, 155 U. S. 47, 39 L. ed. 64, 15 Sup. Ct. Rep. 1; *Black Diamond Coal Min. Co. v. Excelsior Coal Co.* 156 U. S. 611-617, 39 L. ed. 553-555, 15 Sup. Ct. Rep. 482; Walker, Patents, § 349. This principle is particularly important when we come to consider the "stationary card above the stretcher bar,"—an element of the eighth claim.

The anticipating mechanism set up in this case is the so-called English Lake patent of October, 1881. This patent has been the subject of much adverse comment in the cases involving a consideration of it. And it appears to have lapsed for nonpayment of taxes in June, 1885, and not to have been a successful machine. It may be the fact that the patent is not distinctly worded, and that the drawing and specifications are somewhat confused. It does appear, however, without contradiction in the record, that the machine now used by the respondents was made in a large measure from the drawings of the Lake patent. Mischke, one of the respondents, was put upon the stand by the petitioners, and testified that he made the changes in a short time from the Lake patent, which resulted in the alleged infringing machine. The Lake patent showed two brushes, whereas the respondents' machine has dispensed with one and changed the position of the other. He also admits to have changed the position of the cam and shortened the crank arm as shown in the Lake machine. It seems to be the position of the petitioners' expert that Mischke made the changes in the Lake patent necessary to convert it into an operative machine by adopting the controlling features of the Sutton patent. But whatever are the defects of the *Lake patent, the ques- [411] tion here is, Does the machine of the respondents infringe the eighth claim of the Sutton patent? One of the respondents' machines is in evidence, and we have care-

fully examined it. Its general outline may be seen in the annexed copy of the photograph in evidence:

the hair, carried upwardly, to be acted upon by the cutting knives. The reciprocating motion of the stretcher bar from the brush

[412]



[413] *The operation of the alleged infringing machine is such that when the power is applied for moving the stretcher bar, it is carried forward to the revolving brush, and after the brush has separated the fur from the knives is produced by the action of the crank (operating with the cam) on the main shaft, as shown in the photograph. At the same time the mechanism for feeding the machine is in operation, actuated by

the same application of power. This mechanism (shown in the photograph at the side of the respondents' machine) consists of the pawl (attached to the main frame) and the ratchet wheel (attached to the moving frame), turning when the pawl engages therein, and acting with the worm gearing shown, to turn the roll which is part of the feeding mechanism. The operation is such that when the stretcher bar is carried from the knives to the brush in the return motion, the action of the pawl upon the ratchet wheel, with the worm gearing, causes the roll to turn and the pelt to be carried forward, the extent of the feed being regulated by the adjustment of the pawl. By this means the necessity of an independently acting mechanism for the feeding apparatus is avoided and the operation simplified.

The Sutton device, as we have seen, has a stationary stretcher bar; the respondents' mechanism has a movable stretcher bar. The fixed stretcher bar, about which the other mechanism acts, is made a distinct feature of the eighth claim. It is not present in the respondents' mechanism, unless it is true, as argued, that the one is substantially the equivalent of the other. It is said to make no difference whether the knife and brush are carried to the stretcher bar or the stretcher bar is carried to the knife and brush. This might be true if the mechanisms were substantially the same, and there was a mere transposition or substitution of parts. Such changes would amount to an infringement. But in determining infringement we are entitled to look at the

[414] practical operation *of the machines. The other elements of the eighth claim are to be used in connection with the apparatus shown in the Sutton patent, substantially as described. If the device of the respondents shows a substantially different mode of operation, even though the result of the operation of the machine remains the same, infringement is avoided. *Brooks v. Fiske*, 15 How. 212, 221, 14 L. ed. 665, 669; *Union Steam-Pump Co. v. Battle Creek Steam-Pump Co.* 43 C. C. A. 560, 104 Fed. 337, 343. In the latter case Judge Severens, who delivered the opinion of the court, after recognizing the doctrine that mere change of the location of parts, if the parts still perform the same function, did not take the structure without the bounds of the patent, said:

"If, however, such changes of size, form, or location effect a change in the principle or mode of operation such as breaks up the relation and co-operation of the parts, this results in such a change in the means as displaces the conception of the inventor, and takes the new structure outside of the patent."

198 U. S.

And see *Kokomo Fence Co. v. Kitselman*, 189 U. S. 8, 47 L. ed. 689, 23 Sup. Ct. Rep. 521, in which case it was held that where the patent does not embody a primary invention, but only an improvement on the prior art, and the defendant's machines can be differentiated, the charge of infringement is not sustained.

In the case under consideration the respondents have dispensed with the fixed stretcher bar and have adopted a movable one, operated by an entirely different mechanism, capable of accomplishing a much larger amount of work within a given time. In the circuit court of appeals it was said to result in a double working capacity and product. It does not seem to us to be a mere transposition or substitution of parts; in the Sutton patent, the stretcher bar being stationary, there are several mechanisms used for operating the movable brushes and the clipping knives; a different mechanism is used for operating the different parts which are to be brought to the fixed stretcher bar in carrying out the operation intended. In the respondents' machine the same application of power moves the stretcher bar and, by the co-operation of the feeding apparatus *as above outlined, feeds the ma-[415]chine by bringing the pelt forward, at the same time actuating the knives, in practically one operation. This seems to us to be a distinct mechanical departure, as well as an advance upon the Sutton machine, when considered in view of the results accomplished.

Moreover, if infringement could be otherwise sustained, the decree must be affirmed, because the eighth claim has made the stationary card, shown at "E" in the drawing, an essential part of the mechanism described. It may be that this card is unnecessary, and that it was dropped from the later patents issued to Sutton, but it is in this claim, and as was said by Judge Wallace in his dissenting opinion in *Cimiotti Unhairing Co. v. Nearseal Unhairing Co.* 53 C. C. A. 161, 115 Fed. 507, 509, "the patent industriously makes the stationary card, substantially as described, an element of the claim." Of this card the inventor said:

"Immediately above the stretcher bar B is arranged a stationary card, E, which is attached to the ends of the stretcher bar B by means of thumb-screws. (Not shown in the drawings.) The points of the teeth of the card E are close to but do not touch the surface of the skin, so that the hair and fur are both straightened as the skin is fed forward. The teeth of the card E hold down the fine fur, but permit the stiff hairs to stand up between the teeth, owing to the slow forward movement of the skin, which

1107

gives the hairs sufficient time to so adjust themselves."

He also says: "The card is set back from the edge of the stretcher bar to a distance a little more than one half of the length of the fur, for the purpose of holding the fur and preventing it from moving forward until the forward motion of the skin takes place."

[416] While it is said that the card does not touch the surface of the skin so that the hair and fur are both straightened as the skin is fed forward, it is true that the teeth of the card in some measure hold down the fine fur, and it is insisted that the mechanical equivalent of this card is found in respondents' machine in the compression bar, which also acts to hold down the fur before it is carried to the separating brush. But this bar has no carding feature to it, and cannot be made to perform the functions of a card; it has no separate teeth, and is not a card or the mechanical equivalent of one shown and described and made a part of the eighth claim.

We think the Circuit Court of Appeals was right in the conclusion that the mechanism of the respondents was so materially different from the Sutton patent as to avoid the infringement alleged; and that an essential element of the eighth claim of the Sutton patent was not used by the respondents.

Decree affirmed.

A. H. LEONARD, George R. Wilson, R. N. Smith, *et. al.*, *Plffs. in Err.*,
v.

VICKSBURG, SHREVEPORT, & PACIFIC RAILROAD COMPANY, J. H. McCormick, Receiver, and C. C. Harvey.

(See S. C. Reporter's ed. 416-423.)

Error to state court—Federal question.

1. The presence of a question respecting the construction and application of the congressional legislation as to swamp and overflowed lands gives no jurisdiction to the Supreme

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Kipley v. Illinois*, 42 L. ed. U. S. 998; and *Re Buchanan*, 39 L. ed. U. S. 884.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to *Apex Transp. Co. v. Garbade*, 62 L. R. A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court

Court of the United States to review the judgment of a state court in an action of ejectment, holding defendants' title invalid on the independent ground of noncompliance with an act of the state legislature.

2. A Federal question may have been so explicitly foreclosed by prior decisions as to afford no basis for a writ of error from the Supreme Court of the United States to a state court.
3. A decision of a state court that defendants in ejectment, who had successfully insisted in a prior suit in a Federal court that only a portion of a tract of land was in issue, cannot invoke the rule that a judgment determining the ownership of a portion of a tract is conclusive between the same parties, claiming under the same titles, as to the ownership of the entire tract, is not reviewable in the Supreme Court of the United States, as denying any Federal rights asserted under the Federal court's judgment.

[No. 233.]

Argued April 26, 27, 1905. Decided May 29, 1905.

IN ERROR to the Supreme Court of the State of Louisiana to review a judgment which affirmed a judgment of the First Judicial District Court of the Parish of Caddo, in that state, in favor of plaintiffs in an action of ejectment. *Dismissed* for want of jurisdiction.

See same case below, 112 La. 51, 36 So. 223.

Statement by Mr. Chief Justice Fuller:

This was an action of ejectment brought, in 1896, by the Vicksburg, Shreveport, & Pacific Railroad Company in the first judicial district court, Caddo parish, Louisiana, against certain possessors, for whom Smith, Leonard, and others were substituted as defendants, to recover 178.80 acres of land in that parish, less 35.18 acres, theretofore recovered by Smith and others in another action.

Defendants, both by plea and answer, set up that they, being either the heirs of W. W. Smith, or parties privy, brought suit in the circuit court of the United States for the western district of Louisiana against [417]

of the United States—see note to *Mutual L. Ins. Co. v. McGrew*, 63 L. R. A. 33.

On what the record must show respecting the presentation and decision of a Federal question in order to confer jurisdiction on the Supreme Court of the United States of a writ of error to a state court—see note to *Hooker v. Los Angeles*, 63 L. R. A. 471.

As to what is the record for this purpose—see note to *Horne for Incurables v. New York*, 63 L. R. A. 329.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to *Missouri ex rel. Hill v. Dockery*, 63 L. R. A. 571.

one Turner, asserting ownership to the entire tract, and praying to be restored to possession of about 40 acres thereof, alleged to be illegally held by Turner. That Turner disclaimed title, and averred that he was a tenant of the Vicksburg, Shreveport, & Pacific Railroad Company, and thereupon the railroad company answered, claiming possession and ownership of the entire tract known as Silver Lake.

That a judgment was rendered in said suit in favor of the heirs of W. W. Smith (in 1886), decreeing them to be the owners of the parcel of land possession of which was sought in that suit, and they were put in possession of the same; and that the judgment was final, and had the force and effect of *res judicata*, as against all parties to that suit, and as against the claims of plaintiffs in this suit.

The copy of complaint in *Smith v. Turner*, attached, showed that diversity of citizenship was set up as the ground of jurisdiction.

And answering, defendants averred that the state of Louisiana sold to W. W. Smith, on the 14th of May, 1853, the tract of land claimed by plaintiff, for the price of \$1.25 per acre, which was paid into the treasury of the state by Smith, and was never returned to him; that, on the 24th of February, 1855, the state of Louisiana, through its constituted authorities, issued a patent to said tract of land to Smith.

That the state of Louisiana claimed and acquired the said tract of land as swamp and overflowed land, granted to the state of Louisiana by the acts of Congress of 1849 and 1850, known as the swamp-land grants, and that the state sold the lands to Smith as swamp and overflowed lands.

That all sales of land in Louisiana made as swamp and overflowed land, whether made by the United States or by the state of Louisiana, and whether the land sold was of that character or not, were confirmed by the act of Congress approved March 2, 1855, entitled "An Act for the Relief of Purchasers and Locators of Swamp and Overflowed Lands." [10 Stat. at L. 634, chap. 147.]

[418] *That that act of Congress was extended so as to protect sales after its passage, by the act of Congress of March 3, 1857 [11 Stat. at L. 251, chap. 117, U. S. Comp. Stat. 1901, p. 1588], to confirm all selections of swamp and overflowed lands by the several states under the acts of Congress of 1849 and 1850.

That the act of March 2, 1855, confirmed the title of the said W. W. Smith to the tract of land, whether it belonged to the state of Louisiana, under the swamp-land grant of Congress, or whether it belonged

to the United States, and that Smith thus acquired title to the land, both by purchase from the state of Louisiana and by confirmation of Congress.

Thereupon J. H. McCormick, receiver for the Vicksburg, Shreveport, & Pacific Railroad Company, filed his plea and exception of *res judicata* to defendants' answer and plea therein of ownership of the said lands, averring that, in a suit entitled *State of Louisiana v. W. W. Smith et al.*, brought in 1857, in the district court of Caddo parish, Louisiana, defendant Smith put at issue the validity and legality of his title to the land, and, upon final hearing, a judgment was rendered in that suit decreeing the certificate and patent under which Smith claimed to be null and void, and directing their cancelation, and that they be delivered to the state of Louisiana. That defendant appealed to the supreme court, which appeal was thereafter dismissed; and that said judgment is *res judicata*, and a perpetual bar to defendants' rights of action.

The Caddo district court, Watkins, J., found that, on the trial of the cause of *Smith v. Turner*, in the circuit court, in which case recovery of only 35.18 acres out of the tract of 178.80 acres, known as "Silver Lake," was sought, though title to the entire tract was asserted on one side, and denied on the other, the railroad company had offered to prove the value of the whole tract at \$10,000, but that Smith had objected on the ground that only the possession of 35.18 acres was in issue, and the circuit court had, therefore, declined to admit the evidence, and that, the case having gone to judgment, a writ of error from the Supreme Court of the United States was dismissed on motion of defendants in *error, because the possession of the 35.18[419] acres was not worth over \$2,000. 135 U. S. 195, 34 L. ed. 95, 10 Sup. Ct. Rep. 728.

The district court held that as the same parties, who now contended that the judgment in *Smith v. Turner* constituted the thing adjudged as to the entire tract, had successfully insisted in that case that nothing was therein in issue except the right of possession of 35.18 acres, the court was not required to adjudge that the legal effect of that judgment extended to cover the entire tract. As to the judgment in favor of the state, in *State v. Smith*, the court recapitulated the facts, finding that the return of the money paid by Smith to obtain the patent was lawfully tendered December 3, 1857; the grounds on which the judgment proceeded; that this judgment was rendered November 24, 1860, in favor of the state, canceling the Smith entry; that Smith prosecuted an appeal, which, after

delay by reason of the Civil War, was dismissed by the state supreme court, August 11, 1869; and that because of defective certificates, the circuit court was led to believe, in *Smith v. Turner*, that the case of *State v. Smith* had not been disposed of. The district court further found, for reasons given, that the title of the railroad company in and to the land was perfect. The court gave judgment in favor of the railroad company, and the case was carried to the supreme court of Louisiana. 112 La. 51, 36 So. 223.

Dealing with defendants' pleas of *res judicata* and estoppel, the supreme court held that the general rule that a judgment as to the ownership of a portion of a tract of land is conclusive between the same parties, claiming under the same titles, as to the ownership of the whole tract, should not be applied in the circumstances detailed, which, in its opinion, operated to confine the effect of the judgment to the particular parcel for which recovery was sought. Those pleas were overruled as to all of the tract except 35.18 acres, but the court sustained plaintiff's plea of *res judicata* predicated on the judgment in *State v. Smith*, and thus continued:

[420] "This conclusion disposes of the contention that W. W. *Smith bought the land in question as swamp or overflowed land, since the state, in the suit just referred to, distinctly alleged that it was not so sold, and its position was sustained by the judgment therein rendered. But if it had been sold as land acquired under the acts of Congress of 1849 and 1850 (9 Stat. at L. 352, chap. 87, and 9 Stat. at L. 519, chap. 84), the result would be the same, since it belonged to that class of land which, under the act of the general assembly, No. 247, p. 306, of 1855, could only have been sold after having been surveyed; and one of the causes of action set up by the state in its suit against Smith, and maintained by the judgment therein rendered, was that it had not been surveyed.

"Finally, it is argued that, under the acts of Congress of 1849 and 1850, title in *præsenti* to all swamp and overflowed lands within its limits vested in the state of Louisiana without regard to selection or approval; that the land in question was of that character; and that the state acquired it under those acts, and hence that the United States could not have granted, and the state (or railroad company) could not have acquired, it under the act of June 3, 1856 (11 Stat. at L. 18, chap. 42).

"The acts of 1849 and 1850 were clearly not intended to operate against the will of the state. On the contrary, they distinctly left it to the state to select, subject to the

approval of the Secretary of the Interior, the lands which it might consider within the terms of the grant.

"Whether the state might have selected the tract in question, and whether such selection might or would have been approved, need not be here considered. In point of fact, not only was the selection not made and the approval not given, but the grantor and the grantee concurred in the view that the tract fell within the terms of the act of 1856, and was granted to and acquired by the state of Louisiana, as the trustee of the V., S. & P. R. R. Co., for the purpose of aiding in the construction of the railroad which that company was to build."

And the court quoted the headnotes of *Rogers Locomotive *Mach. Works v. American Emigrant Co.* 164 U. S. 559, 41 L. ed. 552, 17 Sup. Ct. Rep. 188, to the effect that the swamp-land act of 1850 gave an inchoate title to the state; that the identification of the lands by the Secretary of the Interior was necessary before the title became perfect; that the certificate of the Secretary, in 1858, that certain lands inured to the state under the railroad act of 1856, was a decision that they were not embraced by the swamp-land act of 1850; that the acceptance by the state of lands certified to it by the Secretary is conclusive upon the state, and that a contract with a county for swamp and overflowed lands gives no better right than the county had to the lands which had been previously certified to the state.

The court then stated that, apart from these defenses, there appeared to be no objection to plaintiff's title.

The judgment of the district court was affirmed, and this writ of error allowed. Motions to dismiss or affirm were submitted and their consideration postponed to the hearing on the merits.

Mr. William P. Hall argued the cause, and, with **Messrs. A. H. Leonard** and **E. W. Sutherland**, filed a brief for plaintiffs in error.

Messrs. Harry H. Hall and **Frank P. Stubbs** argued the cause, and, with **Mr. W. H. Wise**, filed a brief for defendants in error.

Mr. Chief Justice Fuller delivered the opinion of the court:

We assume from the errors assigned, and no other grounds are indicated by the record, that Federal questions in two aspects are relied on to justify this writ of error.

First. The construction and application of the acts of Congress of 1849, 1850, and 1856, taken with other acts referred to.

But as to this it should be pointed out

in the first place that the state court adjudged the Smith title invalid on the independent ground, among others, of noncompliance with an *act of the general assembly of Louisiana; and, in the second place, that the Federal question thus suggested had been so explicitly foreclosed by previous decisions as to leave no room for real controversy. *Rogers Locomotive Mach. Works v. American Emigrant Co.* 164 U. S. 559, 41 L. ed. 552, 17 Sup. Ct. Rep. 188; *Michigan Land & Lumber Co. v. Rust*, 168 U. S. 592, 42 L. ed. 592, 18 Sup. Ct. Rep. 208; *Equitable Life Assur. Soc. v. Brown*, 187 U. S. 308, 47 L. ed. 190, 23 Sup. Ct. Rep. 123.

Second. That the supreme court of Louisiana, by its judgment in this case, denied a right specially set up or claimed under the Constitution of the United States, or an authority exercised under the United States; that is to say, that such a right was asserted, and was denied by the state supreme court, in declining to give collateral effect to a judgment, under certain circumstances, rendered by a court of the United States in Louisiana.

We inquire, then, whether, when the state court, while holding the defense good as to the 35.18 acres by reason of the judgment in *Smith v. Turner*, held that, in the circumstances detailed, defendants could not be permitted to insist that the thing adjudged in that case determined the title to the entire tract, that ruling presented a Federal question.

Generally speaking, questions of this sort are not Federal questions. In *Pierce v. Somerset R. Co.* 171 U. S. 641, 648, 43 L. ed. 316, 319, 19 Sup. Ct. Rep. 64, 66, we said: "A person may, by his acts or omission to act, waive a right which he might otherwise have under the Constitution of the United States as well as under a statute, and the question whether he has or has not lost such right by his failure to act or by his action is not a Federal one." *Eustis v. Bolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; *Rutland R. Co. v. Central Vermont R. Co.* 159 U. S. 630, 40 L. ed. 284, 16 Sup. Ct. Rep. 113, and *Seneca Nation of Indians v. Christy*, 162 U. S. 283, 40 L. ed. 970, 16 Sup. Ct. Rep. 828, were cited.

In *Eustis v. Bolles*, the state court held that, by accepting his dividend under insolvency proceedings, Eustis had waived his legal right to claim that the discharge obtained under subsequent laws impaired the obligation of a contract, and this court held that, whether that view of the case was sound or not,*it was not a Federal question, and therefore not within the province of this court to inquire into.

In *Seneca Nation of Indians v. Christy*, it was held by the state court that even if

there were a right of recovery on the part of plaintiffs in error because a certain grant was in contravention of the Constitution of the United States, yet that such recovery was barred by the New York statute of limitations.

In *Gillis v. Stinchfield*, 159 U. S. 658, 40 L. ed. 295, 16 Sup. Ct. Rep. 131, and *Speed v. McCarthy*, 181 U. S. 269, 45 L. ed. 855, 21 Sup. Ct. Rep. 613, it was ruled that the application of the doctrine of estoppel to mining locations did not raise Federal questions.

In the present case, the supreme court of Louisiana applied the doctrine which forbids parties from assuming inconsistent positions in judicial proceedings.

In its view, Smith, having insisted, in *Smith v. Turner*, that, notwithstanding the railroad company had come in as defendant, and each party asserted title to the entire tract, the title to the 35.18 acres was alone in issue, and that the value of the whole tract was, therefore, not involved, and the railroad company having been thereby deprived of its writ of error, must be confined in this suit to the specific recovery obtained in that, so far as the effect of that judgment was concerned. That was a question of estoppel or quasi-estoppel, and not a Federal question. Whether it was sound or not, it is not for us to inquire. It was broad enough to support the judgment without reference to any Federal question.

Writ of error dismissed.

*BOARD OF TRADE OF CITY OF CHICAGO, Appt.,
v.

HAMMOND ELEVATOR COMPANY and
Western Union Telegraph Company.

(See S. C. Reporter's ed. 424-442.)

Direct appeal from Federal circuit court—when jurisdiction is in issue—writ and process—service on agents of foreign corporation.

1. The question of the validity of the service of process of a Federal circuit court on certain persons as the agents of a foreign corporation involves the jurisdiction of that court so as to sustain a direct appeal to the Supreme Court of the United States under the act of March 3, 1891 (26 Stat. at L. 827,

NOTE.—On direct review in the Federal Supreme Court of judgments or decrees of circuit and district courts—see note to *Gwin v. United States*, 46 L. ed. U. S. 741.

On service of process on foreign corporations—see notes to *Foster v. Charles Betcher Lumber Co.* 23 L. R. A. 490; *Eldred v. American Palace Car Co.* 45 C. C. A. 3.

chap. 517, U. S. Comp. Stat. 1901, p. 549), § 5, from a decree dismissing the bill for lack of valid service.

2. Local "correspondents" of a foreign corporation which furnishes them with market quotations to enable them to take orders from their customers for trades in shares of stock may properly be treated as its agents for the purpose of service of process, although their relations to the corporation, as between themselves, are fixed by formal contract in which agency is expressly disclaimed, where the method of doing business shows that the corporation is the party really interested in the transactions, and the correspondents are compensated by a commission charged the customer for their services.

[No. 215.]

Argued April 13, 1905. Decided May 29, 1905.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois to review a decree dismissing a suit against a foreign corporation for the lack of service of process. *Reversed* and remanded for further proceedings.

Statement by Mr. Justice **Brown**:

This is an appeal directly to this court from a decree of the circuit court dismissing, for want of jurisdiction, a bill filed by the board of trade of the city of Chicago, an Illinois corporation, against the Hammond Elevator Company, a Delaware corporation, and a citizen of that state.

The basis of the bill was that the appellant had a property right in the quotation of prices in transactions made within its exchange; that the defendant had entered into a conspiracy with others to steal and was using such quotations, and prayed an injunction. A subpoena was issued in the usual form, requiring the Hammond Elevator Company to appear and answer the bill, and was afterwards returned by the marshal as

[425] *served within the northern district of Illinois by delivering a copy of the same "to Albert M. Babb, agent for the Hammond Elevator Company at Peoria," and also "by reading the same to and within the presence and hearing of John L. Dickes, a member of the firm of Battle & Dickes, agents of said company," as well as upon Battle. On the day following the service the elevator company entered a special appearance, and moved the court to set aside the service of the subpoena by the marshal, on the ground that the return was untrue in fact and insufficient in law, and prayed judgment of the court whether it should be compelled to appear or plead to the bill of complaint, because it had not been served with process, and because the defendant was not, at the date of filing the bill, or at any other time,

within the state of Illinois; that it is not a resident of such state, but is a Delaware corporation, and its principal place of business is outside the state of Illinois.

This motion of the elevator company was referred to a master to take testimony, and report the same with his conclusions of law. The master filed his report in the circuit court, recommending that the motion of the defendant to quash the service of process be sustained; whereupon counsel for plaintiff stated in open court that he was unable to make any other or different service upon the defendant, and it was ordered that the bill be dismissed as to the Hammond Elevator Company. The bill was also dismissed as to the Western Union Telegraph Company, which had been made a party by an amendment to the original bill. Thereupon appellant appealed to this court upon the same question of jurisdiction, praying that the appeal be allowed and said question be certified, which was done.

Mr. Henry S. Robbins argued the cause and filed a brief for appellant:

"Jurisdiction" is a word of different meanings. In one sense a court of chancery has no jurisdiction where there is a remedy at law; but, as under the Federal judicial system the same court has jurisdiction of equity and common-law cases, this objection really is, not that the court, as such, has no jurisdiction at all, but that the suit is on the wrong side of the court. So, a court is said to be without jurisdiction, where another court has previously taken jurisdiction.

But in these cases the court is required to decide whether, in the one case, the remedy at law is adequate, and, in the other, which court did first get jurisdiction; and its decision binds the parties.

In these and like cases no question of jurisdiction is involved within the meaning of § 5 of the act of March 3, 1891.

Smith v. McKay, 161 U. S. 355, 40 L. ed. 731, 16 Sup. Ct. Rep. 490; *Blythe v. Hinckley*, 173 U. S. 501, 43 L. ed. 783, 19 Sup. Ct. Rep. 497; *Illinois C. R. Co. v. Adams*, 180 U. S. 28, 45 L. ed. 410, 21 Sup. Ct. Rep. 251; *Bache v. Hunt*, 193 U. S. 523, 48 L. ed. 774, 24 Sup. Ct. Rep. 547; *Louisville Trust Co. v. Knott*, 191 U. S. 225, 48 L. ed. 159, 24 Sup. Ct. Rep. 119.

In a more restricted sense, jurisdiction means the power to decide. Without this any judgment is subject to direct or collateral attack as an absolute nullity. Jurisdiction of this kind is two fold: (1) Of the subject-matter, and (2) of the person. If either is wanting there is no jurisdiction.

It is in this sense that "jurisdiction" is used in § 5.

O'Neal v. United States, 190 U. S. 36, 47 L. ed. 945, 23 Sup. Ct. Rep. 776.

This court has uniformly upheld its jurisdiction to review upon direct appeal or writ of error, under § 5, any question of jurisdiction,—whether of the subject-matter (*Wetmore v. Rymer*, 169 U. S. 115, 42 L. ed. 682, 18 Sup. Ct. Rep. 293; *Huntington v. Laidley*, 176 U. S. 668, 44 L. ed. 630, 20 Sup. Ct. Rep. 526; *Interior Constr. & Improv. Co. v. Gibney*, 160 U. S. 217, 40 L. ed. 401, 16 Sup. Ct. Rep. 272) or of the person of the defendant (*Shepard v. Adams*, 168 U. S. 618, 42 L. ed. 602, 18 Sup. Ct. Rep. 214; *Societe Fonciere v. Milliken*, 135 U. S. 304, 34 L. ed. 208, 10 Sup. Ct. Rep. 823; *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 47 L. ed. 1113, 23 Sup. Ct. Rep. 728; *Goldey v. Morning News*, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559).

Conversely, the circuit courts of appeals decline to entertain such cases.

St. Louis Cotton Compress Co. v. American Cotton Co. 60 C. C. A. 80, 125 Fed. 196.

Undoubtedly Congress, in requiring the question of jurisdiction to be certified, realized that in some cases—where, for instance, a want of jurisdiction and a defense to the merits were simultaneously pleaded, and there was a general judgment for defendant—it would, without some kind of a certificate, be difficult to determine when the question of jurisdiction had really been the controlling issue. To meet this difficulty the statute exacts from the trial judge a certificate of the fact that the case has turned on the question of jurisdiction.

Hence this court has not only reviewed jurisdictional cases involving questions of fact and of mixed law and fact (*Wetmore v. Rymer*, 169 U. S. 115, 42 L. ed. 682, 18 Sup. Ct. Rep. 293; *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 47 L. ed. 1113, 23 Sup. Ct. Rep. 728; *Geer v. Mathieson Alkali Works*, 190 U. S. 428, 47 L. ed. 1122, 23 Sup. Ct. Rep. 807), but has also held that there need not in some cases be any certificate at all, but that the question may appear either by the terms of the decree appealed from and of the order allowing the appeal, or by a separate certificate of the court below; and that where the judgment is for defendant upon a preliminary defense of a want of jurisdiction,—the question of jurisdiction being thus the only one involved,—and the appeal is allowed upon this question alone, no certificate is necessary (*United States v. Jahn*, 155 U. S. 109, 39 L. ed. 87, 15 Sup. Ct. Rep. 39; *Re Lehigh Min. & Mfg. Co.* 156 U. S. 322, 39 L. ed. 438, 15 Sup. Ct. Rep. 375; *Shields v. Coleman*, 157 U. S. 168, 39 L. ed. 660, 15 Sup. Ct. Rep. 570; *Interior Constr. & 198 U. S.*

Improv. Co. v. Gibney, 160 U. S. 217, 40 L. ed. 401, 16 Sup. Ct. Rep. 272; *Smith v. McKay*, 161 U. S. 355, 40 L. ed. 731, 16 Sup. Ct. Rep. 490; *Huntington v. Laidley*, 176 U. S. 668, 44 L. ed. 630, 20 Sup. Ct. Rep. 526; *Excelsior Wooden Pipe Co. v. Pacific Bridge Co.* 185 U. S. 282, 46 L. ed. 910, 22 Sup. Ct. Rep. 681; *Arkansas v. Schlierholz*, 179 U. S. 598, 45 L. ed. 335, 21 Sup. Ct. Rep. 229; *Courtney v. Pradt*, 196 U. S. 89, ante, 398, 25 Sup. Ct. Rep. 208).

In determining the validity of the service of process the question is, What is the real relation of these parties to each other and to the business?

Italian-Swiss Agri. Colony v. Pease, 194 Ill. 98, 62 N. E. 317; *Connecticut Mut. L. Ins. Co. v. Spratley*, 172 U. S. 602, 615, 43 L. ed. 569, 573, 19 Sup. Ct. Rep. 308.

Whether these correspondents are such agents as may be served is to be determined by all the facts and circumstances of the case, and not by the mere fact that none of them had been named as such agent.

Norton v. Atchison, T. & S. F. R. Co. 61 Fed. 620.

The so-called commission is not in reality one.

Smith v. Western U. Teleg. Co. 84 Ky. 664, 2 S. W. 483; *Central Stock & Grain Exch. v. Board of Trade*, 196 Ill. 396, 63 N. E. 740.

The Hammond company charges all its traders—as do all bucket-shops—a regular percentage by way of advantage upon its trades, and in order to compensate these agents who gather business for it in Illinois, for their services, it pays them, instead of a regular salary, four fifths of its “commissions” on the business they send, out of which they are required to pay their office expenses. They are no less agents of the Hammond company because their compensation is graduated upon the amount of business they gather, instead of being a fixed salary.

Cone v. Tuscaloosa Mfg. Co. 76 Fed. 891.

By availing itself of the privilege of doing business in a state, a foreign corporation impliedly consents to be there sued and served in the mode provided by the state statute, provided this does not violate the fundamental principle that requires notice of a suit before a party can be bound by it.

St. Clair v. Cox, 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 354; *Baltimore & O. R. Co. v. Harris*, 12 Wall. 65, 81, 20 L. ed. 354, 358; *Ex parte Schollenberger*, 96 U. S. 369, 24 L. ed. 853; *Merchants' Mfg. Co. v. Grand Trunk R. Co.* 21 Blatchf. 109, 13 Fed. 358.

In an action at law in the Federal court in Illinois, a service according to this statute, upon any foreign corporation doing

business within the district, would be sufficient.

Amy v. Watertown, 130 U. S. 301, 32 L. ed. 946, 9 Sup. Ct. Rep. 530.

No sound reason can be suggested why this should not apply to all suits in the Federal court.

Ex parte Schollenberger, 96 U. S. 376, 24 L. ed. 854.

It is held in admiralty suits—which, like equity cases, are not within the statute requiring conformity with the state practice—that service upon a foreign corporation under the state law is sufficient.

Re Louisville Underwriters, 134 U. S. 488, 33 L. ed. 991, 10 Sup. Ct. Rep. 587; *Doe v. Springfield Boiler & Mfg. Co.* 44 C. C. A. 128, 104 Fed. 684.

In chancery cases, service of process under the state law is sustained.

Connecticut Mut. L. Ins. Co. v. Spratley, 172 U. S. 602, 43 L. ed. 569, 19 Sup. Ct. Rep. 308; *Evansville Courier Co. v. United Press*, 74 Fed. 918; *McCord Lumber Co. v. Doyle*, 38 C. C. A. 34, 97 Fed. 22.

The weight of authority is that a corporation which merely solicits business or orders for merchandise, as commercial houses do through drummers, is not doing business within a state so as to warrant service of process upon the solicitor. But the only province of the drummer is to take orders from the customer and mail them to his house for its acceptance. He neither receives the acceptance of the order, nor delivers it to the customer, nor collects or disburses the moneys involved in the transactions. Nor does he maintain an office in the state.

But the rule is otherwise, as decided by Judge Lacombe, in *Cone v. Tuscaloosa Mfg. Co.* 76 Fed. 891, where the selling agent resides in the state, the goods are sent to him, and he sells on a commission and guarantees the solvency of the purchasers.

So, in *Block v. Atchison, T. & S. F. R. Co.* 21 Fed. 529, Mr. Justice Brewer held that a railroad company which did not operate its railroad within a state, but had there an office for the purpose of soliciting business, and also an agent there employed to further the transaction of its business in the state where its road ran, was subject to service of process on such agent.

Denson v. Chattanooga Nat. Bldg. & L. Asso. 46 C. C. A. 634, 107 Fed. 777. See also *United States Sav. & L. Co. v. Miller* (Tenn. Ch. App.) 47 S. W. 17; *Van Dresser v. Oregon R. & Nav. Co.* 48 Fed. 202; *Palmer v. Chicago Herald Co.* 70 Fed. 886; *Locke v. Chicago Chronicle Co.* 107 Iowa, 390, 78 N. W. 49.

Doubtless an offer becomes a contract as soon as the acceptance is committed to the

regular mail or a telegraph company. But according to the better reasoned cases the rule is otherwise when the acceptor commits his acceptance to his own agent, or to an agency within his control.

Re London & N. Bank [1900] 1 Ch. Div. 220; *Thayer v. Middlesex Mut. F. Ins. Co.* 10 Pick. 326; *Bryant v. Booze*, 55 Ga. 438.

Within this principle the wire over which the acceptance passes to the Illinois office is within the control of the Hammond company.

Especially should this principle apply where the parties themselves fix as the time when the transaction shall become a contract, as they do here, the time when the return message reaches its destination.

The case is then analogous to the insurance cases which hold that when an application for insurance is signed in one state, and forwarded to the home office of the company in another, where the policy is issued, and mailed back to the applicant's state to a person other than the applicant, to be there delivered to the applicant,—especially where the policy provides that it shall not take effect until the first premium is paid,—it is a contract of the state of the applicant, despite recitals in the policy seeking to make it a contract of the state of the company's home office.

Equitable Life Assur. Soc. v. Clements (*Equitable Life Assur. Soc. v. Pettus*) 140 U. S. 226, 232, 35 L. ed. 497, 500, 11 Sup. Ct. Rep. 822; *Wall v. Equitable Life Assur. Soc.* 32 Fed. 273; *Hicks v. National L. Ins. Co.* 9 C. C. A. 215, 20 U. S. App. 410, 60 Fed. 690; *Equitable Life Assur. Soc. v. Winning*, 7 C. C. A. 359, 19 U. S. App. 173, 58 Fed. 541; *Berry v. Knights Templars' & M. Life Indemnity Co.* 46 Fed. 439; *Fletcher v. New York L. Ins. Co.* 4 McCrary, 440, 13 Fed. 526; *Mutual Ben. L. Ins. Co. v. Robinson*, 54 Fed. 580.

The "paper contrivances" by which the Hammond company, while transacting this extensive business through these Illinois offices, has attempted to escape liability for suit in that state, should not be successful.

Ransome v. State, 91 Tenn. 716, 20 S. W. 310.

There are two direct authorities upon the particular question at bar.

Boyd Commission Co. v. Coates, 24 Ky. L. Rep. 730, 69 S. W. 1090; *Central Stock & Grain Exch. v. Bendinger*, 56 L. R. A. 875, 48 C. C. A. 726, 109 Fed. 926.

Where a foreign corporation has failed to designate a person to receive service of process in compliance with a statute requiring it, service may be made upon some other proper agent.

Foster v. Charles Betcher Lumber Co. 5
198 U. S.

S. D. 57, 23 L. R. A. 490, 49 Am. St. Rep. 859, 58 N. W. 9; *Hagerman v. Empire Slate Co.* 97 Pa. 534; *Clews v. Rockford, R. I. & St. L. R. Co.* 49 How. Pr. 117; *Funk v. Anglo-American Ins. Co.* 27 Fed. 336; *American Cotton Co. v. Beasley*, 53 C. C. A. 446, 116 Fed. 256; *Mutual Reserve Fund Life Asso. v. Cleveland Woolen Mills*, 27 C. C. A. 212, 54 U. S. App. 290, 82 Fed. 508; *Modern Woodmen v. Noyes*, 158 Ind. 503, 64 N. E. 21; *Bankers' Union v. Nabors* (Tex. Civ. App.) 81 S. W. 91.

Mr. Lloyd Charles Whitman argued the cause, and, with Messrs. Jacob J. Kern and John A. Brown, filed a brief for appellee:

Federal courts in common-law actions follow the statutes in the respective states in regard to service on corporations, by the force of the statute providing for conformity with the state practice in actions at law.

2 Foster, Fed. Pr. 3d ed. pp. 806, 810, 811.

The practice in equity cases is not dictated by statute, but in such cases the state practice merely furnishes a code, which the Federal courts are apt to follow.

1 Foster, Fed. Pr. 3d ed. p. 254.

The state statute must be reasonable, and the service provided for be only upon such agents as may properly be deemed representatives of the foreign corporations.

1 Foster, Fed. Pr. pp. 255, 256; *St. Louis Wire-Mill Co. v. Consolidated Barb-Wire Co.* 32 Fed. 802; *Good Hope Co. v. Railway Barb Fencing Co.* 23 Blatchf. 43, 22 Fed. 635; *Goldey v. Morning News*, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559; *D'Arcy v. Ketchum*, 11 How. 165, 13 L. ed. 648.

Three conditions must occur. First, the corporation must be carrying on its business in such foreign state or district. Second, such business must be transacted or managed by some agent or officer appointed by and representing the corporation in such state. Third, there must be some local law making such corporation amenable to suit there, as a condition expressed or implied of doing business in the state.

1 Foster, Fed. Pr. 3d ed. pp. 257, 258; *United States v. American Bell Teleph. Co.* 29 Fed. 17; *Midland P. R. Co. v. McDermid*, 91 Ill. 173.

And for general discussion of principles involved, see *St. Clair v. Cox*, 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 354.

The averments of the motion to quash are, under the evidence, true. The transactions shown by the evidence do not show a doing of business by the Hammond Elevator Company within the state of Illinois or said district, and the relations between Battle & 198 U. S.

Dickes and Babb and the Hammond Elevator Company do not amount in law to such an agency as is contemplated by law for the service of process upon a nonresident foreign corporation.

Ibid.; *Goodhope Co. v. Railway Barb Fencing Co.* 23 Blatchf. 43, 22 Fed. 635; *United States v. American Bell Teleph. Co.* 29 Fed. 17; *St. Louis Wire-Mill Co. v. Consolidated Barb-Wire Co.* 32 Fed. 802; *Maxwell v. Atchison, T. & S. F. R. Co.* 34 Fed. 286; *N. K. Fairbank & Co. v. Cincinnati, N. O. & T. P. R. Co.* 4 C. C. A. 403, 9 U. S. App. 212, 54 Fed. 420; *Evansville Courier Co. v. United Press*, 74 Fed. 918; *Wall v. Chesapeake & O. R. Co.* 37 C. C. A. 129, 95 Fed. 398; *Doe v. Springfield Boiler & Mfg. Co.* 104 Fed. 684; *Municipal Telegraph & Stock Co. v. Ward*, 133 Fed. 70.

Mr. Justice Brown delivered the opinion of the court:

The circuit court dismissed this appeal upon the ground that it had never acquired jurisdiction over the Hammond Elevator Company by the service of process upon Albert M. Babb and the members of the firm of Battle & Dickes, because they were not officers of the elevator company which was a Delaware corporation, and had its principal place of business in the state of Indiana.

1. There is, however, a preliminary question in this court; that is, whether we can lawfully entertain this appeal under § 5 of the act of March 3, 1891, which provides that an appeal shall lie directly to this court "in any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision." [26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549.]

The proper construction of this section has been the subject of frequent consideration in this court, and it has been definitely settled that it must be limited to cases where the jurisdiction of the Federal court, as a Federal court, is put in issue, and that questions of jurisdiction applicable to the state courts, as well as to the Federal courts, are not within its scope.

The earliest reported case on this subject is that of the *World's Columbian Exposition v. United States*, 6 C. C. A. 58, 18 U. S. App. 42, 56 Fed. 654, in which the circuit court, sitting in equity, granted an injunction to prevent the opening of the Exposition grounds on Sunday. On appeal to the circuit court of appeals the chief justice held that as "the power of the circuit court [433] to hear the cause was not denied, the appellant contending only that the United States had not made a case cognizable in a court of equity, the jurisdiction of the circuit

court was not in issue within the intent and meaning of the act. In *Smith v. McKay*, 161 U. S. 355, 40 L. ed. 731, 16 Sup. Ct. Rep. 490, it was held, following the prior case, that the question whether the remedy was at law or in equity did not involve the jurisdiction of the Federal court as such, and the case was dismissed. A similar ruling was made in *Blythe v. Hinckley*, 173 U. S. 501, 43 L. ed. 783, 19 Sup. Ct. Rep. 497.

The cases were fully reviewed in *Louisville Trust Co. v. Knott*, 191 U. S. 225, 48 L. ed. 159, 24 Sup. Ct. Rep. 119, in which the question involved was the respective rights of a receiver appointed by the state court and one appointed by the circuit court of the United States. It was held that the question was not one of jurisdiction within the meaning of the act of March 3, 1891, the court observing: "The question of jurisdiction which the statute permits to be certified to this court directly must be one involving the jurisdiction of the circuit court as a Federal court, and not simply its general authority as a judicial tribunal to proceed in harmony with established rules of practice governing courts of concurrent jurisdiction as between each other."

In *Bache v. Hunt*, 193 U. S. 523, 48 L. ed. 774, 24 Sup. Ct. Rep. 547, Hunt, as receiver, filed an intervening petition for the reimbursement of certain amounts paid by him as receiver in the extinguishment of prior claims, which certain railroad bonds and stocks had been deposited to secure. A decree was made in his favor, and an appeal was taken to this court. It was said that "the jurisdiction of the circuit court was only questioned in respect to its general authority as a judicial tribunal, and not in respect to its power as a court of the United States. The established rules of practice as to bringing in parties to ancillary or *pro interesse suo proceedings*, and those governing courts of concurrent jurisdiction as between themselves, was alone involved." The appeal was dismissed.

In *Courtney v. Pradt*, 196 U. S. 89, ante, 398, 25 Sup. Ct. Rep. 208, a citizen of Wisconsin, *duly qualified as an executor in that state, was sued as such in Kentucky. Pradt demurred on the ground that the court had no jurisdiction, and the circuit court of the United States, to which the case had been removed, sustained the demurrer and dismissed the suit. It was said that the court had power to so adjudicate, and that the question decided was not one of the jurisdiction of the circuit court as a court of the United States, but one with respect to the law of Kentucky. The case was dismissed.

There is a distinction, however, between these cases which turn upon questions arising after a valid service of process upon the de-

fendant, with respect to the mode of procedure, or the conflicting claims of the state and Federal courts, and certain other authorities which turn upon the validity of the service of process itself upon the defendants; in other words, which involve the jurisdiction of the court in any form over the defendant. The leading case is that of *Shepard v. Adams*, 168 U. S. 618, 42 L. ed. 602, 18 Sup. Ct. Rep. 214. This case turned upon the validity of the service of the summons whereby the defendant was required to appear within ten days after such service, when, by the law of the state, he was allowed thirty days. The question was whether Rev. Stat. § 914, U. S. Comp. Stat. 1901, p. 684, assimilating the practice, pleadings, forms, and modes of proceedings in civil causes in the Federal courts to those obtaining in the state courts, applied to the time within which the defendant was required to appear in obedience to a summons. It was held that, as the rule in the Federal court was adopted in conformity with the rules then in force in the state courts, it was not bound to alter its rules every time the state courts saw fit to alter their rules, and that the Federal courts were at liberty to continue their rules without subservience to such changes. The point was made that the question involved was not the jurisdiction of the Federal court as such, and in reply to that suggestion Mr. Justice Shiras observed: "The present case differs from *Smith v. McKay* in the essential feature that the contention is that the court below never acquired jurisdiction at all over *the[435] defendant by a valid service of process. In such a case there would be an entire want of jurisdiction, and a judgment rendered without jurisdiction can be reviewed on a writ of error directly sued out to this court."

That paragraph is doubtless broader than the exigency of the case required, as the question involved was the validity of the service of process in the Federal court as distinguished from the state court; but in the recent case of *Remington v. Central P. R. Co.* 198 U. S. 95, ante, 959, 25 Sup. Ct. Rep. 577, it was accepted as applicable to the case of the validity of a summons from a state court, served upon a director of a railroad company in a state other than that in which the company was incorporated. The court denied a motion to set the service aside, whereupon the case was removed into the circuit court of the United States, and the defendant renewed its motion to set aside the summons. The motion was granted, and the action was dismissed for want of jurisdiction of the defendant. It was held, upon the authority of *Shepard v. Adams* that this court had authority to review the judgment on writ of error.

While the case under consideration is distinguishable from *Shepard v. Adams*, we think it is concluded by the case last cited, and therefore hold that we have jurisdiction to review the action of the circuit court in dismissing this bill.

2. The merits in the case are contained in the certificate of the district judge, and involve the jurisdiction of the circuit court over the Hammond Elevator Company, by reason of the service in the state of Illinois upon Babb or Battle & Dickes, as agents of such company, and whether the service of process upon them gave the court jurisdiction over the company.

By the law of Illinois (Rev. Stat. chap. 32, § 26), "foreign corporations, and the officers and agents thereof, *doing business in this state*, shall be subjected to all the liabilities" of domestic corporations; and by chap. 110, § 5, "may be served with process by leaving a copy thereof with . . . any agent of said company found in the county."

[436] *The facts showing the relations between the parties served and the elevator company are substantially as follows:

The company maintains a place of business at Hammond, Indiana, and had under lease from the Western Union Telegraph Company the exclusive use, during business hours, of certain telegraph wires running from Hammond to certain offices in different cities in Illinois, including Peoria and Aurora, where the parties served with process lived. In the lease of these wires, signed by defendant, the offices of these "correspondents" are designated as offices of the defendant, and are contained upon regular printed forms prepared by the company. The cost or rental of these wires was paid to the telegraph company by the defendant. Over these wires the defendant caused to be transmitted continuous market quotations of the New York stock exchange to persons standing in relation of Babb and Battle & Dickes, who are called "correspondents," and who posted these quotations upon blackboards in their respective offices.

Customers resorting to the correspondents' offices, and desiring to trade in any one of the sixty different stocks whose quotations are posted, give a verbal or written order to buy or sell certain grain or stocks, which is transmitted by the correspondent in his own name over the private wire of the correspondent running into his office from the office of the defendant at Hammond, as an offer by the correspondent to buy from or sell to the defendant. Sometimes the price is mentioned by the customer, and sometimes not. In the latter case it is understood that the trade is to be at whatever the market is. When the order is given the correspondent exacts from the customer such margin as he

sees fit, unless the customer already has money on deposit with the correspondent, or is of known financial responsibility. Defendant accepts these orders when the state of the market justifies, by return message over the same wire, the contents of which are communicated by the correspondent to the customer. The individuality of each trade is preserved throughout by a number *given to it by the correspondent's operator [437] at the outset. The correspondent, upon receipt of this return message, gives the trader a memorandum showing the trade and the price to which his margin carries it, and except in case of a losing trade, where he has failed to protect himself by securing from the customer a sufficient margin, the correspondent neither participates in the loss nor the profit incurred in the trade. He derives as his compensation a fixed sum, whether the trade results in a profit to the defendant or to the customer. Through daily statements and daily settlements of the balances shown thereby, the correspondent remits to the defendant, through its local bank, whatever amounts are shown to be due from him to the defendant for margins, wire service, etc. When the trader wishes to close a trade thus opened, the correspondent, in like manner, receives and transmits the order over his wire to the Hammond Company, giving to the telegram the number of the order already given to the trade. The order is executed at Hammond the same way as the opening order.

It is admitted by the defendant's counsel that the defendant does not desire to be subject to suit before the state and Federal courts of every state and district where it has correspondents, and that it has endeavored to arrange and conduct its business so as to avoid such contingency.

The relations of the correspondent with the elevator company are in each case fixed by formal contract, to the effect that the parties shall deal as principals, and that the relations of principal and agent shall neither exist or be held to exist. There is no evidence that the correspondents Babb and Battle & Dickes have claimed or represented themselves to be agents of the defendants.

The fact, however, that the relations between the defendant and its correspondents are, as between themselves, expressly disclaimed to be those of principal and agent, is not decisive of their relations so far as third parties dealing with them upon the basis of their being agents are concerned. *Connecticut Mut. L. Ins. Co. v. Spratley*, 172 U. S. 602, 43 L. ed. 569, 19 Sup. Ct. Rep. 308. As was said *in this case, of the agents [438] whose authority to receive service of process was denied by the defendants (p. 615, L. ed.

p. 573, Sup. Ct. Rep. p. 313): "In such case it is not material that the officers of the corporation deny that the agent was expressly given such power, or assert that it was withheld from him. The question turns upon the character of the agent, whether he is such that the law will imply the power and impute the authority to him, and if he be that kind of an agent, the implication will be made, notwithstanding a denial of authority on the part of the other officers of the corporation. . . . In the absence of any express authority the question depends upon a review of the surrounding facts and upon the inferences which the court might properly draw from them." See also *Italian-Swiss Agri. Colony v. Pease*, 194 Ill. 98, 62 N. E. 317; *Commercial Ins. Co. v. Ives*, 56 Ill. 402; *Union Ins. Co. v. Chipp*, 93 Ill. 96; *Indiana Ins. Co. v. Hartwell*, 123 Ind. 177, 24 N. E. 100; *Planters' Ins. Co. v. Myers*, 55 Miss. 479, 30 Am. Rep. 521; *Sprague v. Holland Purchase Ins. Co.* 69 N. Y. 128.

In this connection it was found by the master that "there can be no question that towards the customer the correspondent bears the relation of agent to his principal. The customer knows that the correspondent is not selling the stocks to him, or buying stocks from him, but is merely taking his orders for transmission. Hence, the correspondent's charge to the customer for his services is properly called a commission. The customer does not direct the correspondent from whom he is to purchase, or to whom he is to sell, as the latter is at liberty to purchase from or sell to the defendant, or elsewhere, as he chooses. In point of fact, perhaps, because of the facilities offered by the private wire, he almost invariably does purchase from or sell to the defendant."

The defendant has undoubtedly taken great pains to foreclose the idea that its correspondents are agents in any such sense as to render it liable for their acts, or to validate the service of process upon them as such agents. Each day the defendant enters upon his statement which he that day sends to the correspondent each trade it has that day accepted from *such correspondent. If the statement shows a debit balance, the correspondent deposits an approximate amount in a bank in his city to the credit of the defendant, which thus maintains an active bank account in each of such banks. If the statement results in a balance to the credit of the correspondent, a check of the defendant payable to the correspondent, and usually drawn upon the same local bank, where the deposits are made to defendant's credit, accompanies the statement. As a general thing, the balance due on each day's transactions, as between the defendant and the correspondent, is approximately settled

the next day. The defendant looks only to the correspondent in all trades. In case of a loss, if the correspondent has failed to secure sufficient margin from the customer, and is unable to collect the amount from him, the correspondent must stand the loss. The defendant charges up and retains the amount of its charge for wire services, in any event, as well as all losses of the correspondent on trades. The daily statements by defendant are made upon printed blanks, which contain the statement: "We have no agents." And upon the back is a printed statement to the effect that, upon consideration of the defendant consenting to deal and contract with him as principal in buying and selling commodities, he agrees:

"First. In all cases where I shall purchase from, or contract to purchase from, or shall sell to, or contract to sell to, said Hammond Elevator Company any commodity, I will receive and pay for the commodity purchased, or contracted to be purchased, from it, and will deliver the commodity sold, or contracted to be sold, to it."

"Seventh. That I am not, and will not represent myself as being, agent for said Hammond Elevator Company, but will represent that I have no authority to act for it. It is not responsible for anything that may be done by me."

"But the defendant knows nothing of the customer. All its orders come from the correspondent in his own name. All funds received by him are sent to it through the bank by the *correspondent. All its state- [440] ments are rendered to the correspondent. All its charges are made against, and all its credits entered in favor of, the correspondent. Indeed, so far as the evidence shows, there is no ground for claiming that the defendant knows that the correspondent has any customers, or that he is not dealing solely on his own account."

Notwithstanding these protestations and excessive precautions used to prevent the correspondent being held as agent, the method of business shows that the party really interested in the transaction is the defendant, and that the correspondents are compensated as if they were agents, and not principals. The correspondent charges his customers a commission of one eighth of a cent a bushel on grain. The defendant keeps a regular book account with its correspondents, and, in addition to charging up the margin against him, it makes an arbitrary charge on each deal, which is called on the statement of the correspondent "wire service,"— meaning a charge for the use of the private wire. This charge for wire service is a regular fixed percentage of the commission charged by the correspondent, which indicates that it is a commission under the

guise of wire service, and such a charge upon any transaction of magnitude would be an exorbitant charge for use of the wire. An ordinary charge for wire service would depend upon the length of the message and distance transmitted, wholly irrespective of the amount of the transaction. But in this case, when a charge is made on a transaction involving a hundred shares, the charge is ten times greater than for a trade involving ten shares. This indicates something more than a charge made for the actual use of the wire, the amount of the service being the same in each case. The significance of this wire service is the more marked by the fact of the defendant company paying a fixed sum of \$50 per month for the use of the wire.

[441] The findings, moreover, show that while the correspondent takes the orders from his customers, he transmits them directly to the defendant, and no trade is effected until the return message *is received by the correspondent. While the identity of the customer is not disclosed to the elevator company, it is preserved by a number appropriate to each order; and there can be no doubt that any legal liability of the trader arising out of the transaction could be enforced by the defendant against the customer as soon as his identity was discovered. It is apparent from these transactions that the real trading is done between the customer and the elevator company, and that the functions of the correspondents are really those of agents, and not of principals. There must be two principals, and only two, in every such transaction. Obviously the customer is one of them. We think it equally obvious that the elevator company is the other one, and that the profits appropriate to the transaction belong to the elevator company, and not to the correspondent, who is paid a commission for his services. If the correspondent be not the principal in this transaction, he must be the agent of one party or the other, and as his office is continuously open for the transaction of business, where he receives and executes orders, collects margins, and deposits them to the credit of the defendant in a local bank, and apparently his transactions are entirely with the defendant, it would seem that he was rather the agent of the elevator company than of the customer, — a conclusion which is fortified by the fact that the correspondent is compensated by a percentage of the amount charged the customer under the name of commission for the privilege of trading.

The real transaction in this case is undoubtedly artfully disguised, but notwithstanding the fact that the order is made and accepted at Hammond, and the margin is charged up at Hammond against the correspondent, and the profits or losses made

there, we are of the opinion that in receiving, transmitting, and reporting orders to the customers, receiving their margins, and settling with them for the profits or losses incident to each transaction, the correspondent is really "doing business" as the agent of the elevator company in Illinois, and may be properly treated as its agent for the service of *process. It is evident that if these [442] correspondents be not regarded as agents in these transactions, it is possible for the defendant to establish similar correspondents in a dozen cities in at least a dozen states of the Union, and an enormous business be built up, in which the defendant company is the real principal, with no possibility of being sued except in the states of Indiana and Delaware.

If these correspondents were admitted to be agents of the elevator company it is not perceived how their methods of doing business would be materially changed. They would maintain an office in their own cities; would receive and transmit to their principals offers for trades made to them, and report their acceptance or refusal, as is frequently done with respect to policies by agents of insurance companies; would receive and deposit the margins and attend to the settlement of differences. In fact, their position is analogous to that of an ordinary insurance agent, with power to receive applications and premiums, deliver policies, and settle losses, and whose acts are binding on the principal, notwithstanding a provision in the application for the policy declaring such party shall be the agent of the insured.

It results that *the decree dismissing the bill as to the Hammond Elevator Company must be reversed*, and the case be remanded for further proceedings.

The CHIEF JUSTICE, Mr. Justice **Harlan**, and Mr. Justice **Day** dissented upon the first point.

*GIOVANNI LAVAGNINO, *Plff. in Err.*, [443] v.

EDMUND H. UHLIG, Alexander McKernan, and The St. Joe Mining Company.

(See S. C. Reporter's ed. 443-457.)

Error to state court — Federal question — mining claims — conflicting locations — effect of forfeiture of senior location.

1. A decision of a state court that the statute of limitations making adverse possession of real property for seven years a bar to its recovery operates to defeat an action brought

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to *Hamblin v. Western*

under U. S. Rev. Stat. § 2326, U. S. Comp. Stat. 1901, p. 1430, to try title to conflicting mining claims, in which the defeated party relied on the relocation, under § 2324 (U. S. Comp. Stat. 1901, p. 1426), of a forfeited claim, necessarily involves a denial of rights asserted by him under the latter section, so as to make a case for a writ of error from the Supreme Court of the United States, where the state court treated as irrelevant and immaterial evidence tending to show that the premises in dispute were embraced in the forfeited location, and that possession of that claim was held and retained from a time at least contemporaneous with the initiation of the conflicting locations almost up to the relocation.

2. An adequate presentation of a Federal question to a state court to make a case for a writ of error from the Supreme Court of the United States sufficiently appears where the record clearly shows that the trial court considered that the unsuccessful party was specially claiming rights under U. S. Rev. Stat. § 2326, U. S. Comp. Stat. 1901, p. 1430, authorizing an adverse of an application for a patent to mineral lands, and the highest state court necessarily acted upon that assumption in delivering its opinion.
3. The area of conflict between two mining locations does not, upon the forfeiture of the senior location, become unoccupied mineral lands of the United States, so as to enable a relocater of the forfeited location to adverse successfully the application for a patent by the junior locator, since the latter's right, under U. S. Rev. Stat. § 2326, U. S. Comp. Stat. 1901, p. 1430, to a patent, which would exist in case of the failure of the owner of a subsisting senior location either to adverse the application or to prosecute such adverse if one was made, must also arise from the forfeiture of the claim of the senior locator before the junior locator's application for a patent was made, and the consequent inability of the senior locator to adverse successfully after the forfeiture is complete.

[No. 120.]

Argued January 11, 12, 1905. Decided May 29, 1905.

IN ERROR to the Supreme Court of the State of Utah to review a judgment which affirmed a judgment of a District Court in and for the County of Salt Lake, in that state, in favor of defendants in an action to try title to conflicting mining claims. *Affirmed.*

Land Co. 37 L. ed. U. S. 267; Kipley v. Illinois, 42 L. ed. U. S. 998, and *Re Buchanan*, 39 L. ed. U. S. 884.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbadc, 62 L. R. A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L. R. A. 33.

On what the record must show respecting the presentation and decision of a Federal question

See same case below, 26 Utah, 1, 99 Am. St. Rep. 808, 71 Pac. 1046.

Statement by Mr. Justice **White**:

Uhlig and McKernan, two of the defendants in error, by locations alleged to have been made on January 1, 1889, asserted ownership of two adjacent mining lode claims, designated respectively as the Uhlig No. 1 and the Uhlig No. 2, situated in the West mountain mining district, in Salt Lake county, state of Utah. In the month of August, 1898, the parties named filed in the proper land office an application for patent for said claims. During the publication of notice of the filing of the application, Giovanni Lavagnino, plaintiff in error,—as the alleged owner of a mining lode claim called the Yes You Do,—filed an adverse claim to a portion of the land embraced in each of the Uhlig locations, which it was asserted *overlapped the Yes You Do. There-[444] upon, pursuant to the requirements of § 2326 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 1430), this action was brought in a district court of Salt Lake county, Utah, to determine in whom was vested the title and right of possession to the conflicting areas, which, in the case of the Uhlig No. 1, claim, amounted to 6.374 acres and in the No. 2 to 1.441 acres.

In substance, Lavagnino alleged in his complaint that, at the time of the location of the Uhlig claims, there was a subsisting valid location known as the Levi P. lode claim, which included within its areas the land in dispute in the action; that the necessary labor required by the statutes of the United States was performed upon the claim up to and including the year 1896; that no actual labor or improvements were made upon the claim for the year 1897, and, in consequence, all the land included within the Levi P. location became forfeited, and acquired the status of unoccupied and mineral lands of the United States, and that while such was the status of the land, on January 1, 1898, one J. Fewson Smith, Jr.,—the grantor of Lavagnino,—relocated the Levi P. claim as the Yes You Do, and that thereafter all the requirements neces-

in order to confer jurisdiction on the Supreme Court of the United States of a writ of error to a state court—see note to Hooker v. Los Angeles, 63 L. R. A. 471.

As to what is the record for this purpose—see note to Home for Incurables v. New York, 63 L. R. A. 329.

On review in the Supreme Court of the United States of decisions of state courts in cases involving mining claims—see note to McMillan v. Ferrum Min. Co. ante, 784.

On conflicting mining claims—see notes to Last Chance Min. Co. v. Tyler Min. Co. 39 L. ed. U. S. 859, and Enterprise Min. Co. v. Rico Aspen Consol. Min. Co. 42 L. ed. U. S. 96.

sary to be done had been performed, and the Yes You Do was then a valid and subsisting location.

Subsequently the St. Joe Mining Company was substituted in the stead of Uhlig, as a party defendant.

On the trial it was shown that at the time Smith located the Yes You Do claim he was a deputy mineral surveyor for the district in which such mining claim was situated, and that he made the survey and plat for the protest which had been filed in the land office against the Uhlig application for patent. On the offer, as evidence for the plaintiff, of the notice of location of the Yes You Do claim and the deed from Smith to Lavagnino, objection was made to their admission, and the offered evidence was excluded upon the ground that the asserted location by Smith of the Yes You Do was not valid, because, at the time of the making [445] thereof, Smith was a deputy *mineral surveyor, and was prohibited by the terms of § 452 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 257), from making the location of a mining lode claim. For the same reason the trial court sustained an objection to evidence offered on behalf of the plaintiff tending to show that, at the time the Uhlig claims were located, the ground covered by such locations was then covered by prior locations made at an earlier hour on the same day, and was consequently not subject to location as unoccupied mineral lands of the United States. That one of said locations—the Levi P.—embraced the premises in dispute, and was a subsisting location until forfeited by failure to perform the annual work for the year 1897; that the relocation of said claim as the Yes You Do* was made on January 1, 1898; and that the annual work and other steps required by law to be done in connection with the claim had been performed.

Following the introduction of testimony tending to show the validity of the Uhlig locations, testimony was introduced on behalf of the plaintiff in respect to the location and working of the Levi P. claim; but, on the offer of the Levi P. location notice, the trial court sustained an objection thereto, and ruled that, as the Yes You Do was not a valid location, there were no adverse claims before the court, and as a result it was to be conclusively presumed that there did not exist any location which in anywise conflicted with the Uhlig claims sought to be patented.

The court made findings of fact, in which, *inter alia*, it was recited that the plaintiff at the trial had not introduced any legal or competent evidence to sustain the issues on his part, and consequently that "upon the trial, on motion of counsel for defendants,

the said action of the plaintiff against the defendant was, and is hereby, dismissed." The facts were then found in respect to the location and working of the Uhlig claims, and, as conclusions of law, the court held that the action against the defendants should be dismissed with costs, and that the defendant the St. Joe Mining Company, and the defendant Alexander McKernan, were entitled to purchase* from the United States [446] of America the said Uhlig claims and the whole thereof, and were also entitled to a decree quieting their title to the premises in dispute. From a decree entered in conformity to these conclusions an appeal was prosecuted to the supreme court of Utah, and that court affirmed the decree. 26 Utah, 1, 99 Am. St. Rep. 808, 71 Pac. 1046. A writ of error was thereupon sued out from this court.

Mr. Aldis B. Browne argued the cause, and, with *Messrs. Alexander Britton* and *N. W. Sonnedecker*, filed a brief for plaintiff in error.

Mr. D. H. Wenger argued the cause, and, with *Mr. Arthur Brown*, filed a brief for defendants in error.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court:

The supreme court of Utah was of the opinion that, by force of § 452 of the Revised Statutes of the United States (copied in the margin†), *J. Fewson Smith, Jr.*, being *a [449] deputy mineral surveyor, was disqualified from locating the Yes You Do claim; that in consequence the attempted location of such claim was void; and that the plaintiff, Lavagnino, acquired no rights by the conveyance of the claim to him by Smith. It was next decided that, as the plaintiff had failed to show any right to the disputed premises, he became a stranger to the title, and was without right to contest the claim of the defendant. The correctness of the decree entered by the trial court was also held to result from the terms of § 2332 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 1433) and § 2859 of the Revised Statutes of Utah, both of which sections are copied in the margin.‡

† Section 452, Revised Statutes of the United States.

"The officers, clerks, and employees in the General Land Office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public land; and any person who violates this section shall forthwith be removed from his office."

‡ Section 2332, U. S. Rev. Stat.

"Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the

Adopting the finding of the trial court that the Uhlig claims were valid locations, attention was called to the fact that those claims were located on January 1, 1889, while the Yes You Do was located more than eight years thereafter; *viz.*, on January 1, 1898. A mining claim was declared to be a possessory right and real estate under the statutes of Utah, and it was held that one Mayberry, the locator of the Levi P. claim, not having instituted a suit to recover possession of the premises in dispute within seven years after the location of the Uhlig claims, was barred of all right to such [450] premises by the terms *of § 2859 of the Revised Statutes of Utah, and that his right to contest the title of the defendants to the conflict areas "was also waived by his failure to adverse the application for a patent of the Uhlig Nos. 1 and 2." The court added: "In view of these facts the plaintiff, even if J. Fewson Smith, Jr., had not been a deputy United States mineral surveyor, as the location of the 'Yes You Do' was not made until eight years after the possession of the Uhlig Nos. 1 and 2 was begun, could not avail himself of any rights which the said Mayberry may have had."

This latter ruling of the supreme court of Utah forms the basis for the first of two grounds of a motion to dismiss this writ of error, which motion will now be passed upon.

The first is, in substance, that, assuming that there was a Federal question determined by the supreme court of Utah, its decision was not necessary, and whether it was or not, jurisdiction does not exist, because there was another ground upon which the decree of the trial court was affirmed, non-Federal in its nature, and broad enough to maintain the judgment; *viz.*, the ruling of the bar of the statute of limitations. The second ground is thus stated:

"That under the decision of the supreme court of the state of Utah, this court has no jurisdiction to hear and determine the question raised under § 452, U. S. Rev. Stat., for

statute of limitations for mining claims of the state or territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim; but nothing in this chapter shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property, thereto attached prior to the issuance of a patent."

Section 2859, Utah Rev. Stat.

"No action for the recovery of real property, or for the possession thereof, shall be maintained, unless it appear that the plaintiff, his ancestor, grantor, or predecessor, was seized or possessed of the property in question within seven years before the commencement of the action."

1122

the reason that the plaintiff in error has not brought himself within the provisions of § 709, U. S. Rev. Stat., U. S. Comp. Stat. 1901, p. 575."

We are of opinion that neither of the grounds urged in support of the motion to dismiss are tenable. As to the first, it is true that the supreme court of Utah decided that, even although J. Fewson Smith, Jr., had been qualified to locate the Yes You Do claim, the location was invalid because made more than seven years after the location of the Uhlig Nos. 1 and 2, when, it was held, the bar of the statute of limitations was operative. But this amounted to saying that, even although the plaintiff was entitled to adverse the Uhlig claims, he could not be heard to rebut the evidence for the defendants *as to the possession under the [451] Uhlig locations, by evidence as to the possession taken and had under the Levi P. location. Plainly, we think the ruling denied to the grantee of the Yes You Do, under the hypothesis that they existed, rights asserted by him under § 2324 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 1426), authorizing the relocation of forfeited claims. It is evident from the record that the finding of the trial court as to the time when possession was taken of the Uhlig Nos. 1 and 2 claims, and the duration of possession, was based entirely upon the evidence introduced on behalf of the owners of those claims. The trial court treated as irrelevant and immaterial evidence tending to show that the premises in dispute were embraced in the Levi P. location, and that possession of that claim was held and retained from a time at least contemporaneous with the initiation of the Uhlig locations, and almost up to the location of the Yes You Do, as a relocation of the Levi P. Under such circumstances a decision that the bar of the seven years' statute of limitations was operative, upon the assumption that the locator of the Yes You Do was entitled to adverse conflicting locations, amounted to deciding that Lavagnino could not show that the premises in dispute were unoccupied mineral lands of the United States at the time of the location of the Yes You Do, and, as bearing upon the validity of the relocation of the Levi P., the facts as to the location, possession under, and forfeiture of the Levi P. claim. The necessary effect of this ruling, as before stated, was, we think, to deny to the locator of the Yes You Do the protection of the relocation provisions of § 2324 of the Revised Statutes, if that section justified the claim of right based upon it.

As to the second ground, the record clearly shows that the trial court considered that the plaintiff was specially claiming rights

198 U. S.

under § 2326 of the Revised Statutes, authorizing an adverse of an application for a patent to mineral lands, and the supreme court of Utah necessarily acted upon that assumption in the opinion by it delivered. The motion to dismiss is, therefore, overruled.

[452] *The question then is, Did the supreme court of Utah err in affirming the decree of the trial court?

As we have seen, the supreme court of Utah, in part, rested its conclusion upon the want of power in a deputy mineral surveyor to make the location in question, in consequence of the prohibition contained in § 452 of the Revised Statutes. A consideration of that subject, however, will be unnecessary if it be found that even if a deputy mineral surveyor was not within the restriction of the section referred to, nevertheless, the rights asserted under the Yes You Do location in the adverse proceeding were not paramount to the rights arising from the Uhlig location. We, therefore, come at once to a consideration of that question, and, of course, in doing so assume, for argument sake, that the section of the Revised Statutes relied upon and the rules and regulations of the Land Department did not prohibit a deputy mineral surveyor from making a location of mineral land. And, moreover, in considering the question which we propose to examine, we concede, for the sake of argument, that the Levi P. location, of which the Yes You Do purported to be a relocation, was prior in date to the location of the Uhlig Nos. 1 and 2, and that there were areas in conflict between them. With all these concessions in mind, the question yet remains whether Smith and his transferee, in virtue of the location of the Yes You Do, stood in such a relation as to enable them, or either of them, to successfully adverse the application for patent made by the owners and possessors of the Uhlig locations.

It is undoubted that this court in a number of cases has declared that the rights of a subsisting senior locator of mineral land are paramount to those of the owner of a junior location, so far as said junior location conflicts in whole or in part with the prior location. *Clipper Min. Co. v. Eli Min. & Land Co.* 194 U. S. 220, 226, 48 L. ed. 944, 949; 24 Sup. Ct. Rep. 632, and cases cited. It is elementary, also, that the power conferred by § 2324 of the Revised Statutes, to relocate a forfeited mining claim, does not place the locator in privity of title with the owner of the prior and

[453] *forfeited location. The statute merely provides that when a forfeiture has been occasioned, "the claim or mine upon which such failure occurred shall be open to re-

location in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location."

The question then is, where there was a conflict of boundaries between a senior and junior location, and the senior location has been forfeited, has the person who made the relocation of such forfeited claim the right, in adverse proceedings, to assail the title of the junior locator in respect to the conflict area which had previously existed between that location and the abandoned or forfeited claim?

To say that the relocater had such right involves, necessarily, deciding that, as to the area in conflict between the junior and the senior locations, the junior could acquire no present or eventual right whatever, and that, on the abandonment or forfeiture of the senior claim, the area in conflict became, without qualification, a part of the public domain. In other words, the proposition must come to this: that as the junior locator had acquired no right whatever, present or possible, by his prior location, as to the conflicting area, he would be obliged, in order to obtain a patent for such area, to initiate in respect thereto a new right, accompanied with a performance of those acts which the statute renders necessary to make a location of a mining claim.

The deductions just stated are essential to sustain the right of the relocator of a forfeited mining claim to contest a location existing at the time of the relocation, on the ground that such existing location embraced an area which was included in the forfeited and alleged senior location, for the following reasons: If the land in dispute between the two locations, which antedated the relocation, did not, on the forfeiture of the senior of the two locations, become unqualifiedly a part of the public domain, then the right of the junior of the two *would be operative upon the area in [454] conflict on a forfeiture of the senior location. If it had that effect it necessarily was prior and paramount to the right acquired by a relocation of the forfeited claim.

But we do not think that the deductions which we have said are essential to sustain the right of the relocater to adverse, under the circumstances stated, can be sustained consistently with the legislation of Congress in relation to mining claims. Indeed, we think such a construction would abrogate the provisions of § 2326 of the Revised Statutes, which is as follows:

"Sec. 2326. Where an adverse claim is filed during the period of publication, it

shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment roll with the register of the land office, together with the certificate of the surveyor general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment roll shall be certified by the register to the Commissioner of the General Land Office, and a patent shall issue thereon for the claim, or such portion thereof as the

[455] applicant shall appear *from the decision of the court, to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, with the proper fees, and file the certificate and description by the surveyor general, whereon the register shall certify the proceedings and judgment roll to the Commissioner of the General Land Office, as in the preceding case, and patents shall issue to the several parties according to their respective rights. Nothing herein contained shall be construed to prevent the alienation of the title conveyed by a patent for a mining claim to any person whatever."

This section plainly recognizes that one who, pursuant to other provisions of the Revised Statutes, has initiated a right to a mining claim, has recorded his location notice, and performed the other acts made necessary to entitle to a patent, and who makes application for the patent, publishing the statutory notice, will be entitled to a patent for the land embraced in the location notice, unless adverse rights are set up in the mode provided in the section. Thus clearly providing that if there be a senior locator possessed of paramount rights in the mineral lands for which a patent is sought,

he may abandon such rights and cause them in effect to inure to the benefit of the applicant for a patent by failure to adverse, or, after adverseing, by failure to prosecute such adverse.

It cannot be denied that under § 2326, if, before abandonment or forfeiture of the Levi P. claim, the owners of the Uhlig locations had applied for a patent, and the owners of the Levi P. had not adverseed the application, upon an establishment of a prima facie right in the owners of the Uhlig claims, an indisputable presumption would have arisen that no conflict claims existed to the premises described in the location notice. *Gwillim v. Donnellan*, 115 U. S. 45, 51, 29 L. ed. 348, 350, 5 Sup. Ct. Rep. 1110. And the same result would have arisen had the owner of the Levi P. adverseed the application for a patent based upon the Uhlig locations, and failed to prosecute, and waived such adverse claim.

*In both of the supposed instances the [456] necessary consequence would have been to conclusively determine in favor of the applicant, so far as the rights of third persons were concerned, that the land was not unoccupied public land of the United States, but, on the contrary, as to such persons, from the time of the location by the applicant for the patent, was land embraced within such location, and not subject to be acquired by another person. And this result, flowing from the failure of the owner of a subsisting senior location to adverse an application for patent by the owner of an opposing location, or his waiver, if an adverse claim is made, must, as the greater includes the lesser, also arise from the forfeiture of the claim of the senior locator before an application for patent is made by the conflicting locator, and the consequent impossibility of the senior locator to successfully adverse after the forfeiture is complete.

Of course the effect of the construction which we have thus given to § 2326 of the Revised Statutes is to cause the provisions of that section to qualify §§ 2319 and 2324 (U. S. Comp. Stat. 1901, pp. 1424, 1426), thereby preventing mineral lands of the United States which have been the subject of conflicting locations from becoming, *quoad* the claims of third parties, unoccupied mineral lands by the mere forfeiture of one of such locations.

In text books (Barringer & A. Mines & Mining, p. 306; Lindley, Mines, 2d ed. pp. 650, 651), statements are found which seemingly indicate that, in the opinion of the writers, on the forfeiture of a senior mining location, *quoad* a junior and conflicting location, the area of conflict becomes, in an unqualified sense, unoccupied mineral lands of the United States, without inuring in any way

to the benefit of the junior location. But, in the treatises referred to, no account is taken of the effect of the express provisions of Rev. Stat. § 2326. Moreover, when the cases to which the text writers referred, as sustaining the statements made, are examined, it will be seen that they were decided either before the passage of the adverse claim statutes *of 1872, or concerned controversies between the senior and junior locators, or depended upon the provisions of state statutes. How far such statutes would be controlling, we are not called upon to say, as it is not claimed that there is any statute in Utah in any way modifying the express provisions of § 2326.

As the issue raised by the complaint in this action concerned only the conflict areas, and, on the trial, the invalidity of the Uhlig locations, in respect to the premises in dispute, was attempted to be established solely by proof that the Levi P. was an antecedent location, and embraced the grounds in conflict, it follows, from the opinion which we have expressed, that, at the time when Smith located the Yes You Do claim as a relocation of the Levi P. claim, the land embraced within the location notices of the Uhlig claims, and upon which the Yes You Do overlapped, was not unoccupied mineral lands of the United States, and was consequently not subject to be relocated by Smith, even under the mere hypothesis which we have indulged in, that, as a deputy mineral surveyor, he was not debarred from making the location. For this reason *the judgment of the Supreme Court of Utah was right, and it must therefore be affirmed.*

Mr. Justice **Brewer** concurs in the result.

Mr. Justice **McKenna** dissents.

[458]*MARGARET CUNNIUS, now Margaret Smith, *Piff. in Err.*,
v.

READING SCHOOL DISTRICT.

(See S. C. Reporter's ed. 458-477.)

Constitutional law—due process of law—validity of proceeding for administration of estates of absentees.

1. The due process of law clause of the 14th

NOTE.—As to what constitutes due process of law—see *Kuntz v. Sumption*, 2 L. R. A. 655, and note; *Re Gannon*, 5 L. R. A. 359, and note; *Ulman v. Baltimore*, 11 L. R. A. 224, and note; and *Gilman v. Tucker*, 13 L. R. A. 304, and note. And see notes to *People v. O'Brien*, 2 L. R. A. 255; *Pearson v. Yewdall*, 24 L. ed. U. S. 436, and *Wilson v. North Carolina*, 42 L. ed. U. S. 865.

198 U. S.

Amendment to the Constitution of the United States does not wholly deprive a state of the power to confer jurisdiction on its courts to administer the estates of absentees, irrespective of the fact of death, by a special and appropriate proceeding distinct from the general law for the settlement of the estates of decedents.

2. Fixing the period of a person's absence from his last domicile within the state which will be sufficient, under Pa. Laws 1885, p. 155, to authorize the administration of his property by the special proceeding provided by that statute at seven or more years, is not so unreasonable as to render the statute repugnant to the due process of law clause of the 14th Amendment to the Constitution of the United States.
3. Notice by publication of the special proceeding provided by Pa. Laws 1885, p. 155, for the administration of the estates of absentees, satisfies the requirement of the due process of law clause of the 14th Amendment to the Constitution of the United States.
4. The safeguards for the protection of the property of an absentee in case of his return, afforded by Pa. Laws 1885, p. 155, providing a special proceeding for the administration of the estates of absentees, satisfy the requirement of the due process of law clause of the 14th Amendment to the Constitution of the United States, where that statute authorizes the revocation of the administration at any time on proof that the absentee is in fact alive, and in such event permits him to recover the shares of his estate received by the distributees, and provides that until the latter shall give security for refunding their shares with interest in case the supposed decedent shall be alive, no distribution shall be made, and that in case of inability to give such security the money shall be invested under the control of the court, and the interest only paid to the distributees.

[No. 165.]

Argued March 6, 1905. Decided May 29, 1905.

IN ERROR to the Supreme Court of the State of Pennsylvania to review a judgment which reversed a judgment of the Superior Court of that state, which had affirmed a judgment of the Court of Common Pleas of Berks County in favor of plaintiff in an action to recover arrears of interest which had been paid during her absence from the state to the administrator appointed to administer her estate as an absentee. *Affirmed.*

See same case below, 206 Pa. 469, 98 Am. St. Rep. 790, 56 Atl. 16.

The facts are stated in the opinion.

On notice and hearing required to constitute due process of law—see notes to *Kuntz v. Sumption*, 2 L. R. A. 657; *Chauvin v. Vailton*, 3 L. R. A. 194; and *Ulman v. Baltimore*, 11 L. R. A. 225.

As to what service of process is sufficient to constitute due process of law—see note to *Pinney v. Providence Loan & Invest. Co.* 50 L. R. A. 577.

Mr. Caleb J. Bieber argued the cause and filed a brief for plaintiff in error:

If plaintiff's departure from Pennsylvania, and her omission to demand her arrearages for a period of eleven years, worked an injury to anyone, it was to herself alone, and not to any public right, such as would bring this case within the police powers of the state.

Clapp v. Houg, 12 N. D. 600, 65 L. R. A. 757, 98 N. W. 710; *Lavin v. Emigrant Industrial Sav. Bank*, 18 Blatchf. 1, 1 Fed. 641.

The purpose of this act is plainly and clearly set forth in its title, language, and provisions, and that purpose is the distribution of an estate through the ordinary method of administration, added to which is the liability on the part of the distributee to refund in case the supposed decedent is alive. This liability existed before the passage of this act.

Devlin v. Com. 101 Pa. 273, 47 Am. Rep. 710.

Even if conservation were the purpose of this act, we would nevertheless contend that plaintiff's constitutional rights were infringed.

Clapp v. Houg, 12 N. D. 600, 65 L. R. A. 757, 98 N. W. 710.

However, it is not the purpose, but the effect, of an act, which determines its constitutionality.

Pennsylvania R. Co. v. Riblet, 66 Pa. 164, 5 Am. Rep. 360; *Henderson v. New York* (*Henderson v. Wickham*) 92 U. S. 259, 23 L. ed. 543.

The material inquiry is not whether the act gave the court power to hear and decide certain things, but whether the proceeding under the act infringed plaintiff's constitutional rights.

Carr v. Brown, 20 R. I. 217, 38 L. R. A. 294, 78 Am. St. Rep. 855, 38 Atl. 9; *Lavin v. Emigrant Industrial Sav. Bank*, 18 Blatchf. 1, 1 Fed. 641; *Davidson v. New Orleans*, 96 U. S. 97, 102, 24 L. ed. 616, 618.

Every person is entitled to his day in court before his rights can be concluded by its judgment.

Herman, Estoppel, p. 201, § 182.

No man shall be condemned in his person or property without notice and an opportunity to defend.

Boswell v. Otis, 9 How. 336, 13 L. ed. 164.

No judgment of a court is due process of law if rendered without jurisdiction in the court, or without notice to the party.

Scott v. McNeal, 154 U. S. 34, 46, 38 L. ed. 896, 901, 14 Sup. Ct. Rep. 1108.

The orphans' court had no jurisdiction over the person of the plaintiff, and could not, in the absence of personal service or

the voluntary appearance of the plaintiff in the proceeding, render a decree or order which would be binding on her personally.

Pennoyer v. Neff, 95 U. S. 733, 24 L. ed. 572.

In the absence of personal service, no man can be conclusively bound by the result of a judicial proceeding of which he did not have constructive notice.

Layfayette Ins. Co. v. French, 18 How. 408, 15 L. ed. 453.

This constructive notice is a legal inference from the seizure of the property by attachment or other equivalent act into the grasp of the court; for the law assumes that property is always in the possession of its owner in person or by agent, and it proceeds on the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale. (*Pennoyer v. Neff*, 95 U. S. 727, 24 L. ed. 570.) After such seizure, in a proper proceeding, substituted service by publication is sufficient to bind the nonresident owner to an extent necessary to control the disposition of the property so seized. This is the teaching of *Pennoyer v. Neff*. In the light of this teaching the orphans' court of Berks county never acquired jurisdiction over the property of Margaret Cunnius, for the reason that there was no seizure of plaintiff's property into the custody of the court prior to the rendition of the decree declaring that the presumption of death had arisen against her,—the decree in pursuance of which the administrator subsequently obtained letters, and succeeded to the plaintiff's right against the school district for her arrearages, and collected the same. It follows, therefore, that for want of personal notice to the plaintiff, and in the absence of the required seizure of her property, the proceeding under the act of 1885 was void as to her, whatever other effect it may have.

Lavin v. Emigrant Industrial Sav. Bank, 1 Fed. 641; *Scott v. McNeal*, 154 U. S. 34, 47, 38 L. ed. 896, 902, 14 Sup. Ct. Rep. 1108; *Boswell v. Otis*, 9 How. 336, 13 L. ed. 164; *Webster v. Reid*, 11 How. 437, 13 L. ed. 761; *Pennoyer v. Neff*, 95 U. S. 723, 24 L. ed. 569; *Clapp v. Houg*, 12 N. D. 600, 65 L. R. A. 757, 98 N. W. 710.

Substituted service by publication may also be sufficient in cases where the object of the action is to reach and dispose of property in the state, or of some interest therein, by enforcing a contract or lien respecting the same, or to partition it among different owners, or, when the public is a party, to condemn and appropriate it for public use. (*Pennoyer v. Neff*, 95 U. S. 727, 24 L. ed. 570.) The case in hand does

not come in this class. But where the entire object of the action is to determine the personal rights and obligations of the defendants,—that is, where the suit is merely *in personam*, constructive service in this form upon a nonresident is ineffectual for any purpose. (*Ibid.*) This is the class to which the present case belongs.

If the nonresident have no property in the state, there is nothing on which its tribunals can adjudicate.

Pennoyer v. Neff, 95 U. S. 723, 24 L. ed. 569.

Under the laws of Pennsylvania the school district became personally liable for the payment of the yearly interest (*Kunselman v. Stine*, 192 Pa. 462, 43 Atl. 948); in other words, the Reading school district was the debtor for the arrearages. The right of the plaintiff was the right to a specific sum of money, otherwise called a chose in action. It has repeatedly been held that for the purpose of jurisdiction the situs of a debt or other chose in action follows the domicile of the creditor.

Central Trust Co. v. Chattanooga R. & C. R. Co. 68 Fed. 685.

There was, consequently, no personal property in Pennsylvania belonging to the plaintiff when her administrator was appointed.

State Tax on Foreign-held Bonds, 15 Wall. 300, 320, 21 L. ed. 179, 187; *Bristol v. Washington County*, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585.

Taking the private property of one person and transferring it to another is not due process of law.

Wilkinson v. Leland, 2 Pet. 627, 657, 7 L. ed. 542, 553; *Ervine's Appeal*, 16 Pa. 264, 55 Am. Dec. 499; *Pennoyer v. Neff*, 95 U. S. 733, 24 L. ed. 572; *Scott v. McNeal*, 154 U. S. 46, 38 L. ed. 901, 14 Sup. Ct. Rep. 1108; *Missouri P. R. Co. v. Nebraska*, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130; *Johnson v. Beazley*, 65 Mo. 264, 27 Am. Rep. 276; *Re Road*, 110 Pa. 544, 1 Atl. 431; *Wilkinson v. Leland*, 2 Pet. 627, 657, 7 L. ed. 542, 553; *King v. Hatfield*, 130 Fed. 583; *Dodge v. Mission Twp.* 107 Fed. 827.

The appointment of the administrator is open to collateral attack.

Scott v. McNeal, 154 U. S. 34, 46, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108; *Stevenson v. Superior Court*, 62 Cal. 65; *Hamilton v. Brown*, 161 U. S. 267, 40 L. ed. 696, 16 Sup. Ct. Rep. 585; 1 Herman, Estoppel, p. 64.

Letters of administration upon the estate of a living person are nullities.

Carr v. Brown, 20 R. I. 217, 38 L. R. A. 294, 78 Am. St. Rep. 855, 38 Atl. 9; *Clapp v. Houg*, 12 N. D. 600, 65 L. R. A. 757, 98 N. W. 710; *Lavin v. Emigrant Industrial* 198 U. S.

Sav. Bank, 18 Blatchf. 1, 1 Fed. 641; *Scott v. McNeal*, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108.

Mr. Frederick W. Nicolls (by special leave) argued the cause, and, with *Mr. William Rick*, filed a brief for defendant in error:

An act conferring jurisdiction over the estates of those presumed to be dead is on the same footing as one conferring jurisdiction over bills *quia timet* and for the quieting of title, and should receive the same judicial sanction from this court.

See *Arndt v. Griggs*, 134 U. S. 316, 33 L. ed. 918, 10 Sup. Ct. Rep. 557; *Boswell v. Otis*, 9 How. 336, 13 L. ed. 164; *Bennett v. Fenton*, 10 L. R. A. 500, 41 Fed. 283; *Roller v. Holly*, 176 U. S. 398, 44 L. ed. 520, 20 Sup. Ct. Rep. 410; *Shepherd v. Ware*, 48 N. W. 773, 46 Minn. 174, 24 Am. St. Rep. 212; *Gray v. Gates*, 37 Wis. 614.

Proceedings under the act of 1885, being adapted to like cases of administration upon the estates of the dead, are substantially proceedings *in rem*; and constructive notice, if reasonable, is sufficient.

Pennoyer v. Neff, 95 U. S. 734, 24 L. ed. 572; *Woodruff v. Taylor*, 20 Vt. 73; *Freeman*, Judgm. §§ 607, 608; *Black*, Judgm. §§ 793, 808; *Freeman v. Alderson*, 119 U. S. 185, 187, 188, 30 L. ed. 372, 373, 7 Sup. Ct. Rep. 165; *Heidritter v. Oil Cloth Co.* 112 U. S. 294, 302, 28 L. ed. 729, 732, 5 Sup. Ct. Rep. 135; *Herman*, Estoppel, § 327; *Runyan's Appeal*, 27 Pa. 121; *Quidort v. Pergeaux*, 18 N. J. Eq. 472; *Vanderpoel v. Van Valkenburgh*, 6 N. Y. 190; *Re Storey*, 120 Ill. 244, 11 N. E. 209.

Mr. Justice **White** delivered the opinion of the court:

The legislature of Pennsylvania, in 1885, adopted a law "relating to the grant of letters of administration upon the estates of persons presumed to be dead, by reason of long absence from their former domicile." Briefly, and in substance, the act provided that upon application made to the register of wills for letters of administration upon the estate of any person supposed to be dead on account of absence for *seven or more[459] years from the place of his last domicile within the state, the register of wills shall certify the application to the orphans' court, and that said court, if satisfied that the applicant would be entitled to administration if the absentee were in fact dead, shall cause the fact of the application to be advertised in a newspaper published in the county once a week for four successive weeks, giving notice that on a day stated, which must be two weeks after the last publication, evidence would be heard by the court concerning "the alleged absence of the supposed de-

cedent, and the circumstances and duration thereof." After providing for a hearing in the orphans' court, the statute empowers that court, if satisfied by the proof that the legal presumption of death is made out, to so decree, and cause a notice to be inserted for two successive weeks in a newspaper published in the county, and also, when practicable, in a newspaper published at or near the place beyond the state where, when last heard from, the supposed decedent had his residence. This notice requires the absentee, if alive, or any other person for him, to produce to the court, within twelve weeks from the date of the last insertion of the notice, satisfactory evidence of the continuance in life of the absentee. If, within the period of twelve weeks, evidence is not produced to the court that the absentee is alive, the statute makes it the duty of the court to order the register of wills to issue letters of administration to the party entitled thereto, and such letters, until revoked, and all acts done in pursuance thereof and in reliance thereupon, shall be as valid as if the supposed decedent were really dead. Power is further conferred upon the orphans' court to revoke the letters at any time on proof that the absentee is in fact alive, the effect of the revocation being to withdraw all the powers conferred by the grant of administration. But it is provided that—

"All receipts or disbursements of assets, and other acts previously done by him" (the administrator), "shall remain as valid as if the said letters were unrevoked, and the administrator shall settle an account of his [460] administration down to *the time of such revocation, and shall transfer all assets remaining in his hands to the person as whose administrator he had acted, or to his duly authorized agent or attorney: *Provided*, Nothing in this act contained shall validate the title of any person to any money or property received as widow, next of kin, or heir of such supposed decedent, but the same may be recovered from such person in all cases in which such recovery would be had if this act had not been passed."

It is further provided that before any distribution of the estate of such supposed decedent shall be made to the persons entitled to receive it, they shall give security, to be approved by the orphans' court, in such sum as the court shall direct, conditioned that if the absentee "shall, in fact, be at the time alive, they will, respectively, refund the amounts received by each, on demand, with interest thereon; but if the person or persons entitled to receive the same is or are unable to give the security aforesaid, then the money shall be put at interest on security approved by said court, which inter-

est is to be paid annually to the person entitled to it, and the money to remain at interest until the security aforesaid is given, or the orphans' court, on application, shall order it to be paid to the person or persons entitled to it."

After affording remedies in favor of the absentee in case the issue of letters should be subsequently revoked, the statute provides that the costs attending the issue of letters or their revocation shall be paid out of the estate of the supposed decedent, and that the costs arising upon the application for letters which shall not be granted shall be paid by the applicant. Public Laws 1885, p. 155.

The plaintiff in error, Margaret Cunnius, now Margaret Smith, whom we shall hereafter refer to as Mrs. Smith, prior to and at the time of the passage of this act, was domiciled in the state of Pennsylvania. In virtue of her right of dower in certain real estate of her husband, which passed to him from his deceased mother's estate, she became entitled to the annual interest during her life on the sum of \$569.61. This debt was *assumed by John M. Cunnius, who [461] acquired the real estate from which the right of dower arose, and was in turn assumed by the Reading school district, in consequence of its acquisition from John M. Cunnius of the property. The school district paid the interest as it accrued to Mrs. Smith, at her domicile in the city of Reading, up to the 1st of April, 1888. In that year she left her domicile in the city of Reading, and for nearly nine years—up to March, 1897—she had not been heard from. At that date her only son, who resided in Reading, alleging the absence of his mother for the period stated, and the fact that she had not been heard from, and the consequent presumption of her death, made application to the register of wills, under the statute to which we have just referred, for letters of administration. After the reference of the matter to the orphans' court, as required by the statute, and the making of the publication, and compliance with the other requisites of the statutes, the letters of administration which the statute authorized were granted. Under the authority thus conferred the administrator collected from the Reading school district the arrears of interest which had accrued on the right of dower of Mrs. Smith, from the date of the last payment made to her before her disappearance on April the 1st, 1888, down to the time of the appointment of the administrator. The administrator gave the school district a receipt and discharge. In 1899 Mrs. Smith sued the Reading school district in the court of common pleas of Berks county to recover the arrears of interest which had been paid

during her absence to the administrator appointed by the orphans' court. And the proof in the suit developed that at the time the proceedings against her as an absentee were initiated, and when the administrator was appointed, she was living in Sacramento, California. The school district relied for its defense upon the payment of the interest made to the administrator, and the discharge which that officer had given under the law. Mrs. Smith asserted that the proceedings in the state court and the receipt of the administrator furnished no protection [462] *to the school district, because, as she was alive when the proceedings for administration were taken in the state court, those proceedings and the law which authorized them were repugnant to the 14th Amendment to the Constitution of the United States. She, moreover, contended, even although there was power in the state to provide by law for the administration of the property of an absentee, the particular law in question was repugnant to the 14th Amendment to the Constitution, as it did not provide for adequate notice, and because the law failed to furnish the necessary safeguards to give it validity. The case went to a jury upon legal points being reserved.

The trial court decided that Mrs. Smith was entitled to recover, because the Pennsylvania statute did not provide essential notice, and was, therefore, repugnant to the due process clause of the 14th Amendment. The superior court, to which the case was taken, affirmed the action of trial court on the ground that, as Mrs. Smith was alive when the proceedings to administer her estate as an absentee were had, that administration was void, and the statute authorizing it was repugnant to the 14th Amendment. 21 Pa. Super. Ct. 340. The supreme court of Pennsylvania, on appeal, reversed the judgments of the court below, and decided that the statute was a valid exercise of the police power of the state, and, therefore, both as to form and substance, was not repugnant to the 14th Amendment. 206 Pa. 469, 98 Am. St. Rep. 790, 56 Atl. 16.

In their ultimate aspect the assignments of error and the propositions based on them all rest on the assumption that the state of Pennsylvania had no jurisdiction over the person or property of the absentee, and therefore the proceedings for the appointment of the administrator and all acts done by him were void and subject to collateral attack. But to uphold this contention, in a broad sense, would be to deny the possession by the various states of powers which they obviously have the right to exert. That the debt due the absentee by the school district, resulting from the establishment of her dower, was within the jurisdiction of the state authority, is clear. It would undoubtedly have been subject to administration under the laws of Pennsylvania had the absentee been in fact dead. *Wyman v. Haistead* (*Wyman v. United States*), 109 U. S. 654, 656, 27 L. ed. 1068, 1069, 3 Sup. Ct. Rep. 417; *Sayre v. Helme*, 61 Pa. 299; *Mansfield v. McFarland*, 202 Pa. 173, 174, 51 Atl. 763. The debt was certainly subject to taxation, and, being so subject, had it been taxed, the state would have had power to provide remedial process for the collection of the tax. *Savings & Loan Soc. v. Multnomah County*, 169 U. S. 421, 428, 42 L. ed. 803, 805, 18 Sup. Ct. Rep. 392; *Bristol v. Washington County*, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585. Moreover, it would have been in the power of the state to subject the debt to attachment at the instance of a creditor of the absentee. *Harris v. Balk*, 198 U. S. 215, ante, 1023, 25 Sup. Ct. Rep. 625. And that the law *of [468] Pennsylvania would have authorized such an attachment is also clear. *Furness v. Smith*, 30 Pa. 520, 522. It may not also be doubted that the state of Pennsylvania had authority to enact an applicable statute of limitations.

Shrinking from the conclusion to which the assertion of the want of jurisdiction in the state over the debt logically leads, the foregoing propositions are not seriously disputed. It is, however, insisted that they are not determinative of the power of the state to provide for the administration of the property of a person who, having been domiciled in the state, has absented himself for an unreasonable time, leaving no trace of his whereabouts. The contentions on this subject are thus stated in the brief of counsel:

"In a word, the case before the court is one in which the private property of one person was, without her knowledge or consent, transferred to another, who, in reality, had no shadow of a right to it, by virtue of an *ex parte* proceeding of which the owner had no lawful notice. Is it possible that such a manifest infringement of the fundamental and inherent rights which belong to every person in the use and enjoyment of his private property can be construed to be due process of law?"

Again:

"If the plaintiff's departure from Pennsylvania, and her omission to demand her arrears for the period of eleven years, work an injury to anyone, it was to herself alone, and not to any public right such as would bring this case within the police power of the state. Plaintiff was under no legal obligation to remain in Reading."

It will be observed that the propositions challenge the authority of the state to enact the statute which formed the basis of the

proceedings, not only because it is insisted that there was a complete want of power to do so, but also because, even if the state had power, the method of procedure which the statute authorized was so wanting in notice as not to constitute due process of law. We shall consider these objections separately:

[469] *1st. Was the state statute providing for the administration of the property of an absentee under the circumstances contemplated by the statute so beyond the scope of the state's authority as to constitute a want of due process of law within the intendment of the 14th Amendment? That the amendment does not deprive the states of their police power over subjects within their jurisdiction is elementary. The question, then, is not the wisdom of the statute, but whether it was so beyond the scope of municipal government as to amount to a want of due process of law. The solution of this inquiry leads us, therefore, to consider the general power of government to provide for the administration of the estates of absentees under the conditions enumerated in the Pennsylvania law. We do not pause to demonstrate, by original reasoning, that the right to regulate concerning the estate or property of absentees is an attribute which, in its very essence, must belong to all governments, to the end that they may be able to perform the purposes for which government exists. This is not done, because we propose rather to test the question by ascertaining how far such authority has been deemed a proper governmental attribute in all times and under all conditions. If it be found that an authority of that character has ever been treated as belonging to government and embraced in the right to protect and foster the well-being and order of society, it must follow that that which has at all times been conceded to be within the power of government cannot, in reason, be said to be so beyond scope of governmental authority that the exertion of such a power must be held to be a want of due process of law, even although there is no constitutional limitation affecting the exercise of the power. Whilst it may be that under the Roman law there was no complete and coherent system provided for the administration of the estate of an absentee (Toullier, title 1, No. 379; Duranton, title 1, No. 384), it is nevertheless certain that absence, without being heard from for a given length of time, authorized the appointment of a

[470] curator to protect and administer an estate. See the references to the Roman law on that subject in Domat, liv. 2, title 2, § 1, No. 13. That in the ancient law of France, under varying conditions, the same governmental right was recognized, is also undoubted.

Journal du Palais Rep. Verbo *Absence*, p. 20, from No. 9 to 25. In the Code Napoleon the subject is especially provided for under a title treating of absence, in which ample provision is made for the administration of the property of the absentee, the law providing for, first, the provisional and ultimately the final distribution of such property in accordance with the restrictions and regulations which the title provides. Code Napoleon, bk. 1, title 4, art. 112 *et seq.* Demolombe, in generally treating upon the subject, thus expounds the fundamental conceptions from which the power of government on the subject is derived:

"Three characters of interest invoke a necessity for legislation concerning this difficult and important subject. First. The interest of the person himself who has disappeared. If it is true that, generally speaking, every person is held, at his own peril, to watch over his own property, nevertheless the law owes a duty to protect those who, from incapacity, are unable to direct their affairs. It is upon this principle of public order that the appointment of tutors to minors or curators to the insane rests. It is indeed natural to presume that a person who has disappeared, if he continues to exist, is prevented from returning by some obstacle stronger than his own will, and which, therefore, places him in the category of an incapable person, whose interest it is the duty of the law to protect. And it is for this reason that the provisions as to absence in the Code are placed in the chapter treating of the status of persons, because the absentee, in the legal sense, is a person occupying a peculiar legal status. Second. The duty of the lawmaker to consider the rights of third parties against the absentee, especially those who have rights which would depend upon the death of the absentee. Third. Finally, the general interest of society which may require that property *does not remain abandoned with-

[471] out some one representing it, and without an owner. . . ."

And it may not be doubted that the power to deal with the estate of an absentee was recognized and exerted not only by the common law of Germany, but also by the codes of the various states of the continent of Europe. De Saint Joseph Concordance entre les Codes Civils Etrangers et le Code Napoleon, vol. 1, page 11.

Provisions similar in character to those of the Code Napoleon were incorporated in the Civil Code of Louisiana of 1808, under the head of absentees, in book 1 of that code, defining the status of persons, and such provisions have been in force from that day to the present time. La. Civil Code, art. 47 *et seq.* The provisions of that code on

the subject were referred to by this court in *Scott v. McNeal*, 154 U. S. 34, 41, 38 L. ed. 896, 900, 14 Sup. Ct. Rep. 1108. Under the law of England, as stated in that case, a presumption of death arose from an absence of seven years without being heard from; and whilst it is true, as we shall hereafter have occasion to say, that such presumption was not conclusive, and was rebuttable, nevertheless the very fact of the presumption occasioned by absence, irrespective of the force of the presumption, was a manifestation of the power to give legal effect to the status arising from absence.

As the preceding statement shows that the right to regulate the estates of absentees, both in the common and civil law, has ever been recognized as being within the scope of governmental authority, it must follow that the proposition that the state of Pennsylvania was wholly without power to legislate concerning the property of an absentee is without merit, unless it be that the authority of a state over the subject is restrained by some constitutional limitation. That the Constitution of Pennsylvania does not put such a restriction is foreclosed by the decision of the supreme court of Pennsylvania in this case. But it is insisted, conceding that the state of Pennsylvania had power to provide for the administration of the property of an absentee, yet that authority could not *be exerted without violating the due process clause of the 14th Amendment if the administrative proceeding, brought into play under the exercise of the authority, is made binding upon the absentee if it should subsequently develop that he was alive when the administration was initiated. To sustain this proposition numerous decisions of state courts of last resort are relied upon, which are enumerated in the margin,† and special reliance is placed upon the decision of this court in *Scott v. McNeal*, 154 U. S. 34, 41, 38 L. ed. 896, 900, 14 Sup. Ct. Rep. 1108. We are of opinion, however, that the cases relied upon, with one or two exceptions, hereafter to be noticed, are inapposite to this case. The leading cases were reviewed in *Scott v. McNeal*, and their

inapplicability to the present case will therefore be demonstrated by a brief consideration of *Scott v. McNeal*.

In that case a probate court in the state of Washington had issued letters of administration upon the estate of a person who had disappeared, and proceeded to administer his estate as that of a dead person, upon the presumption of death, which the court assumed had arisen from his absence. There was no statute of the state of Washington providing for an administration of the estate of an absentee as such, and creating rights and safeguards applicable to that situation, as distinct from the general law of the state, conferring upon courts of probate power to administer the estates of deceased persons. Referring to the presumption under the law of England of *death[473] arising from absence, it was held that such presumption was not conclusive, and was absolutely rebutted by proof that the person who was presumed from the fact of absence to be dead was, in fact, alive. Having established this proposition, it was then held, as death was essential to confer jurisdiction on a probate court to administer an estate as such, the fact of life at the time the administration was initiated conclusively rebutted the presumption, and caused the court to be wholly without jurisdiction to administer the estate of a person who was alive. This conclusion was abundantly sustained by a citation of the English and American adjudications, in none of which was the doctrine upon which the case proceeded more cogently stated than in the opinion of this court, speaking through Chief Justice Marshall, in *Griffith v. Frazier*, 8 Cranch, 9, 23, 3 L. ed. 471, 475. That the opinion, however, in *Scott v. McNeal*, was not intended to and did not imply that the states were wholly devoid of power to endow their courts with jurisdiction, under proper conditions, to administer upon the estates of absentees, even though they might be alive, by special and appropriate proceedings applicable to that condition, as distinct from the general power to administer the estates of deceased persons, is conclusively shown by the opinion

†*French v. Frazier* (1832) 7 J. J. Marsh. 425, 432; *State v. White* (1846) 29 N. C. (7 Ired. L.) 116; *Duncan v. Stewart* (1854) 25 Ala. 408, 414, 60 Am. Dec. 527; *Moore v. Smith* (1858) 11 Rich. L. 569, 73 Am. Dec. 122; *Jochumsen v. Suffolk Sav. Bank* (1861) 3 Allen, 87; *Morgan v. Dodge* (1862) 44 N. H. 255, 259; 82 Am. Dec. 213; *Withers v. Patterson* (1864) 27 Tex. 491, 498, 86 Am. Dec. 643; *Quidort v. Pergeaux* (1867) 18 N. J. Eq. 472, 477; *Melia v. Simmons* (1878) 45 Wis. 334, 337, 30 Am. Rep. 746; *D'Arusment v. Jones* (1880) 4 Lea, 251, 40 Am. Rep. 12; *Devlin v. Com.* (1882) 101 Pa. 273, 47 Am. Rep. 710; **198 U. S.**

Stevenson v. Superior Court (1882) 62 Cal. 60, 65; *Thomas v. People* (1883) 107 Ill. 517, 47 Am. Rep. 458; *Perry v. St. Joseph & W. R. Co.* (1883) 29 Kan. 420, 423; *Epping v. Robinson* (1884) 21 Fla. 36, 49; *Martin v. Robinson* (1887) 67 Tex. 368, 3 S. W. 550; *Springer v. Shavender* (1895) 116 N. C. 12, 33 L. R. A. 772, 47 Am. St. Rep. 791, 21 S. E. 397, 118 N. C. 33, 54 Am. St. Rep. 708, 23 S. E. 976; *Carr v. Brown* (1897) 20 R. I. 217, 38 L. R. A. 294, 78 Am. St. Rep. 855, 38 Atl. 9; *Clapp v. Iloung* (1904) 12 N. D. 600, 65 L. R. A. 757, 98 N. W. 710.

in *Scott v. McNeal*. Thus, the law of Louisiana, providing for the administration of the property of absentees, as distinct from the authority conferred to administer the estates of deceased persons, was approvingly referred to. And, moreover, as showing that it was deemed that the absence of legislation by the state of Washington of a similar character was the determinative factor in the case, the court said (p. 47, L. ed. p. 902, Sup. Ct. Rep. p. 1113):

"The local law on the subject, contained in the Code of 1881 of the territory of Washington, in force at the time of the proceedings now in question, and since continued in force by article 27, § 2, of the Constitution of the state, does not appear to us to warrant the conclusion that the probate court is authorized to conclusively decide, as against a living person, that he is dead, and his [474] estate therefore *subject to be administered and disposed of by the probate court.

"On the contrary, that law, in its very terms, appears to us to recognize and assume the death of the owner to be a fundamental condition and prerequisite to the exercise by the probate court of jurisdiction to grant letters testamentary or of administration upon his estate, or to license anyone to sell his lands for the payment of his debts."

After copiously reviewing the Washington statutes and pointing out that they dealt with the estates of deceased persons as such, the case was summed up in the following language:

"Under such a statute, according to the overwhelming weight of authority, as shown by the cases cited in the earlier part of this opinion, the jurisdiction of the court to which is committed the control and management of the estates of deceased persons, by whatever name it is called,—ecclesiastical court, probate court, orphans' court, or court of the ordinary or the surrogate,—does not exist or take effect before death. All proceedings of such courts in the probate of wills and the granting of administrations depend upon the fact that a person is dead, and are null and void if he is alive. Their jurisdiction in this respect being limited to the estate of deceased persons, they have no jurisdiction whatever to administer and dispose of the estates of living persons of full age and sound mind, or to determine that a living man is dead, and thereupon undertake to dispose of his estate."

True it is that there are some general expressions found in the opinion (p. 50, L. ed. p. 903, Sup. Ct. Rep. p. 1114), which, if separated from the context of the opinion, might lead to the conclusion that it was held that a state was absolutely without power

to provide by a special proceeding for the administration and care of the property of an absentee, and to confer jurisdiction on its courts to do so, irrespective of the fact of death. But these general expressions are necessarily controlled, by the case which was before the court, and by the context of the opinion, which makes it *clear that it [475] was alone decided that under a law giving jurisdiction to probate courts to administer the estates of deceased persons, even although a rebuttable presumption existed as to death after a certain time, that if such presumption was subsequently rebutted by the proof of the fact of life, that the court, whose authority depended upon death, was devoid of jurisdiction.

We have said that two of the cases relied upon would be separately noticed. Those cases are *Carr v. Brown*, 20 R. I. 217, 38 L. R. A. 294, 78 Am. St. Rep. 855, 38 Atl. 9, and *Clapp v. Houg*, 12 N. D. 600, 65 L. R. A. 757, 98 N. W. 710. In the first case there was a statute of Rhode Island providing for administration under the presumption of death after an absence of seven years, and it was decided that the statute was void. The opinion leads to the view that the conclusion of the court was primarily based upon the construction that the statute did not create a conclusive presumption conferring jurisdiction in the event the absentee was alive, and not dead. In the second case there was also a statute of the state of North Dakota, but the court held it to be void, because of the inadequacy of the notice for which it provided. There are, in both of the cases, expressions tending to the view that the state was without power to provide by special legislation for the administration of the property of an absentee. In so far, of course, as these views were rested upon the state Constitution, we are not concerned with them. In so far, however, as they intimate that, by the operation of the 14th Amendment, the states are deprived of power to legislate concerning the estates of absentees, we do not approve them.

The error underlying the argument of the plaintiff in error consists in treating as one two distinct things,—the want of power in a state to administer the property of a person who is alive, under its general authority to provide for the settlement of the estates of deceased persons, and the power of the state to provide for the administration of the estates of persons who are absent for an unreasonable time, and to enact reasonable regulations on that subject. The distinction between the *two is well illustrated [476] in Pennsylvania, for in that state, prior to the enactment of the statute in question, it had been expressly decided that a court of probate, as such, was absolutely wanting in

jurisdiction to administer the estate of a person who was alive, simply because there existed a presumption which was rebuttable as to the fact of death. This is also aptly illustrated by the law of Louisiana. In that state, as we have seen, provisions have existed from the beginning for the administration of the estates of absentees as distinct from the power conferred upon the courts of probate to administer the estates of deceased persons. In this condition of the law, under an averment of death, an estate was opened in a probate court of Louisiana, and administered upon. A question as to the validity of that administration subsequently arose in *Burns v. Van Loan*, 29 La. Ann. 560, 563. As the proceedings were probate proceedings not taken under the statute providing for the administration of the estates of absentees, the supreme court of the state of Louisiana declared them to be absolutely void. As it cannot be denied that, in substance, the Pennsylvania statute is a special proceeding for the administration of the estates of absentees, distinct from the general law of that state providing for the settlement of the estates of deceased persons, and as, by the express terms of the statute, jurisdiction was conferred upon the proper court to grant the administration, it follows that the supreme court of Pennsylvania did not deprive the plaintiff in error of due process of law within the intendment of the 14th Amendment.

2d. It remains only to consider the contention that even although there was power to enact the statute, it is nevertheless repugnant to the 14th Amendment, because it fails to provide notice as a prerequisite to the administration which the statute authorizes, and because of the absence from the statute of essential safeguards for the protection of the property of the absentee which is to be administered. Let it be conceded, as we think it must be, that the creation by a state law of an arbitrary and [477]unreasonable presumption of death *resulting from absence for a brief period, would be a want of due process of law, and therefore repugnant to the 14th Amendment. Let it be further conceded, as we also think is essential, that a state law which did not provide adequate notice as prerequisite to the proceedings for the administration of the estate of an absentee would also be repugnant to the 14th Amendment. Again, let it be conceded that if a state law, in providing for the administration of the estate of an absentee, contained no adequate safeguards concerning property, and amounted, therefore, simply to authorizing the transfer of the property of the absentee to others, that such a law would be repugnant to the 14th Amendment. We think none of these

concessions are controlling in this case. So far as the period of absence provided by the statute in question, it certainly cannot be said to be unreasonable. So far as the notices which it directs to be issued, we think they were reasonable. As concerns the safeguards which the statute creates for the protection of the interest of the absentee in case he should return, we content ourselves with saying that we think, as construed by the Supreme Court of Pennsylvania, the provisions of the statute do not conflict with the 14th Amendment.

Affirmed.

DANIEL R. KENDALL, *Appt.*,
v.
AMERICAN AUTOMATIC LOOM COMPANY.

(See S. C. Reporter's ed. 477-483.)

Direct appeal from circuit court—when jurisdiction in issue—writ and process—service on treasurer of foreign corporation.

1. The question of the validity of the service of a subpoena issued by a Federal circuit court upon the resident treasurer of a foreign corporation involves the jurisdiction of that court as a Federal court so as to sustain a direct appeal to the Supreme Court of the United States under the act of March 3, 1891 (26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549), § 5, from an order setting aside the service.
2. Service of a subpoena on the resident treasurer of a foreign corporation is not sufficient to give the court jurisdiction over such corporation, where, at the time of such service, it was doing no business within the state, and never had done any business there since its incorporation.

[No. 541.]

Submitted April 24, 1905. Decided May 29, 1905.

APPPEAL from the Circuit Court of the United States for the Southern District of New York to review an order setting aside the service of a subpoena on the resident treasurer of a foreign corporation. *Affirmed.*

Statement by Mr. Justice **Peckham**:
This suit was brought against the de-

NOTE.—On direct review in the Supreme Court of the United States of circuit and district court judgments or decrees—see note to *Gwin v. United States*, 46 L. ed. 741.

On service of process on foreign corporation—see notes to *Foster v. Charles Betcher Lumber Co.* 23 L. R. A. 490; and *Eldred v. American Palace-Car Co.* 45 C. C. A. 3.

defendant, appellee, for the purpose of obtaining a discovery of all the matters referred to in the bill of complaint, and to have a receiver appointed of the assets of the company within the state of New York, and for an accounting by the directors of the defendant, and for other relief.

The bill alleged that the plaintiff, at the time of filing his bill, was a citizen of the United States and of the state, county, and city of New York; that the defendant was a stock corporation, organized in March, 1898, and existing under the laws of the state of West Virginia, and was incorporated to engage in the business of manufacturing and selling looms and weaving machinery, and that, by its charter, its principal office and place of business was in the city, county, and state of New York. The bill of complaint, together with a writ of subpoena requiring the defendant to answer the bill, were served in the city of New York upon a person who had been the treasurer of the defendant corporation. Within the proper time the defendant appeared specially, for the sole purpose of questioning the jurisdiction of the court, and of moving to set aside the attempted service.

The motion was founded upon the affidavit of Joseph H. Emery, in which he averred, among other matters, that the service of the subpoena had been made upon him in the city of New York, because (as he believed) he had been the treasurer of the defendant corporation; that the domicile and residence of the defendant were in the state of West Virginia; the purpose of its incorporation was the development of a self-feeding loom attachment, which gives to the ordinary loom a continuous supply of filling thread. It was further stated in the affidavit that the corporation was the owner of divers patents, but it had never manufactured merchandise. It had never made a sale, and it had never engaged in the [479] transaction *of the business for which it was incorporated. It had no business or assets in the state of New York, and had no office or place of business there, and those of its officers who resided in that state were not there officially, or as representing any business or interest of the corporation. After the formation of the corporation, and between the years 1898 and 1901, the meetings of the directors of the company were held at different places in the city of New York where accommodations could be secured,—sometimes at the office of the counsel of the company in New York, and sometimes at a hotel; but since August 10, 1901, there had been no meeting, either of the stockholders or of the directors; and on the last-mentioned date the stockholders were notified that the company had no funds with

which to pay the franchise taxes which were due to the state of West Virginia, and affiant averred that no funds had since been provided for that purpose; that since that date the company had transacted no business, had maintained no office in the state of New York, and that an action had been commenced by the state of West Virginia against it to terminate and forfeit its corporate franchise. The sole assets of the company consisted of two automatic looms and tools and machinery employed in the making thereof and its patents. The looms, with machinery and tools, were in Attleboro, Massachusetts. The letters patent were also in the possession of a Mr. Mossberg, in Attleboro, Massachusetts, who had made divers attempts to improve the looms. The company had no bank account, no office force, and no employees. It had never reached the stage of the active transaction of business, and such assets as it possessed were beyond the jurisdiction of the court. No one had been elected treasurer in place of Mr. Emery, so far as the record shows, and he was the treasurer of the company when service was made upon him.

An affidavit in opposition was filed by the complainant, but the facts above set forth were substantially undenied. The circuit court, upon the hearing, granted the motion of the defendant to set aside and declare null and void the attempted *service on the [480] corporation of the bill of complaint and writ of subpoena by the service thereof upon Joseph H. Emery, on or about the 13th day of December, 1904. The complainant has appealed directly to this court from the order of the circuit court setting aside the service of the subpoena.

Mr. Noah C. Rogers submitted the cause for appellant:

The defendant is subject to the jurisdiction of the New York court by the provision in its articles of incorporation fixing its principal place of business there.

People v. Geneva College, 5 Wend. 211; *Atty. Gen. v. Oakland County Bank*, 1 Walk. Ch. (Mich.) 90; *Canada Southern R. Co. v. Gebhard*, 109 U. S. 527, 537, 27 L. ed. 1020, 1024, 3 Sup. Ct. Rep. 363.

The service of the writ of subpoena on the defendant's treasurer was sufficient to give the court jurisdiction.

American Locomotive Co. v. Dickson Mfg. Co. 117 Fed. 972; *McCord Lumber Co. v. Doyle*, 38 C. C. A. 34, 97 Fed. 22; *Connecticut Mut. L. Ins. Co. v. Spratley*, 172 U. S. 602, 43 L. ed. 569, 19 Sup. Ct. Rep. 308; *Merchants' Mfg. Co. v. Grand Trunk R. Co.* 21 Blatchf. 109, 13 Fed. 358.

Mr. Benjamin N. Cardozo submitted the cause for appellee:

The defendant has no domicile or abode in the state of New York; it is not engaged in business in that state; and the service of the subpoena on its treasurer was ineffective to bring it into court.

Conley v. Mathieson Alkali Works, 190 U. S. 406, 47 L. ed. 1113, 23 Sup. Ct. Rep. 728; *Goldney v. Morning News*, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559; *Fitzgerald & M. Constr. Co. v. Fitzgerald*, 137 U. S. 106, 34 L. ed. 611, 11 Sup. Ct. Rep. 36; *Geer v. Mathieson Alkali Works*, 190 U. S. 429, 47 L. ed. 1123, 23 Sup. Ct. Rep. 807; *Caledonian Coal Co. v. Baker (New Mexico ex rel. Caledonian Coal Co. v. Baker)* 196 U. S. 444, ante, 545, 25 Sup. Ct. Rep. 375; *Sharkey v. Indiana, D. & W. R. Co.* 186 U. S. 479, 46 L. ed. 1266, 22 Sup. Ct. Rep. 941; *Wabash Western R. Co. v. Brow*, 164 U. S. 271, 41 L. ed. 431, 17 Sup. Ct. Rep. 126; *Re Keasbey & M. Co.* 160 U. S. 221, 40 L. ed. 402, 16 Sup. Ct. Rep. 273; *St. Clair v. Cox*, 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 354; *Central Grain & Stock Exch. v. Board of Trade*, 60 C. C. A. 299, 125 Fed. 463; *Martin v. New Trinidad Lake Asphalt Co.* 130 Fed. 394; *McGillin v. Claflin*, 52 Fed. 657; *Good Hope Co. v. Railway Barb Fencing Co.* 23 Blatchf. 43, 22 Fed. 635.

Cases which attribute controlling force to the designation of the place of business, as contained in the certificate of incorporation, have relation only to the question of the situs of the corporation within the state of its origin. They have no bearing upon its situs without that state.

Western Transp. Co. v. Scheu, 19 N. Y. 408; *Galveston, H. & S. A. R. Co. v. Gonzales*, 151 U. S. 496, 38 L. ed. 248, 14 Sup. Ct. Rep. 401.

The question in issue is not a question of the jurisdiction of the court below, within the meaning of § 5 of the act of March 3, 1891; and an appeal directly from the circuit court cannot be sustained.

Courtney v. Pradt, 196 U. S. 89, ante, 398, 25 Sup. Ct. Rep. 208; *Bache v. Hunt*, 193 U. S. 523, 48 L. ed. 774, 24 Sup. Ct. Rep. 547; *Louisville Trust Co. v. Knott*, 191 U. S. 225, 232, 48 L. ed. 159, 161, 24 Sup. Ct. Rep. 119; *Blythe v. Hinckley*, 173 U. S. 501, 43 L. ed. 783, 19 Sup. Ct. Rep. 497; *Mexican C. R. Co. v. Eckman*, 187 U. S. 429, 47 L. ed. 245, 23 Sup. Ct. Rep. 211.

Mr. Justice **Peckham**, after making the foregoing statement, delivered the opinion of the court:

It is objected, in the first place, by the appellee, that the appellant had no statutory right to appeal directly to this court
198 U. S.

from the order setting aside the service of the subpoena. It is asserted that the case does not involve the jurisdiction of the court below within the meaning of § 5 of the act of March 3, 1891 [26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549], inasmuch as the jurisdiction of the circuit court as a Federal court is not questioned, the jurisdiction being denied upon grounds alike applicable to any other judicial tribunal, state or Federal, under the same circumstances. This case is, however, on that point governed by that of *Board of Trade v. Hammond Elevator Co.* (decided at this time), 198 U. S. 424, ante, 1111, 25 Sup. Ct. Rep. 740, where it is held that the order is reviewable by this court under the section above mentioned.

Regarding the case as properly here, the question is whether the service made upon the treasurer of the appellee corporation was a valid service upon the corporation itself. We think it was not. It is perfectly apparent that the corporation was, at the time of the service on the treasurer, doing no business whatever within the state of New York, and that it had never done any business there since it was incorporated in the state of West Virginia. While we have lately held that, in the case of a foreign corporation, the service upon a resident director of the state where the service was made was a good service *where that[483] corporation was doing business within that state (*Pennsylvania Lumbermen's Mut. F. Ins. Co. v. Meyer*, 197 U. S. 407, ante, 810, 25 Sup. Ct. Rep. 483), yet such service is insufficient for a court to acquire jurisdiction over the corporation where the company was not doing any business in the state, and was situated like this company at the time of the service upon the treasurer. *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 47 L. ed. 1113, 23 Sup. Ct. Rep. 728.

The order of the Circuit Court was right, and is affirmed.

LOUISVILLE & NASHVILLE RAILROAD
COMPANY, *Petitioner*,

v.

WEST COAST NAVAL STORES COM-
PANY.

(See S. C. Reporter's ed. 483-500.)

Wharves—right of public use.

A wharf in the harbor of a city, at the foot of a public street, built by a railway company under authority from the city, in addition to adequate terminal facilities, for the purpose of more conveniently procuring the transportation of freight beyond its own line by such carriers as it might select, is not a

public wharf, whose use can be demanded by a shipper on payment of reasonable hire, for the purpose of employing vessels of his own selection for the further carriage of his goods.

[No. 225.]

Submitted April 25, 1905. Decided May 29, 1905.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Northern District of Florida in favor of plaintiff in an action to recover damages from the railway company for its refusal to permit a shipper to use its wharf for the further carriage of his goods. *Reversed* and remanded to the Circuit Court for further proceedings.

See same case below, 62 C. C. A. 681, 128 Fed. 1020.

Statement by Mr. Justice **Peckham**:

Certiorari to the circuit court of appeals for the fifth circuit to review a judgment of that court affirming one in favor of the West Coast Naval Stores Company (hereinafter called the plaintiff), against the railroad company (hereinafter called the defendant), for damages for refusing to permit the plaintiff to use the wharf of defendant at Pensacola for the *transportation of plaintiff's property, as stated in the declaration.

The action was brought in the circuit court of the United States for the northern district of Florida.

The plaintiff's declaration contains two counts, which are substantially the same, and it is therein averred that the plaintiff is a citizen of Florida and the defendant is a citizen of Kentucky, and that the latter is a common carrier, and carries goods into Pensacola over its railroad, and, among them, the goods of the plaintiff. The course of business between the two companies has been for the plaintiff to obtain transportation of its turpentine and rosin from its yard near Pensacola, and its warehouse in that city, by means of a switch, built for that purpose by the defendant, to defendant's main line, and thence to the wharf of defendant (which plaintiff alleged was a public wharf), by means of the cars and upon the railroad of the defendant. The wharf extended into the bay of Pensacola, and was used by defendant (and by persons bringing goods over the defendant's railway to and into Pensacola) for the purpose of shipping such goods from the wharf to vessels destined for other ports. After defendant had transported the goods of the plaintiff to the wharf of defendant, the plaintiff

had been accustomed to ship to other ports by vessels, with the managers of which plaintiff had contracts of carriage; that in the midst of the prosecution of such business defendant had notified plaintiff that it would thereafter refuse, and it did thereafter refuse, to allow plaintiff to transport its goods to the wharf for the purpose of there loading them on such vessels as above mentioned, and refused to permit the wharf and railway of defendant to be used in the prosecution of plaintiff's business, in so far as the prosecution would involve the use of the vessels chosen by the plaintiff for the shipment of the goods from Pensacola, to the damage of the plaintiff, as set forth in the declaration.

The defendant filed several pleas to this declaration, and the plaintiff demurred to them, which demurrer was overruled *by [485] the circuit court. Upon writ of error the circuit court of appeals reversed that judgment (57 C. C. A. 671, 121 Fed. 645), and when the case came down the defendant withdrew all former pleas and filed in the circuit court another plea, as follows:

"The defendant, withdrawing all former pleas, pleads to the first and second counts of the declaration as follows:

"1. That the defendant has adequate depots and yards in the city of Pensacola for the receipt and delivery of all merchandise committed to it for transportation to, and delivery at, Pensacola. That neither its charter nor any statutory law has compelled or required, or compels or requires, it to construct or maintain the wharf mentioned in the declaration, but that it constructed the same at an expense to it of tens of thousands of dollars, for the purpose of providing facilities for the transaction of its business with such vessels as it might permit to come to and lie at said wharf to take cargo. That no business has ever been done at said wharf except the transportation by the defendant, in cars on its railroad over said wharf, to and from vessels lying at the said wharf, of goods brought, or to be transported, by said vessels, and the loading and unloading thereof of such vessels. That, in accordance with such purpose, it made and promulgated, upon the construction of said wharf, and more than five years prior to the bringing of this suit, rules and regulations, by which it limited the use of its wharves, including the wharf mentioned in the declaration, 'to traffic handled by vessels in regular lines running in connection with the Louisville & Nashville Railroad, and vessels belonging to, or consigned to, Gulf Transit Company' (an agency of defendant), and making the use of said wharves 'for traffic in connection with vessels other than herein referred to,'

'subject to special arrangement.' The said rules and regulations were in operation and enforced by defendant from the time of their promulgation, as aforesaid, up to, and at the time of, the refusal of the defendant to permit the naval stores of the plaintiff to be loaded from its wharf *into the 'certain vessels' mentioned in the declaration, and still are in force and operation. That the said 'certain vessels' were not regular lines running in connection with the Louisville & Nashville Railroad, nor were they belonging to, or consigned to, Gulf Transit Company, nor had they made any special arrangements with the defendant for the use of the said wharf; but that said vessels constituted an independent line between New York and Pensacola, and New York and Mobile, Alabama, carrying merchandise between the said points, and would have come in competition with a line of steamers with which the defendant was then negotiating for regular service in the transportation of merchandise to and from New York and Pensacola, in connection, and under traffic arrangements, with defendant, and such service has since been established, and a line of steamers is now regularly transporting merchandise between said points, in such connection, and under such traffic arrangements; and was also in competition with the defendant itself, which was, at said time, and had been for a long time prior thereto, engaged in a like business between said points, carrying goods by its line of railroad from Pensacola and Mobile to River Junction, Florida, Cincinnati, Ohio, and Montgomery, Alabama, and there delivering the same to a connecting carrier and other carriers connecting therewith, transporting goods to the city of New York, and receiving from said connecting carriers at the points aforesaid, and transporting to Pensacola and Mobile, goods shipped from New York to Pensacola and Mobile.

"That the defendant has not either notified plaintiff that it would not carry plaintiff's naval stores, nor refused to transport plaintiff's naval stores, over its railway mentioned in the declaration, to and on its wharf, also mentioned in the declaration; that it has at all times so transported them when requested so to do by the plaintiff; that the defendant has refused to permit the certain vessels mentioned in the declaration to take goods and merchandise from its said wharf, to be transported by them to the port of New York, as aforesaid, but that [487] such *refusal was solely because the said vessels were not of either of the classes provided for by the rules aforesaid, nor had made special arrangements with the defendant, and would have been, as aforesaid, in competition with the lines of vessels con-

necting with the defendant, running to and from New York, and was, as aforesaid, in competition with the defendant itself in its rail transportation aforesaid, to and from New York city; and that the defendant was then, and at all times had been, ready and willing to give, and did give, to the plaintiff the same facilities for shipping naval stores to New York, or any other port, over defendant's said wharf, as it gave to any and all other shippers; that the unloading by the plaintiff of its said goods into said vessels necessarily involves the lying at, attachment to, and use of, the said wharf, one of the terminals of the defendant, by the said vessels; that the said wharf was not, at the time mentioned in the declaration, and has never been, a public wharf, unless the facts set forth hereinbefore in this plea constituted it such."

This plea was in substance the same as the third plea which defendant had theretofore interposed, and which the circuit court of appeals had held bad. The plaintiff again demurred. The circuit court sustained the demurrer, in accordance with the decision of the circuit court of appeals, and gave leave to the defendant to amend as it might be advised. The defendant refused to amend. Judgment was then entered against it by default, and direction given to proceed with the case for the purpose of having plaintiff's damages assessed. A trial by jury upon the question of damages was had, and the jury found a verdict for the plaintiff for \$1,000, upon which judgment was duly entered.

The defendant then sued out a writ of error to the circuit court of appeals for the fifth circuit, which court, adhering to the views expressed by it on the former appeal, affirmed the judgment (62 C. C. A. 681, 128 Fed. 1020), and the defendant thereupon applied to this court for a writ of certiorari, which was granted, and the case is now here.

Messrs. William A. Blount and A. C. Blount, Jr., submitted the cause for petitioner:

The defendant is not, under the circumstances stated in the plea, a common carrier as to its wharf.

Dickson v. Great Northern R. Co. L. R. 18 Q. B. Div. 176; *Oxlade v. Northeastern R. Co.* 1 Nev. & Mac. 162, 15 C. B. N. S. 680; *Johnson v. Midland R. Co.* 4 Exch. 367; *Hosca v. McCrory*, 12 Ala. 349; *Whitmore v. The Caroline*, 20 Mo. 513; *Lake Shore & M. S. R. Co. v. Perkins*, 25 Mich. 329; *People ex rel. Spruance v. Chicago & N. W. R. Co.* 57 Ill. 437; *Citizens' Bank v. Nantucket S. B. Co.* 2 Story, 33, Fed. Cas. No. 2,730; *Garton v. Bristol & E. R. Co.* 1 Best. & S. 112; *Hutchinson*, Carr. p. 75.

One common carrier has not, independent

of charter or contract, the right to use the terminals of another carrier.

Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co. 110 U. S. 667, 28 L. ed. 291, 4 Sup. Ct. Rep. 185; *Gulf, C. & S. F. R. Co. v. Miami S. S. Co.* 30 C. C. A. 142, 52 U. S. App. 732, 86 Fed. 407; *Little Rock & M. R. Co. v. St. Louis & S. W. R. Co.* 26 L. R. A. 192, 4 Inters. Com. Rep. 854, 11 C. C. A. 417, 27 U. S. App. 380, 63 Fed. 775; *Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co.* 4 Inters. Com. Rep. 537, 59 Fed. 404; *St. Louis Drayage Co. v. Louisville & N. R. Co.* 5 Inters. Com. Rep. 137, 65 Fed. 39; *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 2 L. R. A. 289, 2 Inters. Com. Rep. 351, 37 Fed. 567; *Oregon Short Line & U. N. R. Co. v. Northern P. R. Co.* 4 Inters. Com. Rep. 249, 51 Fed. 465; *Illwaco R. & Nav. Co. v. Oregon Short Line & U. N. R. Co.* 5 Inters. Com. Rep. 627, 6 C. C. A. 495, 15 U. S. App. 173, 57 Fed. 673; *Napier v. Glasgow & S. W. R. Co.* 1 Nev. & Mar. 292; *Donovan v. Pennsylvania Co.* 61 L. R. A. 140, 57 C. C. A. 362, 120 Fed. 215; *Jencks v. Coleman*, 2 Sumn. 221, Fed. Cas. No. 7,258; *Barker v. Midland R. Co.* 18 C. B. 46; *Beadell v. Eastern Counties R. Co.* 2 C. B. N. S. 509; *Painter v. London, B. & S. C. R. Co.* 2 C. B. N. S. 702; *Barney v. Oyster Bay & H. S. B. Co.* 67 N. Y. 301, 23 Am. Rep. 115; *The D. R. Martin*, 11 Blatchf. 234, Fed. Cas. No. 1,030; *Old Colony R. Co. v. Tripp*, 147 Mass. 35, 9 Am. St. Rep. 661, 17 N. E. 89; *Com. v. Carey*, 147 Mass. 40, note, 17 N. E. 97; *Fluker v. Georgia R. & Bkg. Co.* 81 Ga. 461, 2 L. R. A. 843, 12 Am. St. Rep. 328, 8 S. E. 529; *Griswold v. Webb*, 16 R. I. 649, 7 L. R. A. 302, 19 Atl. 143; *Smith v. New York, L. E. & W. R. Co.* 149 Pa. 249, 24 Atl. 304; *New York C. & H. R. R. Co. v. Flynn*, 74 Hun. 124, 26 N. Y. Supp. 859; *New York C. & H. R. R. Co. v. Sheeley*, 57 N. Y. S. R. 766, 27 N. Y. Supp. 185; *Brown v. New York C. & H. R. R. Co.* 75 Hun. 355, 27 N. Y. Supp. 69, 151 N. Y. 674, 46 N. E. 1145; *Summitt v. State*, 8 Lea, 413, 41 Am. Rep. 637; *Lucas v. Herbert*, 148 Ind. 64, 37 L. R. A. 376, 47 N. E. 146; *New York, N. H. & H. R. Co. v. Scovill*, 71 Conn. 136, 42 L. R. A. 157, 71 Am. St. Rep. 159, 41 Atl. 246; *Kates v. Atlanta Baggage & Cab Co.* 107 Ga. 636, 46 L. R. A. 431, 34 S. E. 372; *Godbout v. St. Paul Union Depot*, 79 Minn. 188, 47 L. R. A. 532, 81 N. W. 835; *New York C. & H. R. R. Co. v. Warren*, 31 Misc. 571, 64 N. Y. Supp. 781; *Boston & A. R. Co. v. Brown*, 177 Mass. 65, 52 L. R. A. 418, 58 N. E. 189; *Boston & M. R. Co. v. Sullivan*, 177 Mass. 230, 83 Am. St. Rep. 275, 58 N. E. 689; *New York, N. H. & H. R. R. Co. v. Bork*, 23 R. I. 218, 49 Atl. 965.

It is especially true that one competing

common carrier has not, independent of statute or contract, the right to use the terminals of another carrier.

Oregon Short Line & U. N. R. Co. v. Ilwaco R. & Nav. Co. 51 Fed. 611; *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666.

The railroad company performs its whole duty to the public at large and to each individual when it affords the public all reasonable express accommodations. If this is done, the railroad company owes no duty to the public as to the particular agencies it shall select for that purpose.

Express Cases, 117 U. S. 1, 24, 29 L. ed. 791, 801, 6 Sup. Ct. Rep. 542, 628. See also *Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car Co.* 139 U. S. 79, 35 L. ed. 97, 11 Sup. Ct. Rep. 490; *St. Louis Drayage Co. v. Louisville & N. R. Co.* 5 Inters. Com. Rep. 137, 65 Fed. 39.

Even if the wharf had been a public wharf, the defendant had a right to discontinue its public use at any time, and refuse to let any particular individual use it.

O'Neill v. Annett, 27 N. J. L. 290, 72 Am. Dec. 364; *Heaney v. Hecency*, 2 Denio, 625; *Bogert v. Haight*, 20 Barb. 251; *The Mary K. Campbell*, 24 Blatchf. 475, 31 Fed. 840.

Mr. John C. Avery submitted the cause for respondent:

The case at bar is not within the operation of the Interstate Commerce Act, and the common law must govern in determining the rights of the parties.

Iowa v. Chicago, M. & St. P. R. Co. 4 Inters. Com. Rep. 425, 33 Fed. 391; *Swift v. Philadelphia & R. R. Co.* 4 Inters. Com. Rep. 633, 58 Fed. 860.

The course of the defendant was to give to a very large portion of the public the right to use its wharf, with the result that such wharf became a facility in which the public as a public had become interested in such manner and to such extent as to deprive the defendant of the right to claim that it was a private wharf, in the operation of which the public were not entitled to insist that equal privileges were to be accorded to all persons requiring them in their respective businesses.

Indian River S. B. Co. v. East Coast Transit Co. 28 Fla. 433, 29 Am. St. Rep. 258, 4 So. 480; *Oregon Short Line & U. N. R. Co. v. Ilwaco R. & Nav. Co.* 51 Fed. 611; *Munn v. Illinois*, 94 U. S. 125, 24 L. ed. 84; *Dutton v. Strong*, 1 Black, 33, 17 L. ed. 32; Gould, Waters, 232; 1 Dill. Mun. Corp. § 68; *Compton v. Hawkins*, 90 Ala. 411, 9 L. R. A. 387, 24 Am. St. Rep. 823, 8 So. 75; *Barrington v. Commercial Dock Co.* 15 Wash. 170, 33 L. R. A. 116, 45 Pac. 748.

Mr. Justice **Peckham**, after making the foregoing statement, delivered the opinion of the court:

When this case was first before the circuit court of appeals, it was stated in the opinion which was then delivered that the case showed that the railroad company was in possession of a large wharf, built at its own expense, "on the extension of a public street in the city of Pensacola, into the deep waters of the harbor of the city." On looking at the record before us, we find in the pleadings no averment that the wharf in question was in fact built as such an extension. The statement of facts preceding the opinion of the circuit court of appeals shows, however, that there were replications filed to the various pleas, one of which replications contained the averment that the wharf was an extension of a street of the city of Pensacola, into the bay of Pensacola, for a distance of more than 500 yards, all within the limits of the city of Pensacola, and maintained by the defendant by authority of the city. Hence the statement in the [493] opinion was perfectly *correct. Subsequently to the decision of the circuit court of appeals, and after the case was remanded to the circuit court, it appears by the record before us that the defendant withdrew all its former pleas, and filed the single plea set forth in the foregoing statement of facts. To this plea no replication was filed. Counsel for the plaintiff admits that neither the declaration nor the plea contains any averment that the wharf in question was an extension of a public street. If we assume, what is without doubt the fact, that the wharf was built at the foot of a public street in the city of Pensacola, and was carried out into the deep water of the bay some hundreds of yards, we must also assume the fact mentioned in the brief of the defendant, and substantially set forth in the former replication, that the building and maintaining of the wharf were authorized by authority from the city of Pensacola, and also from the state of Florida. These facts will therefore be taken as admitted, in order that the case may be discussed upon the facts as they really exist.

Counsel for plaintiff now asserts, and we assume, that the gravamen of plaintiff's complaint is not that the defendant would not transport plaintiff's goods, or any part of them, on defendant's lines, from the wharf in question, "but only that defendant would not permit plaintiff's goods to be at, from, or by means of defendant's wharf loaded upon, or delivered to, the said vessels," with the managers of which plaintiff had contracted to have its goods transported to other ports. This means of transportation, by such vessels as plaintiff should

choose, is asserted by it as a right, because it contends that the wharf of defendant, under the averment to that effect in the declaration, and not denied, in terms, in the plea, taken in connection with the facts stated in such plea, was a public wharf, or that, at least, the defendant had devoted it to a public use. The defendant in its plea sets up facts which it avers show the wharf was not a public one. The plaintiff insists that the plea shows that the defendant built and used the wharf itself and permitted a large part of the public to *use it, includ- [494] ing, at any rate, those who were engaged in traffic handled by vessels belonging to regular lines running in connection with the defendant, and also including vessels belonging or consigned to the Gulf Transit Company, an agent of defendant, together with those who were using the wharf under some special arrangements between them and the defendant. All this, the plaintiff contends, amounted to making the wharf a public one, or at least that it thereby became a facility, to the use of which the public as a public had a right on payment of reasonable compensation. If plaintiff chose to employ, for the further transportation of its goods, the vessels with the managers of which the defendant had some business arrangement or contract, it is not denied that the defendant would and did permit such transportation. In this respect there is no allegation that the plaintiff did not have equal facilities with all other shippers. Defendant's plea avers that it did give to plaintiff the same facilities for shipping its goods over defendant's wharf that it gave to any or all shippers. In brief, the fact seems to be that the only complaint of the plaintiff is that defendant will not permit competing vessels to make use of its wharf for the purpose of such competition.

We do not see that the fact that the wharf was erected under authority from the city, at the foot of a public street of the city, makes any material difference in the character of the wharf, or that the right of plaintiff to select its own vessels to continue from that wharf the transportation of its goods is, on that ground, enhanced, or the right of defendant to control the wharf for its own use when erected is thereby diminished. The right to erect the wharf was granted by the proper authorities, and, so far as the record shows, it was granted without imposing any conditions as to its use by the public. We think the plaintiff had no right of access to the wharf founded simply upon the fact that it was erected under proper authority, in the harbor of Pensacola, and at the foot of one of the public streets of that city. The question of the rights of plaintiff must really *turn upon the [495]

character of the use of the wharf, whether it is public or private.

The argument upon the part of plaintiff is, in substance, this: True, defendant has erected a wharf, which is not in fact intended or used as the terminus of its road at Pensacola, adequate yards and depots having been furnished by the defendant for all goods and passengers destined to Pensacola only; but the wharf has been erected to enable defendant to more conveniently carry out contracts for transportation beyond its own line, which it was not compelled to make, and which it could carry out by such agencies as it chose; but the plaintiff, having goods destined for points outside of Florida, insists upon its right to use the road of defendant, not to carry these goods to Pensacola, but to defendant's wharf, so that plaintiff may there transfer them into vessels which it has arranged to take them; in order to do this it is necessary that defendant be compelled to share its possession of its own wharf with the managers of these other vessels; for this possession plaintiff is prepared to make reasonable compensation. The right on the part of the plaintiff is urged as the result of the action of defendant in permitting the use of the wharf as stated in the plea. By such use it is contended that the defendant in effect dedicated the wharf to the public; or, at least, has granted to the public an interest in the use of the wharf.

We are of opinion that the wharf was not a public one, but that it was a mere facility, erected by and belonging to defendant, and used by it, in connection with that part of its road forming an extension from its regular depot and yards in Pensacola, to the wharf, for the purpose of more conveniently procuring the transportation of goods beyond its own line, and that defendant need not share such facility with the public or with any carriers other than those it chose for the purpose of effecting such further transportation.

Neither the public nor the plaintiff had such an interest in the wharf as would give to either the right to demand its use on payment of reasonable hire. Nor was the wharf [496] a depot *or place of storage of the defendant for goods to be delivered at or taken from the city of Pensacola for transportation by rail. The defendant had adequate depots and yards in that city for the proper storage of all merchandise committed to it for delivery at Pensacola, or there received, to be transported therefrom by defendant. All consignees of goods at Pensacola had equal facilities for obtaining them there. Although not bound originally to carry goods beyond its own terminus at Pensacola, yet the defendant might agree to do so, and it

had the right, when duly authorized by the proper authorities, to construct facilities to enable it to continue such transportation beyond the line of its railroad, by such other carriers as it might agree with. The city or state authorities, in granting the right to erect such facilities, might, of course, have attached such conditions as they thought wise; but, in their absence, neither the public nor this plaintiff, as the owner of goods, would have the right, on this state of facts, to go to the wharf with vessels for the purpose of continuing transportation of goods in competition with the defendant. The defendant never became a common carrier, as to this wharf, in the sense that it was bound to accord to the public or to plaintiff a right to use it upon payment of compensation. We do not see that the plaintiff had any right even to demand that the defendant should carry plaintiff's goods on the rails defendant had laid down to reach the wharf from its depot or yards at Pensacola, the terminus of its road at that city. Those rails were only laid for the purpose of reaching the wharf, in order that defendant might carry goods to it which it had undertaken to forward, by itself or by vessels it had arranged with, beyond its line. Very likely it would be bound to carry plaintiff's goods on this part of its rails, for the same purpose and on the same terms it did for others, *viz.*, in order that it might itself, or through others it had contracted with, forward the goods beyond its own line. But plaintiff demands more than this: it demands that defendant shall carry plaintiff's goods over its rails thus laid, in order that plaintiff may itself forward its *goods [497] by vessels of its own selection, and that defendant shall surrender possession of enough of its wharf to enable plaintiff to do so.

That the defendant had the right to choose its own agencies, and grant to them the exclusive privilege of access to its own wharf, which it built only for the purpose of continuing the transportation of goods which it had transported to the end of its line, has in effect been decided by this court. *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.* 110 U. S. 667, 28 L. ed. 291, 4 Sup. Ct. Rep. 185. In that case it was held that, although at common law the common carrier was not bound to carry beyond its own lines, yet it might contract to do so, and, in the absence of statutory regulations prohibiting it, the carrier might determine for itself what agencies it would employ to continue the transportation, and it was not bound to enter into agreements for such transportation with another because it had done so with one common carrier. Having the right, as the authorities prove, to de-

cide what agencies it would employ for the purpose of transporting goods beyond its own line, and not being bound to enter into any contracts or arrangements with one person or carrier because it had so contracted or arranged with another, we think it follows that defendant was not obliged to permit the public to have access to its wharf, built for the purpose stated, simply because it granted such permission to those with whom it made arrangements of the kind set forth in the plea. While refusing to make any agreement with defendant for the further transportation of plaintiff's goods beyond Pensacola, plaintiff nevertheless claims a right to use the wharf erected by defendant for its own purpose, as already stated. This cannot be sustained. The principle stated in the above case is, in substance, recognized in *Gulf, C. & S. F. R. Co. v. Miami S. S. Co.* 30 C. C. A. 142, 52 U. S. App. 732, 86 Fed. 407; *Little Rock & M. R. Co. v. St. Louis S. W. R. Co.* 26 L. R. A. 192, 4 Inters. Com. Rep. 854, 11 C. C. A. 417, 27 U. S. App. 380, 63 Fed. 775, affirming same case in 4 Inters. Com. Rep. 537, 59 Fed. 400. The two last cases involved the construction of the Interstate Commerce Act, but they affirm the principle that a [498] common carrier may agree with *such other carrier as it may choose, to forward beyond its own line the goods which it had transported to its own terminus. See also *Central Stock Yards Co. v. Louisville & N. R. Co.* 192 U. S. 568-571, 48 L. ed. 565-569, 24 Sup. Ct. Rep. 339; *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 2 L. R. A. 289, 2 Inters. Com. Rep. 351, 37 Fed. 567; *Oregon Short Line & U. N. R. Co. v. Northern P. R. Co.* 4 Inters. Com. Rep. 249, 51 Fed. 465; *Illwaco R. & Nav. Co. v. Oregon Short Line & U. N. R. Co.* 5 Inters. Com. Rep. 627, 6 C. C. A. 495, 15 U. S. App. 173, 57 Fed. 673.

The cases cited did not involve rights of parties to a wharf situated in a harbor, but we think that the right of one carrier to enter into arrangements with another carrier to forward its goods, and to refuse to do so with others, or to permit such others to avail themselves of the facilities constructed by the original carrier for that purpose, is not altered because the facility so constructed by it happens to be a wharf in the harbor of a city instead of some structure on land. The wharf may be a private one, and its owner may permit those only to have access to it that it may choose. A private wharf may exist on the shores of a navigable river or lake, or in a harbor of a city from which access is obtained directly to the sea. *Dutton v. Strong*, 1 Black, 23, 32, 17 L. ed. 29, 32.

It is to be remembered that the wharf

was not, in strictness, the terminus of defendant for unloading its goods for Pensacola. The defendant had other depots and yards for that purpose. The main use of the wharf was only for the purpose of sending the goods brought by defendant, to other ports as a continuation of their carriage beyond the line of the defendant's road. How much space, if any, it might devote to other vessels, with the managers of which it might make special arrangements, would naturally be for the defendant to decide, as also the particular terms of such arrangements. The conveniences of the wharf are, of course, necessarily limited.

It is well said by counsel for defendant in their brief that "the very nature of a wharf, and its inadequacy to meet the demands of every incoming vessel, necessitates that its use should be exclusively for those with whom the carrier enters into arrangements. The carrier has a right to select a strong *connection instead of a weak one,—one that [499] will give assurance of permanent business, instead of one that can offer only occasional shipment. If the free use is incompatible with the certain regular use by the steamer, or lines of steamers, with which the carrier is aligned, it is too clear for further reasoning that such carrier has the right to accept the latter and thereby exclude the former."

The reasons for permitting such use of the wharf are manifold. Without it the commerce of the country in the large cities would be cramped, if not very greatly damaged, by the uncertainty of finding quarters for the regular and swift unloading and loading of the vessels. But the capacity of a wharf is necessarily limited, and if the wharf were open to all comers in their turn there could be no certainty as to any particular vessels being able to reach the wharf at any definite time, and consequently there would be a like uncertainty as to when such vessel would be able to depart with its load. One unexpected so-called tramp vessel might, by arriving a few hours in advance, take possession of all that was left of the wharf for the purpose of loading, and thus prevent the regular steamer, arriving a little later, from coming to the dock, unloading its cargo, and then loading with goods from the railroad. In this way there would be confusion in time and in the possession of the wharf by the different vessels, and its value for the purpose for which it was erected would be greatly reduced, if not wholly destroyed.

The principle herein recognized has also been affirmed by this court in what are known as the *Express Cases*, 117 U. S. 1, 29 L. ed. 791, 6 Sup. Ct. Rep. 542, 628, where it was held (because the facilities

were necessarily limited) that railroad companies had the right to contract with particular express companies for the transportation of the traffic of the latter over the lines of their railroads, and that the railroad company was not bound to transport the traffic of independent express companies over its lines in the same manner in which it transported the traffic of the particular companies contracted with; in other words, that the railroad companies were not bound to furnish, in the absence of a statute, to all independent express companies, equal facilities for doing an express business upon their passenger trains.

These observations answer the contention of plaintiff that defendant, by erecting the wharf and using it in the way it does, has thereby devoted its property to a public use, and that it has thereby granted to the public an interest in such use, within the principle laid down in *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77. It has not devoted its wharf to the use of the public in so far as to thereby grant to every vessel the right to occupy its private property upon making compensation to defendant for the exercise of such right. The reasons we have already endeavored to give.

The judgments of the Circuit Court of Appeals and of the Circuit Court for the Northern District of Florida are reversed, and the case remanded to the latter court for further proceedings not inconsistent with this opinion.

Reversed.

Mr. Justice **Harlan** dissents.

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AH SIN, *Plff. in Err.*,
v.

GEORGE W. WITTMAN, as Chief of Police of the City and County of San Francisco, California.

(See S. C. Reporter's ed. 500-508.)

Constitutional law—validity of municipal ordinance against visiting barricaded gambling rooms—due process of law—equal protection of the laws.

1. A municipal ordinance which makes it unlawful to visit or resort to a barred or bar-

ricaded house or room where gambling implements are exhibited or exposed to view does not deprive anyone of his liberty without due process of law, even if it authorizes a conviction for an innocent visit to such a place.

2. Discrimination against Chinese persons in the administration of a municipal ordinance making it unlawful either to exhibit gambling implements in a barred or barricaded house or room or to visit such a house or room where gambling instruments are exhibited is not sufficiently shown to enable the Supreme Court of the United States to declare such ordinance void, as denying the equal protection of the laws, in reviewing the refusal of a state court to grant habeas corpus to one convicted of a violation of the ordinance, by a stipulation between the parties, recited in the order discharging the writ, that the facts are as set forth in the petition, where such petition merely avers that the ordinance is enforced "solely and exclusively against persons of the Chinese race, and not otherwise," and contains no allegation that the conditions and practices against which the ordinance is directed do not exist exclusively among the Chinese, or that there are other offenders, as to whom it is not enforced.

[No. 245.]

Submitted April 28, 1905. Decided May 29, 1905.

IN ERROR to the Superior Court in and for the City and County of San Francisco, in the State of California, to review a judgment discharging a writ of habeas corpus to inquire into a conviction in the police court of that city for the violation of an ordinance making it unlawful to exhibit gambling implements in a barred or barricaded house or room, or to visit such a place where gambling implements are exhibited or exposed to view. *Affirmed.*

The facts are stated in the opinion.

Mr. **George D. Collins** submitted the cause for plaintiff in error:

The record shows conclusively that the ordinance in question is enforced and executed against Chinese persons only. It is, therefore, in violation of the 14th Amendment, and void.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064.

There can be no question as to the fact of discrimination. As there is nothing to controvert the averment of the petition in that respect, it would be deemed a correct

NOTE.—On municipal power as to nuisances affecting public morals, decency, peace, and good order—see note to *State v. Karstendiek*, 39 L. R. A. 520.

As to what constitutes due process of law—see *Kuntz v. Sumption*, 2 L. R. A. 655, and note; *Re Gannon*, 5 L. R. A. 359, and note; *Uiman v. Baltimore*, 11 L. R. A. 224, and note; and *Gilman v. Tucker*, 13 L. R. A. 304, and note. And see notes to *People v. O'Brien*, 2

L. R. A. 255; *Pearson v. Yewdall*, 24 L. ed. U. S. 436; and *Wilson v. North Carolina*, 42 L. ed. U. S. 865.

As to the validity of class legislation—see *State v. Goodwill*, 6 L. R. A. 621, and note; and *State v. Loomis*, 21 L. R. A. 789, and note.

As to constitutional equality of privileges, immunities, and protection—see *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* 14 L. R. A. 579, and note.

statement of the fact, even if there were no stipulation to that effect.

Whitten v. Tomlinson, 160 U. S. 231, 40 L. ed. 406, 16 Sup. Ct. Rep. 297; *Kohl v. Lehlback*, 160 U. S. 296, 40 L. ed. 432, 16 Sup. Ct. Rep. 304; *Re Smith*, 143 Cal. 368, 77 Pac. 180.

It certainly is not within the scope of the police power of the state to prohibit or punish what is entirely innocent or indifferent.

Lawton v. Steele, 152 U. S. 137, 38 L. ed. 388, 14 Sup. Ct. Rep. 499; *Mugler v. Kansas*, 123 U. S. 661, 31 L. ed. 210, 8 Sup. Ct. Rep. 273; *Health Department v. Trinity Church*, 145 N. Y. 32, 27 L. R. A. 710, 45 Am. St. Rep. 579, 39 N. E. 833; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Minnesota v. Barber*, 136 U. S. 320, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *St. Louis v. Roche*, 128 Mo. 541, 31 S. W. 915; *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 689, 43 L. ed. 861, 19 Sup. Ct. Rep. 565.

A police officer, as such, has no right to enter on private premises, unless in the execution of process, or to make an arrest for felony, or to prevent an escape; manifestly not to discover, or suppress, or make an arrest for gambling, where he has no warrant or process.

1 Bishop, New Crim. Proc. § 197; *McLennon v. Richardson*, 15 Gray, 74, 77 Am. Dec. 353.

The system of police espionage prevailing in Europe would not be lawful in the United States or in England. It would even be unlawful to issue a search warrant for the purpose of obtaining evidence of crime by way of discovery.

Cooley, Const. Lim. 7th ed. p. 431.

The police cannot make entry on private premises for the purpose of discovering crime.

Cooley, Const. Lim. 7th ed. p. 424; *Boyd v. United States*, 116 U. S. 630, 29 L. ed. 751, 6 Sup. Ct. Rep. 524.

The fact that the state supreme court has construed the ordinance and read into it certain provisions does not prevent the Federal courts from putting their own construction on the ordinance.

Yick Wo v. Hopkins, 118 U. S. 366, 30 L. ed. 225, 6 Sup. Ct. Rep. 1064.

The record imports absolute verity.

Evans v. Stettinisch, 149 U. S. 605, 607, 37 L. ed. 866, 867, 13 Sup. Ct. Rep. 937; *Hudgins v. Kemp*, 18 How. 534, 15 L. ed. 512; *Elliott*, App. Proc. § 186; *Middlebrooks v. Middlebrooks*, 57 Ga. 193; *Bartoli v. Huguenard*, 39 La. Ann. 411, 2 So. 196, 6 So. 30; *Boston v. Haynes*, 31 Cal. 107; *Ashley v. Howard*, 99 Ga. 132, 24 S. E. 875; *Nixon v. Barber*, 27 Vt. 783; *Wilmot v.*

Smith, 86 Wis. 299, 56 N. W. 873; *Wilson v. Taylor*, 119 Mo. 626, 25 S. W. 199; *Blanchard v. Devoe*, 80 Iowa, 521, 45 N. W. 911; *Edwards's Succession*, 34 La. Ann. 216; *Woodard v. Baird*, 43 Neb. 310, 61 N. W. 612.

If for any reason a record does not speak the truth, the remedy must be sought in the court whose record it is. It is not within the province of an appellate tribunal to entertain or act upon a suggestion that the record does not express the truth. If the transcript of the record is defective, or incorrect, or incomplete, in that event only can the appellate court grant relief; this is done by means of a certiorari or mandamus.

Nashua & L. R. Corp. v. Boston & L. R. Corp., 9 C. C. A. 468, 21 U. S. App. 50, 61 Fed. 237.

Messrs. **L. F. Byington** and **I. Harris** submitted the cause for defendant in error:

Ordinances similar to the one here involved have been construed by the state supreme court, and held to be constitutional in the face of attack based upon identically the same ground. In all such cases it has been held that, notwithstanding the generality of the language of the ordinance, no lawful or innocent act would subject a person to the penalty provided for therein. In other words, it is held that the law will be rationally applied, and that cases of innocence will be excepted from its terms, and that, before a valid conviction can be had, the prosecution will be compelled to show in addition to the fact of the "visit," that something was done by the "visitor" showing a guilty or unlawful purpose, and thus bring him within the class intended to be denounced by the ordinance.

Ex parte Lorenzen, 128 Cal. 439, 50 L. R. A. 55, 79 Am. St. Rep. 47, 61 Pac. 68; *United States v. Kirby*, 7 Wall. 482, 19 L. ed. 278; *Ex parte McClain*, 134 Cal. 111, 54 L. R. A. 779, 86 Am. St. Rep. 243, 66 Pac. 69; *People v. Mead*, 145 Cal. 500, 78 Pac. 1047.

If, therefore, as plaintiff in error contends, the evidence taken at his trial showed nothing more than that he was an innocent visitor, his remedy is by appeal from the judgment of conviction; and hence his application for the writ of habeas corpus is without justification in law.

Ex parte Long, 114 Cal. 159, 45 Pac. 1057; *Ex parte Watkins*, 3 Pet. 203, 7 L. ed. 653; *Re Wilson*, 140 U. S. 583, 35 L. ed. 516, 11 Sup. Ct. Rep. 870; *Re Delgado (Delgado v. Chavez)*, 140 U. S. 588, 35 L. ed. 580, 11 Sup. Ct. Rep. 874.

There is no Federal question involved, but only a mere error in the application of the law; and the object of the jurisdiction

of this court in controlling decisions of state courts is not to correct mere errors.

Remington Paper Co. v. Watson, 173 U. S. 451, 43 L. ed. 764, 19 Sup. Ct. Rep. 456; *Central Land Co. v. Laidley*, 159 U. S. 111, 40 L. ed. 94, 16 Sup. Ct. Rep. 80.

Mr. Justice **McKenna** delivered the opinion of the court:

Error to the judgment of the superior court of the city and county of San Francisco, state of California, discharging a writ of habeas corpus.

[503] *Plaintiff in error filed a petition in said court, alleging that he was a subject of the Emperor of China, and was restrained of his liberty by defendant in error, who was the chief of police of the city and county of San Francisco, under a judgment of imprisonment rendered in the police court of said city for the violation of one of its ordinances. The ordinance is as follows:

"Prohibiting the Exposure of Gambling Tables or Implements in a Room Barred or Barricaded or Protected in Any Manner to Make It Difficult of Access or Ingress to Police Officers, When Three or More Persons Are Present; or the Visiting of a Room Barred and Barricaded or Protected in Any Manner to Make It Difficult of Access or Ingress to Police, in Which Gambling Tables or Implements Are Exhibited or Exposed, When Three or More Persons are Present.

"Be it ordained by the people of the city and county of San Francisco as follows:

"Sec. 1. It shall be unlawful for any person within the limits of the city and county of San Francisco to exhibit or expose to view in any barred or barricaded house or room, or in any place built or protected in a manner to make it difficult of access or ingress to police officers, when three or more persons are present, any cards, dice, dominoes, fan-tan table or layout, or any part of such layout, or any gambling implements whatsoever.

"Sec. 2. It shall be unlawful for any person within the limits of the city and county of San Francisco to visit or resort to any such barred or barricaded house or room or other place built or protected in a manner to make it difficult of access or ingress to police officers, where any cards, dice, dominoes, fan-tan table or layout, or any part of such layout, or any gambling implements whatsoever are exhibited or exposed to view when three or more persons are present.

[504] "Sec. 3. Every person who shall violate any of the provisions of this ordinance shall be deemed guilty of misdemeanor, *and upon conviction thereof shall be punished by a fine not to exceed five hundred (\$500.00)

dollars, or by imprisonment in the county jail for not more than six (6) months, or by both such fine and imprisonment.

"Sec. 4. This ordinance shall take effect and be in force on and after its passage."

The complaint in the police court charges a violation of the ordinance by the plaintiff in error. The petition for writ of habeas corpus alleges that the ordinance violates § 1 of the 14th Amendment of the Constitution of the United States, in that it deprives plaintiff in error of the equal protection of the laws, because it is enforced solely and exclusively against persons of the Chinese race, and in that it "unjustly and arbitrarily discriminates in favor of certain visitors, and also in favor of certain persons resorting to the house, room, or place referred to in said ordinance, as well as in favor of such persons and visitors as resort to or visit such house or room or place when not barred or barricaded or protected in a manner to make the same difficult of access or ingress to police officers." These objections, it is alleged, were made by him in the police court, and overruled.

The petition also alleges that plaintiff in error is, by the ordinance, deprived of his liberty without due process of law, in that he is prohibited thereby from visiting, innocently and for a lawful purpose, the house or room or place mentioned in said ordinance.

It is also alleged that the ordinance is in contravention of the treaty between the United States and China.

Upon filing the petition a writ of habeas corpus was issued, returnable before the court on the 22d of March, 1904, and petitioner admitted to bail in the sum of \$10.

The following is the order of the court dismissing the writ, and remanding the petitioner to custody:

"This matter came on regularly for hearing this 28th day of March, A. D. 1904, the petitioner being represented by his counsel and the people being represented by the district attorney; *whereupon it was stipulated [505] and agreed in open court by counsel for the people and by counsel for the petitioner that the facts are as set forth in the petition on file herein for the writ of habeas corpus. The cause was then argued by counsel on the points stated in the said petition, and was thereupon submitted to the court for its decision and judgment; and the court, being fully advised in the matter, does now, upon the authority of *Re Ah Cheung*, 136 Cal. 678, 69 Pac. 492, dismiss the writ of habeas corpus heretofore issued herein, and remand the petitioner to the custody of the chief of police of the city and county of San Francisco. Ordered accordingly. The

petitioner reserved an exception to the judgment."

Plaintiff in error's petition presents the question of the constitutionality of the ordinance under which he was convicted. Section 1 makes it unlawful for any person to exhibit any gambling implements whatsoever in any "barred or barricaded house or room or other place built or protected in a manner to make it difficult of access or ingress to police officers, where any cards, dice, dominoes, fan-tan table or layout, or any part of such layout, or any gambling implements whatsoever, are exhibited or exposed to view where three or more persons are present."

Section 2 makes it unlawful to visit or resort to such barricaded house or room.

The ordinance received consideration in *Re Ah Cheung* by the supreme court of the state of California. 136 Cal. 680, 69 Pac. 493. It was decided that it refers "only to places which are specially barred and barricaded against intrusion by officers of the law, so that illegal gambling may be protected from discovery. Rightly construed, the words 'barred and barricaded' do not include an ordinary private residence or room, where doors are sometimes locked or bolted in the ordinary method. Neither should it be construed to mean an attempted prevention of ordinary innocent games played with cards, dice, or dominoes."

[506] The suppression of gambling is concededly within the police *powers of a state, and legislation prohibiting it, or acts which may tend to or facilitate it, will not be interfered with by the court unless such legislation be a "clear, unmistakable infringement of rights secured by the fundamental law." *Booth v. Illinois*, 184 U. S. 425, 429, 46 L. ed. 623, 626, 22 Sup. Ct. Rep. 425; *Otis v. Parker*, 187 U. S. 606, 47 L. ed. 323, 23 Sup. Ct. Rep. 168. As interpreted by the supreme court of the state, the ordinance cannot be so characterized.

It is contended that the ordinance makes criminal "the mere act of innocently visiting such a house or room where the visitor had no knowledge and nothing whatever to do with the barring or barricading of the premises or the prescribed articles." It is hence contended by plaintiff in error that "he is deprived of his liberty without due process of law, in that he is prohibited thereby from visiting, innocently and for a lawful purpose, the house or room or place mentioned in said ordinance." Granting, for argument's sake, that one might visit innocently a barred or barricaded house or room where gambling implements are exhibited or exposed to view, and if, as plaintiff in error alleges in his petition, that he was convicted, notwithstanding he estab-

lished that he had innocently visited the house mentioned in the charge against him, we are not at liberty to declare the ordinance unconstitutional. Besides, his remedy for that ruling was not by habeas corpus. It was by appeal to the superior court, which the Penal Code of the state gave him. We may observe he could have raised on such appeal the questions he now raises, and have them reviewed by this court.

Plaintiff in error avers "that said ordinance and the provisions thereof are enforced and executed by the said municipality of San Francisco, and said state of California, solely and exclusively against persons of the Chinese race, and not otherwise." The contention is that Chinese persons are thereby denied the equal protection of the law, in violation of the 14th Amendment of the Constitution of the United States. *Yick Wo v. Hopkins*, 118 U. S. 373, 30 L. ed. 227, 6 Sup. Ct. Rep. 1064, is cited to sustain the contention. And it is further contended that the fact of *a partial execu-[507] tion of the ordinance is admitted by the order of the superior court, wherein it is recited that, upon the presentation of the case, "it was stipulated and agreed in open court by counsel for the people and by counsel for the petitioner that the facts are as set forth in the petition on file herein for the writ of habeas corpus." There is a misunderstanding between counsel as to what was intended by the stipulation. Counsel for defendant in error contends it was not intended to admit a discrimination in the administration of the law, but to submit the case on such facts as would test and cause a review of *Re Ah Cheung*, 136 Cal. 678, 69 Pac. 492. This seems to be supported by the order of the court taken as a whole, and it is the understanding of the court we are to ascertain. In other words, we are to ascertain what questions of law and fact were submitted to the court. It cannot be certainly said that the court regarded the fact of discrimination to have been admitted, for it rested its decision on the authority of the *Cheung Case*. The court indeed may have regarded the allegation of the petition as lacking in certainty of averment, and hence not bringing the case within the ruling of the *Yick Wo Case*. That case concerned the use of property for lawful and legitimate purposes. The case at bar is concerned with gambling, to suppress which is recognized as a proper exercise of governmental authority, and one which would have no incentive in race or class prejudice or administration in race or class discrimination. In the *Yick Wo Case* there was not a mere allegation that the ordinance attacked was enforced against the Chinese only, but it was shown that not only the pe-

titioner in that case, but two hundred of his countrymen, applied for licenses, and were refused; and that all the petitions of those not Chinese, with one exception, were granted. The averment in the case at bar is that the ordinance is enforced "solely and exclusively against persons of the Chinese race, and not otherwise." There is no averment that the conditions and practices to which the ordinance was directed did not exist exclusively among the Chinese, or that

[508] there were other offenders against the ordinance than the Chinese, as to whom it was not enforced. No latitude of intention should be indulged in a case like this. There should be certainty to every intent. Plaintiff in error seeks to set aside a criminal law of the state, not on the ground that it is unconstitutional on its face, not that it is discriminatory in tendency and ultimate actual operation as the ordinance was which was passed on in the *Yick Wo Case*, but that it was made so by the manner of its administration. This is a matter of proof; and no fact should be omitted to make it out completely, when the power of a Federal court is invoked to interfere with the course of criminal justice of a state.

We think, therefore, *the judgment of the Superior Court should be and it is hereby affirmed.*

Mr. Justice **Peckham** dissents.

SUPREME LODGE, KNIGHTS OF PYTHIAS, *Plff. in Err.*,
v.

HENRIETTA MEYER.

(See S. C. Reporter's ed. 508-520.)

Insurance—what law governs—error to state court—construction of state statute.

1. A certificate of Insurance issued in Illinois to a resident of New York, which, by its terms, was first to take effect as a binding obligation when the Insured should execute the agreement indorsed thereon, to accept it "subject to all the conditions therein contained," is a New York, and not an Illinois, contract, where New York was the state in which the required agreement was executed.
2. Whether the relation of physician and patient so existed as to exclude the former's testimony, under N. Y. Code Civ. Proc. §§ 834, 836, involves a question of the construction

NOTE.—On conflict of laws as to contracts of insurance—see notes to *Johnson v. Mutual l. Ins. Co.* 63 L. R. A. 833; and *Corley v. Travelers' Protective Assn.* 46 C. C. A. 287.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to *Missouri ex rel. Hill v. Dockery*, 63 L. R. A. 571.

1146

of a state statute, on which the decisions of the highest state court will be accepted on a writ of error from the Supreme Court of the United States to that court.

[No. 234.]

Argued and submitted April 28, 1905. Decided May 29, 1905.

IN ERROR to the Supreme Court of the State of New York to review a judgment entered pursuant to the mandate of the Court of Appeals of that state, which affirmed the judgment of the Appellate Division of the Supreme Court, Second Department, which had in turn affirmed a judgment of the Supreme Court in and for the County of Queens, in that state, in favor of plaintiff in an action on a certificate of insurance. *Affirmed.*

See same case below in Appellate Division of Supreme Court, 82 App. Div. 359, 81 N. Y. Supp. 813, and in Court of Appeals, 178 N. Y. 63, 64 L. R. A. 840, 70 N. E. 111.

The facts are stated in the opinion.

Messrs. Carlos S. Hardy and Laurence G. Goodhart submitted the cause for plaintiff in error:

The terms of the benefit certificate issued by the plaintiff in error to Emanuel Meyer, the laws and rules of the plaintiff in error, together with the application for membership by Emanuel Meyer, constitute the contract which existed between the member and the society, which instruments, construed together, measure the rights of the litigants, and are binding in all respects upon the defendant in error.

Sabin v. Phinney, 134 N. Y. 423, 30 Am. St. Rep. 681, 31 N. E. 1087; *Hellenberg v. District No. 1, I. O. of B. B.* 94 N. Y. 580; *Sanger v. Rothschild*, 123 N. Y. 577, 26 N. E. 3; *Niblack, Mut. Ben. Soc.* § 166; *Grossman v. Supreme Lodge, K. & L. of H.* 13 N. Y. S. R. 592; *Fullenwider v. Supreme Council R. L.* 180 Ill. 625, 72 Am. St. Rep. 239, 54 N. E. 485.

The contract arose, and the acceptance which made up the contract took place, within the jurisdiction of the state of Illinois. It is, therefore, an Illinois contract, and the *lex loci celebrationis* applies.

22 Am. & Eng. Enc. Law, 2d ed. p. 1324; *Bascom v. Zediker*, 48 Neb. 380, 67 N. W. 148; *Waldron v. Ritchings*, 9 Abb. Pr. N. S. 359; *Armstrong v. Best*, 112 N. C. 59, 25 L. R. A. 188, 34 Am. St. Rep. 473, 17 S. E. 14; *Equitable Life Assur. Soc. v. Clements* (*Equitable Life Assur. Soc. v. Pettus*) 140 U. S. 226, 35 L. ed. 497, 11 Sup. Ct. Rep. 822; *Carrollton Furniture Mfg. Co. v. American Credit Indemnity Co.* 59 C. C. A. 545, 124 Fed. 25; *Sheldon v. Hartun*, 91 N. Y. 124; *M'Intyre v. Parks*,

198 U. S.

3 Met. 207; *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241; *Gay v. Rainey*, 89 Ill. 221, 31 Am. Rep. 76; *Buchanan v. Drovers' Nat. Bank*, 5 C. C. A. 83, 6 U. S. App. 566, 55 Fed. 223; *Western Transp. & Coal Co. v. Kilderhouse*, 87 N. Y. 430; *Merchant v. Chapman*, 4 Allen, 362; *Sands v. Smith*, 1 Neb. 108, 93 Am. Dec. 331; *Hosford v. Nichols*, 1 Paige, Ch. 220; *Jewell v. Wright*, 30 N. Y. 264, 86 Am. Dec. 372; *Merchants' Bank v. Griswold*, 72 N. Y. 480, 28 Am. Rep. 159; *Dickinson v. Edwards*, 77 N. Y. 576, 33 Am. Rep. 671.

The contract arises where the last essential act looking to its completion is of necessity to be performed.

Equitable Life Assur. Soc. v. Clements (*Equitable Life Assur. Soc. v. Pettus*) 140 U. S. 226, 35 L. ed. 497, 11 Sup. Ct. Rep. 822; *Carrollton Furniture Mfg. Co. v. American Credit Indemnity Co.* 59 C. C. A. 545, 124 Fed. 25.

To the same effect are *Bascom v. Zediker*, 48 Neb. 380, 67 N. W. 148; *Sheldon v. Hawtun*, 91 N. Y. 124; *M'Intyre v. Parks*, 3 Met. 207; *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241; *Gay v. Rainey*, 89 Ill. 221, 31 Am. Rep. 76; *Buchanan v. Drovers' Nat. Bank*, 5 C. C. A. 83, 6 U. S. App. 566, 55 Fed. 223; *Western Transp. & Coal Co. v. Kilderhouse*, 87 N. Y. 430; *Merchant v. Chapman*, 4 Allen, 362; *Sands v. Smith*, 1 Neb. 108, 93 Am. Dec. 331; *Hosford v. Nichols*, 1 Paige, Ch. 220; *Armstrong v. Best*, 112 N. C. 59, 25 L. R. A. 188, 34 Am. St. Rep. 473, 17 S. E. 14; *Waldron v. Ritchings*, 9 Abb. Pr. N. S. 359.

The place of acceptance, and not the place of proposal, is the place of the contract.

Formers' & M. Sav. Co. v. Bozore, 67 Ark. 252, 54 S. W. 339; *Zeltner v. Irwin*, 25 App. Div. 228, 49 N. Y. Supp. 337; *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241; *Baum v. Birchall*, 150 Pa. 164, 30 Am. St. Rep. 797, 24 Atl. 620.

It will be presumed that the contract is to be performed at the place where it is made, and is to be governed by the law of Illinois, unless there is something in the terms of the contract, or in the explanatory circumstances of its execution, inconsistent with that intention.

First Nat. Bank v. Shaw, 61 N. Y. 294; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* 129 U. S. 448, 32 L. ed. 794, 9 Sup. Ct. Rep. 469; *Pritchard v. Norton*, 106 U. S. 124, 27 L. ed. 104, 1 Sup. Ct. Rep. 102; *Lloyd v. Guibert*, L. R. 1 Q. B. 115; *Lewis v. Headley*, 36 Ill. 433, 87 Am. Dec. 227; *Smith v. Mead*, 3 Conn. 253, 8 Am. Dec. 183; *De Sobry v. De Laistre*, 2 Harr. & J. 191, 3 Am. Dec. 535; *Tinninghast v. Boston & P. R. Lumber Co.* 39 S. C. 484, 22 L. R. A. 49, 18 S. E. 120; *Fisher v. Otis*, 3 Pin-

ney, 78; *Hilliard v. Outlaw*, 92 N. C. 266; *Kittle v. De Lamater*, 3 Neb. 325; *Young v. Horris*, 14 B. Mon. 557, 61 Am. Dec. 170; *Hyatt v. Bank of Kentucky*, 8 Bush, 193; *Philadelphia Loan Co. v. Towner*, 13 Conn. 257.

The interpretation of the contract and of the rights and obligations of the parties thereto is regulated by the law prevailing at the place of performance; and how much more is this true when the place of performance is the place of execution.

St. Nicholas Bank v. State Nat. Bank, 128 N. Y. 26, 13 L. R. A. 241, 27 N. E. 849; *Jewell v. Wright*, 30 N. Y. 259, 86 Am. Dec. 372; *Dickinson v. Edwards*, 58 How. Pr. 24; *Seudder v. Union Nat. Bank*, 91 U. S. 406, 23 L. ed. 245; *Cox v. United States*, 6 Pet. 172, 8 L. ed. 359; *Morris v. East Side R. Co.* 43 C. C. A. 605, 104 Fed. 409; *Sandham v. Grounds*, 36 C. C. A. 103, 94 Fed. 83; *Martin v. Roberts*, 36 Fed. 217; *Don v. Lippmann*, 5 Clark & F. 1; *Ferguson v. Fyffe*, 8 Clark & F. 121; *Shoe & Leather Nat. Bank v. Wood*, 142 Mass. 563, 8 N. E. 753; *Akers v. Demond*, 103 Mass. 323; *Brown v. Camden & A. R. Co.* 83 Pa. 316; *First Nat. Bank v. Hall*, 150 Pa. 466, 30 Am. St. Rep. 823, 24 Atl. 665; *Baum v. Birchall*, 150 Pa. 164, 30 Am. St. Rep. 797, 24 Atl. 620; *Fitzsimons v. Guanahani Co.* 16 S. C. 192; *Robinson v. Queen*, 87 Tenn. 445, 3 L. R. A. 214, 10 Am. St. Rep. 690, 11 S. W. 38; *Cartwright v. New York, R. & M. R. Co.* 59 Vt. 675, 9 Atl. 370; *Hanrick v. Andrews*, 9 Port. (Ala.) 9; *Belmont v. Cornen*, 48 Conn. 342; *Vermont State Bank v. Porter*, 5 Day, 322, 5 Am. Dec. 157; *Herschfeld v. Drexel*, 12 Ga. 582; *Grunwald v. Freese* (Cal.) 34 Pac. 73; *Lewis v. Headley*, 36 Ill. 433, 87 Am. Dec. 227; *Guignon v. Union Trust Co.* 156 Ill. 135, 47 Am. St. Rep. 186, 40 N. E. 556; *Lowry v. Andrews*, 20 Ill. App. 521; *Abt v. American Trust & Sav. Bank*, 159 Ill. 467, 50 Am. St. Rep. 175, 42 N. E. 856; *People's Bldg. Loan & Sav. Asso. v. Fowble*, 17 Utah, 122, 53 Pac. 999; *Stevens v. Gregg*, 89 Ky. 461, 12 S. W. 775; *Boyd v. Ellis*, 11 Iowa, 97; *Arnold v. Potter*, 22 Iowa, 194; *Alexandria, A. & Ft. S. R. Co. v. Johnson*, 61 Kan. 417, 59 Pac. 1063; *Capron v. Adams*, 28 Md. 529; *Marburg v. Marburg*, 26 Md. 8, 90 Am. Dec. 84; *Jordan v. Fitz*, 63 N. H. 227; *Whitney v. Whiting*, 35 N. H. 462; *Thayer v. Elliott*, 16 N. H. 102; *Dyer v. Hunt*, 5 N. H. 401; *Knox v. Gerhauser*, 3 Mont. 275; *Shacklett v. Polk*, 51 Miss. 378; *Hart v. Livermore Foundry & Mach. Co.* 72 Miss. 809, 17 So. 769; *Queen v. Ogilvie*, 6 Can. Exch. 21.

A contract is an agreement in which a party agrees to do or not to do a particular thing. The law binds him to perform his

obligation, and this is, of course, the obligation of his contract.

Sturges v. Crowninshield, 4 Wheat. 197, 4 L. ed. 549.

The obligation of a contract consists of its binding force on the party who makes it. This depends on the laws in existence when it was made. These are necessarily referred to in all contracts, and form a part of them as the measure of the obligation to perform them by the one party and the right acquired by the other.

McCracken v. Hayward, 2 How. 608, 11 L. ed. 397.

A Federal question having been made, and this cause being properly in this court under the writ of error allowed herein, the entire record is to be examined, and, if reversible error has been committed, the judgment must be reversed.

Burton v. United States, 196 U. S. 283, ante, 482, 25 Sup. Ct. Rep. 243; *Horner v. United States*, 143 U. S. 570, 576, 577, 36 L. ed. 266, 268, 269, 12 Sup. Ct. Rep. 522.

Mr. Otto H. Droege argued the cause, and, with Mr. J. Lawrence Friedmann, filed a brief for defendant in error:

If the contract in question was a New York contract, then there can, of course, be no question that the statute, which was enacted in 1893, could not impair the obligation of a contract which was not made until 1894.

Lehigh Water Co. v. Easton, 121 U. S. 388, 30 L. ed. 1059, 7 Sup. Ct. Rep. 916.

The highest court of the state of New York has found that the contract in question was made in New York. This finding of fact of the highest court of the state of New York upon this question, we submit, is conclusive upon this court.

Western U. Tel. Co. v. Missouri, 190 U. S. 412, 422, 47 L. ed. 1116, 1120, 23 Sup. Ct. Rep. 730; *Dower v. Richards*, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452.

As the premium was to be paid in New York, where the assured resided, the place of payment is the place of contract.

Equitable Life Assur. Soc. v. Clements (*Equitable Life Assur. Soc. v. Pettus*) 140 U. S. 226, 36 L. ed. 497, 11 Sup. Ct. Rep. 822.

Russell v. Prudential Ins. Co. 176 N. Y. 178, 98 Am. St. Rep. 656, 68 N. E. 252; *Millard v. Brayton*, 177 Mass. 533, 52 L. R. A. 117, 83 Am. St. Rep. 294, 59 N. E. 436.

The place of performance is ordinarily deemed the situs of an insurance contract.

Bottomley v. Metropolitan L. Ins. Co. 170 Mass. 274, 49 N. E. 438.

Mr. Justice McKenna delivered the opinion of the court:

The plaintiff in error is a corporation or

ganized under an act of Congress approved June 29, 1894. This action was brought against it by defendant in error as payee in a certain benefit certificate issued by it to Emanuel Meyer, husband of Henrietta Meyer, dated September 20, 1894, whereby it insured his life in the sum of \$2,000. The defendant in error obtained judgment, which was successively affirmed by the appellate division and by the court of appeals of New York. The judgment of affirmance was entered in the supreme court, to which the case was remitted, and this writ of error was then sued out.

There are two questions in the case,—the place of the contract *and the effect of the [516] following provision in the certificate of insurance:

"And I hereby, for myself, my heirs, assigns, representatives, and beneficiaries, expressly waive any and all provisions of law, now or hereafter in force, prohibiting or excusing any physician heretofore or hereafter attending me professionally or otherwise, from disclosing or testifying to any information acquired thereby, or making such physician incompetent as a witness; and hereby consent that any such physician may testify to and disclose any information so derived or received in any suit or proceeding wherein the same may be material."

This provision takes pertinence from another, whereby "it is agreed that if death shall result by self-destruction, whether sane or insane," the certificate "shall be null and void, and all claims on account of such membership shall be forfeited."

The case was submitted for a special verdict on the question "Did Emanuel Meyer, the husband of the plaintiff, commit suicide?" The jury answered "No."

On the trial plaintiff in error offered the testimony of three physicians who attended Meyer, as to declarations made by him tending to show that he had taken poison with suicidal intent. It appeared that Meyer did not request the attendance of the physicians,—indeed, protested against treatment. The testimony was excluded under §§ 834 and 836 of the Code of Civil Procedure of the state. Section 834 forbids any physician "to disclose any information which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity," and § 836 provides that § 834 applies "unless the provisions thereof are expressly waived upon the trial or examination by . . . the patient. . . . But a physician . . . may, upon a trial or examination, disclose any information as to the mental or physical condition of a patient who is deceased, which he acquired in attending such patients

professionally, except confidential communications and such facts as would tend to disgrace the memory of the patient, *when the provisions of § 834 have been expressly waived on such trial or examination by the personal representatives of the deceased patient."

The court of appeals held that the physicians were "attending a patient in their professional capacity;" that the information that they acquired "was necessary to enable" them "to act in that capacity," and that their testimony was therefore properly excluded under §§ 834 and 836. The court also held that the certificate of insurance was a New York contract. Judge Gray and Chief Judge Parker concurred in the latter view, but dissented as to the application of the Code sections. Plaintiff in error contests both sections. The argument is that (1) it appears from the testimonium clause of the certificate of insurance that it was signed and sealed by plaintiff in error at Chicago, Illinois, and hence is an Illinois contract, and must be construed with regard to the law of that jurisdiction; and as there is no evidence of what that law is it must be assumed to be what the common law of the state is, and under that law the testimony of the physicians was admissible. (2) We quote counsel: "The attempted application of §§ 834 and 836 of the Civil Code of Procedure of the state of New York to the contract in the case at bar is a violation of the Federal Constitution."

These contentions may be said to have the same ultimate foundation, but regarding them as separate and independent, the first is based on the ground that plaintiff in error derived the right, from its contract with Meyer; to the testimony of the physicians, which right attended the contract in whatever forum suit upon the contract might be brought. This is certainly debatable. The general rule is that all matters respecting the remedy and admissibility of evidence depend upon the law of the state where the suit is brought. *Northern P. R. Co. v. Babcock*, 154 U. S. 190, 38 L. ed. 958, 14 Sup. Ct. Rep. 978; *Wilcox v. Hunt*, 13 Pet. 378, 10 L. ed. 209; *Pritchard v. Norton*, 106 U. S. 124, 27 L. ed. 104, 1 Sup. Ct. Rep. 102; *Bank of the United States v. Donnelly*, 8 Pet. 361, 8 L. ed. 974.

However, if the certificate of insurance is not an Illinois *contract, all the questions which depend upon that become irrelevant. We think it is not an Illinois contract. Judge Gray, expressing the opinion of the court of appeals, disposed of the contention that the certificate of insurance is an Illinois contract briefly but completely. The learned judge said:

"With respect to the first of these questions

[that the legislation of New York impaired the obligation of the contract between plaintiff in error and Meyer] raised by the appellant. whatever other answers might be made to the applicability of the provision of the Federal Constitution relied upon, it is sufficient to say, now, that this contract was consummated in the state of New York, and is to be governed, in its enforcement, by the laws of that state. The beneficiary was a resident of this state, and there made his application for the insurance. The certificate, issuing upon the application, appears, from its language, only to have been signed by the officers of the defendant at Chicago, in the state of Illinois, on September 20th, 1894; but upon it was printed the following clause: 'I hereby accept this certificate of membership subject to all the conditions therein contained,' and that had the signature of the applicant, followed by the words, 'Dated at New York, this 28th day of September, 1894, attest: Louis Riegel, secretary section 2179, Endowment Rank, K. of P.' By the terms of the certificate, the agreement of the defendant was subject not only to the conditions subscribed to by the member in his application, but 'to the further conditions and agreements hereinafter named;' and the clause containing his acceptance, above quoted, was one of those 'further agreements.' From these terms of the agreements of the parties the only natural conclusion is that the place of the contract was where it was intended, and understood, to be consummated. Its completion depended upon the execution by the member of the further agreement indorsed upon the certificate: namely, to accept it 'subject to all the conditions therein contained.' The contract was not completed, in the sense that *it was binding upon either party to it, until it was delivered in New York, after the execution by the member of the further agreement expressing his unqualified acceptance of its conditions. As a matter of fact, the promise of the defendant was to pay the insurance moneys to the plaintiff, who resided in New York; a feature giving additional local coloring to the contract. But the sufficient and controlling fact is that, by its terms, it was first to take effect as a binding obligation when the required agreement on the part of the member was executed by him." [178 N. Y. 70, 64 L. R. A. 843, 70 N. E. 114.]

2. The ground of this contention is not made clear. The language of counsel points to the contract clause of the Constitution as that relied on, and to render it available makes the law of Illinois the obligation of the contract of insurance. But this can only be upon the supposition, which we have seen is erroneous, that the certificate of insur-

ance was an Illinois contract, not a New York contract. Being a New York contract, the Code sections did not impair its obligation. They were enacted before the contract was executed, and if they were a valid exercise of legislative power, and we have no doubt they were, it was competent for the state to enact the rule of evidence expressed in them. The case is in this narrow compass, and we need not further follow the details of the argument of counsel that the obligation of the contract of insurance was impaired. But we may observe that there is no question in the case of the validity or the enforcement of the provision in the certificate of insurance against suicide. It is only of the testimony offered to prove suicide. Plaintiff in error sought to prove it by the testimony of a physician, and the attempt encountered the New York Code and the questions we have discussed.

Plaintiff in error further contends that, as in writs of error to the circuit and district courts of the United States, we are not restricted to constitutional questions, so in writs of error to a state court, we may also decide all questions presented by the record, and that it is open for us to [520] decide whether the *relation of doctor and patient existed between one of the witnesses and Meyer. This is attempted to be made out by that part of § 709 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 575) which provides: "The writ [to the final judgment or decree of a state court] shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States."

However this may be, in cases like that at bar, we accept the construction the state courts give to state statutes. It is manifest that the question submitted involves the construction of the state statute. Plaintiff in error is not helped by the decision in *Foley v. Royal Arcanum*, 151 N. Y. 196, 56 Am. St. Rep. 621, 45 N. E. 456. It was there decided that a waiver in a policy of insurance was valid under §§ 834 and 836, as they then stood, and their subsequent amendment did not affect the waiver. But the certificate of insurance in the case at bar was made after the amendment to § 836. In *Holden v. Metropolitan L. Ins. Co.* 165 N. Y. 13, 58 N. E. 771, it was held that the statute, by virtue of the amendment, "in positive and express terms, requires the waiver to be made upon or at the time of the trial or examination," and "no one, except the personal representatives of the deceased patient, can waive the provisions of § 834, and it can be waived by them only upon the trial or examination where the evidence is offered or received." *Foley v. Royal Arcanum* was referred to, and limited to the

construction of the statute as it stood before amendment. The opinion of the Court of Appeals in the case at bar follows the *Holden Case* and distinguishes prior cases.
Judgment affirmed.

*TEXAS & PACIFIC RAILWAY COM-[521]
PANY, *Plff. in Err.*,
v.

GEORGE H. DASHIELL.

(See S. C. Reporter's ed. 521-529.)

Release — construction — general and particular words.

1. General words in a release are to be limited and restrained to the particular words in the recital.
2. Impaired mental powers and partial loss of sight, resulting from injuries received by a railway employee in a collision, are not covered by a release which, after enumerating the injuries sustained as bruises of his body, right leg, and right arm, and a scalp wound, recites that "to maintain amicable and pleasant relations and avoid all controversy in respect to said matter" and for a monetary consideration such employee releases the railway company from all claims of any kind and character whatsoever arising from the injuries and damages sustained in the manner or upon the occasion aforesaid, and the results of those injuries.

[No. 212.]

Argued April 11, 1905. Decided May 29, 1905.

IN ERROR to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Northern District of Texas in favor of plaintiff in an action for personal injuries sustained by a railway employee in a collision, which had been removed to that court from the District Court of Tarrant County, in the state of Texas. *Affirmed.*

See same case below, 62 C. C. A. 531, 128 Fed. 23.

The facts are stated in the opinion.

Mr. David D. Duncan argued the cause, and, with Messrs. John F. Dillon and Winslow S. Pierce, filed a brief for plaintiff in error:

The rule of construction as stated in *Union P. R. Co. v. Artist*, 9 C. C. A. 14, 19 U. S. App. 612, 60 Fed. 365, cannot be invoked in this case because of the utter dissimilarity of the general clauses.

Green v. Chicago & N. W. R. Co. 35 C. C. A. 68, 92 Fed. 873.

While mistakes of fact may be sufficient

to avoid a release, ignorance of future effects of an injury does not render the instrument inoperative or void.

Currier v. Bilger, 149 Pa. 109, 24 Atl. 168; *Kane v. Chester Traction Co.* 186 Pa. 145, 65 Am. St. Rep. 846, 40 Atl. 320; *Eccles v. Union P. R. Co.* 7 Utah, 335, 26 Pac. 924; *Nelson v. Minneapolis Street R. Co.* 61 Minn. 167, 63 N. W. 486; *Shook v. Illinois C. R. Co.* 52 C. C. A. 651, 115 Fed. 57; *Chicago & N. W. R. Co. v. Wilcox*, 54 C. C. A. 147, 116 Fed. 913; *Quebe v. Gulf C. & S. F. R. Co.* (Tex.) 66 L. R. A. 734, 81 S. W. 20.

Mr. Ben M. Terrell argued the cause and filed a brief for defendant in error:

If the terms and expressions of an instrument are such as to render uncertain the true intention of the parties in the use of such terms and expressions, then the court has the right and it is its duty to hear testimony touching the matters to which such instrument relates, and to give it such a construction as will obviate any latent ambiguity therein and express the real intention of the parties at the time of its execution, and to ascertain what was contemplated by them when such terms and expressions were so used.

Union P. R. Co. v. Artist, 23 L. R. A. 581, 9 C. C. A. 14, 19 U. S. App. 612, 60 Fed. 365; *Houston & T. C. R. Co. v. McCarty*, 94 Tex. 302, 53 L. R. A. 507, 86 Am. St. Rep. 854, 60 So. 429; *Ramsden v. Hylton*, 2 Ves. Sr. 304; *Lumley v. Wabash R. Co.* 22 C. C. A. 60, 43 U. S. App. 476, 76 Fed. 66; 2 Parsons, Contr. 1855 ed. p. 28; *Jackson ex dem. Roosevelt v. Stackhouse*, 1 Cow. 122, 13 Am. Dec. 514; *Hill v. Miller*, 76 N. Y. 33; *Clark v. Woodruff*, 83 N. Y. 520; Chitty, Contr. 6th Am. ed. p. 778a title Release; Bacon, Abr. Release, K.; *Payler v. Homersham*, 4 Maule & S. 423, 16 Revised Rep. p. 516; *Shook v. Illinois C. R. Co.* 52 C. C. A. 651, 115 Fed. 57.

General words in a release are to be limited and restrained to the particular words in the recital.

Stonehewer v. Farrar, 14 L. J. Q. B. N. S. 122; *Lyman v. Clark*, 9 Mass. 235.

Mr. Justice McKenna delivered the opinion of the court:

This action was originally brought in the district court of Tarrant county, in the state of Texas, and removed by the railway company to the United States circuit court for the northern district of Texas, on the ground that the railway company is a corporation under the law of the United States. The trial resulted in a verdict for the defendant in error for the sum of \$7,500, upon which judgment was entered. It was affirmed by the circuit court of appeals.

198 U. S.

The action was for personal injuries sustained by defendant in error through the negligence of the railway company. The defendant in error was a conductor on one of the company's freight trains, with which another train collided, "whereby," it is alleged, "plaintiff was seriously, painfully, and permanently injured in many parts of his body, and especially was he so injured in and about the head, eyes, back, sides, arms, and shoulders, and in the organs and functions of his brain, and in his entire mental and nervous system, and that, as a result of said injuries, plaintiff has, since the reception thereof, now is, and in the future will permanently be, helpless, injured, and unsound of mind and body, and wholly incapable of transacting any kind of business or of doing any kind of mental or manual work, and that he now is and for the remainder of his life will be cared for and protected, if at all, by his friends and relatives."

*And it is also alleged:

[524]

"That as a result of said negligence and collision plaintiff further says he was badly burned about the legs, sides, back, arms, hands, and head, and that his left eye has become seriously affected by reason of said injury thereto, and by reason of said injury to his head and nervous system affecting said eye, insomuch that the value, use, and sight of said eye is now greatly impaired and almost entirely lost, and that the sight of his right eye is also now considerably weakened and impaired by reason of its sympathy for his said left eye. That as a result of said negligence and injury plaintiff now suffers, has suffered, and for all his life will continue to suffer, great physical pain and much mental anguish and pain."

Among other defenses plaintiff in error pleaded a release executed by defendant in error on the 2d of February, 1901, which is as follows:

"Whereas, on and prior to the 24th day of December, 1900, I, G. H. Dashiell, was employed by the Texas & Pacific Railway Co. as brakeman and extra freight conductor at or near Eastland, Texas, on the said 24th day of December, 1900, about 3:15 o'clock A. M. I sustained certain personal injuries in the manner and of the character described, to the best of my knowledge and ability, to wit:

"Extra east eng. 189 struck caboose of extra east eng. 255, 2½ miles east of Eastland, bruising my body, right leg, right arm, and giving me a scalp wound.

"And, whereas, it is by said railway company and myself mutually desirable to maintain amicable and pleasant relations and

1151

avoid all controversy in respect to said matter:

"Now, therefore, to that end, and in consideration of thirty and no /100 dollars, to me now here paid in cash by said Texas & Pacific Railway Company, I hereby release and acquit, and by these presents bind myself to indemnify and forever hold harmless, said Texas & Pacific Railway Company from and against all claims, demands, damages, and liabilities, of any and every kind or character whatsoever, for or on account of

[525]*the injuries and damages sustained by me in the manner or upon the occasion aforesaid, and arising or accruing, or hereafter arising or accruing, in any way therefrom.

"It is expressly understood that, although we remain as free to contract with each other as if this transaction had not occurred, the Texas & Pacific Railway Company has not and does not agree to bind itself to employ me at or for any time, or in any capacity whatsoever.

"And it is also expressly understood, that all premises and agreements respecting or in any wise relating to the subject hereof are fully expressed herein and no others are made or exist."

The plaintiff in error further pleaded that defendant in error remained in its service and employment for about three months, and did at said time and at all times thereafter ratify and approve the release and all of its terms and provisions.

To that part of the answer which pleaded the release, defendant in error demurred, and also answered, alleging that (1) at the time of its execution and ratification, if it was ratified, he was of unsound mind; (2) He and plaintiff in error were mistaken as to the extent of his injuries, and did not contemplate the result set out in his petition; (3) The release was without consideration.

These defenses to the release were disposed of by the court as follows:

"On the question of the release of the defendant from liability for the injury sustained by plaintiff, you are charged that the agreement entered into between the plaintiff and the defendant company, which has been introduced in evidence, is a release of the defendant from liability for the particular injuries which are enumerated in the face thereof, to wit: injuries to his body, right leg, right arm, and a scalp wound. The court does not, however, construe it to be a release for the injuries alleged to have been received by him resulting in the impaired mental powers, and in the partial loss of sight in his left eye. These injuries

[526]are those for which damages *are sought in this action, and the consideration of which will be submitted to you in this charge."

This interpretation of the release was affirmed by the court of appeals, and presents the only question in the case.

Plaintiff in error contends that the release was intended "to be a final settlement of all claims growing out of the accident." The defendant in error contends that it was a settlement only of the particular injuries enumerated.

An instantly occurring objection to the contention of plaintiff in error is that, if the release was a settlement of all claims growing out of the accident, why enumerate the particular injuries? The mere collision of the trains was of no consequence independent of the injuries which resulted, and it was for the injuries satisfaction was to be made, and satisfaction would be measured by the visible injuries, and, because measured by them, they would be enumerated. If the accident alone was settled for, there was a more direct way of accomplishing it.

But let us analyze the release. It commences with the recital of the relation of defendant in error with plaintiff in error, and that he "sustained certain personal injuries in the manner and of the character described, to the best of his knowledge and ability." Then follows this: "Extra east eng. 189 struck caboose of extra east eng. 255, 2½ miles east of Eastland, bruising my body, right leg, right arm, and giving me a scalp wound." For the injuries compensation was fixed at \$30, with the additional consideration, let us say, in order to fully exhibit the contention of plaintiff in error, of the desire mutually entertained by him and defendant in error (we quote from the release) "to maintain amicable and pleasant relations and avoid all controversy in respect to said matter." Upon the word "matter" plaintiff in error puts its main reliance; indeed, makes it dominant of the meaning of the release. The contention is that it refers to the accident, not to the injuries, the latter serving only to identify the accident which "was the cause of action." This is an *attempt to separate the [527] inseparable. The negligence of plaintiff in error caused the accident which resulted in injuries to defendant in error, and constituted his right or cause of action, and was the matter to which the release was addressed; but the extent of the release, whether confined to the injuries enumerated or includes other injuries, depends upon the other words of the release. They are as follows:

"I hereby release and acquit, and by these presents bind myself to indemnify and forever hold harmless, said Texas & Pacific Railway Company from and against all claims, demands, damages, and liabilities

of any and every kind or character whatsoever, for or on account of *the injuries* and damages sustained by me in the manner or upon the occasion aforesaid, and arising or accruing or hereafter arising or accruing any way therefrom."

We may admit that there is some ambiguity in these words. The release is "of all claims of every kind and character whatsoever," arising, not from all injuries and damages sustained, but from "*the injuries* and damages sustained." That is, the specific or enumerated injuries sustained "in the manner or upon the occasion aforesaid," and the results of those injuries. The words "in the manner and upon the occasion" are a mere tautological identification of the collision and cause of the injuries. They add nothing else whatever to the meaning of the release. This construction gives purpose to the enumeration of the injuries and to all of the provisions of the release. And the rule of construction should not be overlooked that general words in a release are to be limited and restrained to the particular words in the recital. The rule is illustrated by the case of *Union P. R. Co. v. Artist*, 23 L. R. A. 581, 9 C. C. A. 14, 19 U. S. App. 612, 60 Fed. 365. Artist was an engineer in the employ of the company, and sustained injuries while switching cars. The release passed upon recited that it was "for amounts agreed upon in settlement of claim of Andrew S. Artist against the Union Pacific Railway Company on account of injuries received." The injuries were specified, and the release recited [528] "settlement is in full of all claims and demands of every character," and concluded with a release "of all manner of actions, cause of action, suits, debts, and sums of money, dues, claims, and demands whatsoever, in law or equity." Passing on the effect of the release, Circuit Judge Sanborn, speaking for the court of appeals of the eighth circuit, applied the rule, citing *Jackson ex dem. Roosevelt v. Stackhouse*, 1 Cow. 122, 126, 13 Am. Dec. 514, and 2 Parsons, Contr. 633, note.

In *Lumley v. Wabash R. Co.* 22 C. C. A. 60, 43 U. S. App. 476, 76 Fed. 66, the rule was also applied by the circuit court of appeals of the sixth circuit. The instrument enumerated the injuries received, released the railroad company "from all actions, suits, claims, reckonings, and demands for, on account of, or arising from, injuries so as aforesaid received, and any, every, and all results hereafter following therefrom."

Quebe v. Gulf, C. & S. F. R. Co. 97 Tex. —, 66 L. R. A. 734, 81 S. W. 20, is cited in opposition. The case can be distinguished. Notwithstanding some of its expressions, we do not think it was the intention of the 198 U. S.

court to impugn the rule which qualifies general words by the particular words in a recital. The trial court submitted to the jury as a question of fact whether the release was intended to be confined to the injury mentioned in the release. Quebe contended that the release was so confined as a matter of law. The supreme court, replying to it, said that the intention was "to release the cause of action rather than to acknowledge receipt of payment for a part of the damage." The court admitted the existence of the rule of construction relied on, and that it was supported by many authorities, but used language which seemed to confine it to cases where the release is attacked on the ground of mistake or fraud, and not to apply it when the interpretation or construction of language of a release is under consideration. This is certainly a doubtful limitation of the rule. The purpose is not to set aside or reform an instrument, but to ascertain its scope and meaning. In the case at bar, however, mistake is charged, and there is evidence tending to show *that [529] defendant in error's skull was fractured, and it was from that the impairment of his sight and mental powers resulted. Such effects, the testimony tended to show, could not result from a simple wound to the scalp. There was testimony going to show, therefore, that the injuries to defendant in error's skull, brain, and eye were not known to the parties when the release was executed, and that his impaired mental powers and loss of sight were the results of those injuries, and not the result of those which were enumerated.

In *Union P. R. Co. v. Harris*, 158 U. S. 326, 39 L. ed. 1003, 15 Sup. Ct. Rep. 843, a written release was set up in bar of an action for damages against the railway company. Several defenses were made to the release, among others, "that the minds of the parties never met on the principal subject embraced in the release, namely, the damages for which the action was brought." This defense was complicated in the instructions of the court with the defenses of fraud and mental incompetency to understand the terms and extent of the release, and it is difficult to make satisfactory extracts from the charge of the trial court. Enough, however, appears to show that the court submitted to the jury the fact of mistake of injuries received as bearing on the effect of the release, and this action was affirmed by this court.

It follows from these views that judgment should be and it is affirmed.

Mr. Justice **Brewer**, Mr. Justice **Brown**, and Mr. Justice **Peckham** dissent.

[530]***UNION TRUST COMPANY and Security Warehousing Company**
v.

HENRY L. WILSON, Trustee in Bankruptcy of **Harry L. Flanders**.

(See S. C. Reporter's ed. 530-539.)

Pledge of warehouse receipts—sufficiency of delivery as against attaching creditors.

The indorsement to a third person, as security for loans, of a receipt issued by a warehouse company for goods kept under lock and key in a place leased by it from the owner of the goods, which receipt recites that it received the property on storage, "to be delivered only upon surrender of this receipt, properly indorsed, and payment of all charges thereon," is a sufficient delivery as against attaching creditors of the owner to validate the transaction as a pledge, whether the receipt is to be deemed a public warehouse receipt under Ill. Rev. Stat. chap. 114, § 2, or not.

[No. 424.]

Submitted January 23, 1905. Decided May 29, 1905.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Seventh Circuit, presenting questions as to whether the indorsement of receipts issued by a warehouse company constituted a pledge valid as against other creditors of the owner. *Answered in the affirmative.*

The facts are stated in the opinion.

Messrs. Henry S. Robbins and Charles R. Holden submitted the cause for the **Union Trust Company et al.**:

The placing of property in a room leased to, and kept by, a vendee, pledgee, or warehouseman, accompanied by a continuous display of signs and placards plainly indicating the vendee's, pledgee's, or warehouseman's interest, constitutes a sufficient change of possession to make the transaction valid.

Hatch v. Standard Oil Co. 100 U. S. 124, 25 L. ed. 554; *Sumner v. Hamlet*, 12 Pick. 76; *First Nat. Bank v. Pennsylvania Trust Co.* 60 C. C. A. 100, 124 Fed. 968; *Bank of Rome v. Haselton*, 15 Lea, 216; *Sharp v. Philadelphia Warehouse Co.* 9 Rep. 572; *Kentucky Furnace Co. v. City Nat. Bank*, 25 Ky. L. Rep. 28, 75 S. W. 848; *Fidelity Ins. Trust & S. D. Co. v. Roanoke Iron Co.* 81 Fed. 439; *American Pig Iron Storage Warrant Co. v. German*, 126 Ala. 194, 85 Am. St. Rep. 21, 28 So. 603; *Dunn v. Train*, 60 C. C. A. 113, 125 Fed. 221; *Allen v. Hollander*, 128 Fed. 159.

NOTE.—On delivery and possession of property pledged—see notes to *Yeatman v. New Orleans Sav. Inst.* 24 L. ed. U. S. 589; and *Norton v. Baxter*, 4 L. R. A. 305.
1154

The receipts were of such a character that their indorsement and delivery were tantamount to the delivery of the property itself.

Gibson v. Stevens, 8 How. 385, 12 L. ed. 1123; *Montgomery, W. & Co. v. American Trust & Sav. Bank*, 71 Ill. App. 20; *Northrop v. First Nat. Bank*, 27 Ill. App. 527; *Millhiser Mfg. Co. v. Gallego Mills Co.* 101 Va. 579, 44 S. E. 760; *Rice v. Cutler*, 17 Wis. 352, 84 Am. Dec. 747; *Union Trust Co. v. Trumbull*, 137 Ill. 146, 27 N. E. 24; *Lickbarrow v. Mason*, 2 T. R. 63, 1 Smith, Lead. Cas. 7th Am. ed. p. 1197.

The transactions were valid as pledges, even if the receipts be not regarded as strictly warehouse receipts.

Porter v. Shotwell, 105 Mo. App. 177, 79 S. W. 728; *Kentucky Furnace Co. v. City Nat. Bank*, 25 Ky. L. Rep. 28, 75 S. W. 848.

Messrs. Edwin Burritt Smith, George Packard, Vincent J. Walsh, and W. Tudor Ap Madoc submitted the cause for **Wilson, Trustee**:

The receipts issued by the security company were not true warehouse receipts. Their indorsement and delivery to the trust company, therefore, as security for loans, was not a pledge of the leather covered by them, which would be valid as against attaching creditors.

Burton v. Curyea, 40 Ill. 320, 89 Am. Dec. 350; *Thornton v. Davenport*, 2 Ill. 296, 29 Am. Dec. 358; *Hamilton v. Russell*, 1 Cranch, 309, 2 L. ed. 118; *Warner v. Norton*, 20 How. 448, 15 L. ed. 950; *Ticknor v. McClelland*, 84 Ill. 471; *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664, 23 L. ed. 1003; *Dooley v. Pease*, 180 U. S. 126, 45 L. ed. 457, 21 Sup. Ct. Rep. 308; *Harkness v. Russell*, 118 U. S. 663, 30 L. ed. 285, 7 Sup. Ct. Rep. 51; *Gibson v. Stevens*, 8 How. 384, 12 L. ed. 1123; *Conrad v. Atlantic Ins. Co.* 1 Pet. 445, 7 L. ed. 214; *Geilfuss v. Corrigan*, 95 Wis. 651, 37 L. R. A. 166, 60 Am. St. Rep. 143, 70 N. W. 306; *Franklin Nat. Bank v. Whitehead*, 149 Ind. 560, 39 L. R. A. 725, 63 Am. St. Rep. 302, 49 N. E. 592; *State v. Watson*, 141 Mo. 338, 42 S. W. 726; *Shepardson v. Cary*, 29 Wis. 34; *State v. Bryant*, 63 Md. 66; *Staubli v. Blaine Nat. Bank*, 11 Wash. 426, 39 Pac. 814; *Thorne v. First Nat. Bank*, 37 Ohio St. 254; *Bell & C. Co. v. Glass Works Co.* 20 Ky. L. Rep. 1089, 48 S. W. 440; *Yenni v. McNamee*, 45 N. Y. 614; *Adams v. Merchants' Nat. Bank*, 9 Biss. 396, 2 Fed. 174; *Broadwell v. Howard*, 77 Ill. 305; *National Exch. Bank v. Wilder*, 34 Minn. 149, 24 N. W. 699; *Merchants' & M. Bank v. Hibbard*, 48 Mich. 118, 42 Am. Rep. 465, 11 N. W. 834; *Union Trust Co. v. Trumbull*, 137 Ill. 146, 27 N. E. 24; *Re Rodgers*, 60 C. C. A. 567, 125 Fed. 169; *Tradesmen's Nat. Bank*
198 U. S.

v. *Kent Mfg. Co.* 186 Pa. 556, 65 Am. St. Rep. 876, 40 Atl. 1018; *Moors v. Jagode*, 195 Pa. 163, 45 Atl. 723; *Mechanics Trust Co. v. Dandridge*, '8 Ky. L. Rep. 625, 37 S. W. 288; *Bucher v. Tom*, 103 Pa. 528.

If the receipts were not true warehouse receipts, the transactions did not constitute a pledge of the leather by Flanders to the trust company, which would be valid against attaching creditors.

Casey v. Cavaroc, 96 U. S. 467, 24 L. ed. 779; *Sinshoimer v. Whitely*, 111 Cal. 378, 52 Am. St. Rep. 192, 43 Pac. 1109; *Second Nat. Bank v. Gilbert*, 174 Ill. 485, 66 Am. St. Rep. 306, 51 N. E. 584; *Harding v. Eldridge*, 186 Mass. 39, 71 N. E. 115; *Sholes v. Western Asphalt Block & Tile Co.* 183 Pa. 528, 38 Atl. 1029; *Union Trust Co. v. Trumbull*, 137 Ill. 146, 27 N. E. 24; *George v. Pierce*, 123 Cal. 172, 55 Pac. 775, 56 Pac. 53; *Watson v. Dealy*, 28 Misc. 544, 59 N. Y. Supp. 623; *Harrington v. Blanchard*, 70 N. H. 597, 49 Atl. 576; *Story v. Cordell*, 13 Mont. 204, 33 Pac. 6; *Thorne v. First Nat. Bank*, 37 Ohio St. 254; *Button v. Rathbone*, 126 N. Y. 187, 27 N. E. 266; *First Nat. Bank v. Caperton*, 74 Miss. 857, 60 Am. St. Rep. 540, 22 So. 60; *Martin v. Sexton*, 72 Ill. App. 395; *Moors v. Reading*, 167 Mass. 322, 57 Am. St. Rep. 460, 45 N. E. 760; *Drury v. Moors*, 171 Mass. 252, 50 N. E. 618.

Mr. Justice **Holmes** delivered the opinion of the court:

The questions certified by the circuit court of appeals arise upon the following facts, abridged from the statement submitted to us. The bankrupt, Flanders, was a wholesale leather dealer. He walled off a part of the basement of his place of business, and let it at a nominal rent to the Security Warehousing Company. There were doors to this part, with padlocks bearing the name of the company, which were kept locked, and to which the company had the only keys. The company had a key to Flanders' front door, and access to the part let to it at all hours of day or night. No one else could get such access without breaking in. There were two signs on the outside, stating, in large letters, that the premises were occupied by the company as a public warehouseman. The company received leather from Flanders into this place,

[535]issuing *a certificate that it had received the same on storage, subject to the order of H. L. Flanders & Co., and identifying the leather; "said commodity to be retained on storage, and delivered only upon surrender of this receipt, properly indorsed, and payment of all charges thereon." To every parcel of the leather was attached a card, legibly stating that it was in the possession
198 U. S.

of the warehouse company. The company stipulated in the receipt against liability for damage by fire, water, etc., and, by a general contract with Flanders, the latter assumed all risk of loss except from dishonesty of the company's servants. Flanders paid the company \$20 a month for the first \$10,000 worth of property or less, and a dollar a month for each additional \$1,000. He also paid the expenses of the company in connection with storing the goods. The certificates of the company issued as above were all indorsed by Flanders to the Union Trust Company as security for loans made by it to him in the regular course of business. If Flanders desired to remove any part of the leather, he paid the necessary sum to the trust company, was intrusted with the receipts, got the warehouse company to send a man to unlock the place of enclosure and allow the removal, indorsing on the receipt the amount delivered, if less than all, and then, as the case might be, returned the receipt to the trust company or surrendered it into the warehousing company's hands.

Flanders became bankrupt, and his trustee filed a bill in the district court, alleging the storage arrangement to have been fraudulent, and claiming the leather on the ground that it always had been in the possession of Flanders, and therefore had come to the possession of the trustee. Upon these facts the circuit court of appeals certifies the following questions:

"1. Whether, upon the facts above recited, the receipts issued by the warehousing company are to be deemed valid warehouse receipts, so that their indorsement by Flanders to the trust company, as security for loans, constituted a pledge or pledges to the trust company of the leather covered by such receipts, which would be valid against attaching creditors.

*"2. Whether, if the receipts are not to be[536] deemed valid as warehouse receipts, upon the facts above recited, the transactions are to be regarded as constituting pledges of such leather by Flanders to the trust company, which would be valid as against attaching creditors.

"3. If there was no pledge, whether the trust company, under the facts above recited, acquired an equitable lien upon such leather that is superior to the title thereto of the trustee in bankruptcy."

No question under the statutes of Illinois is suggested. Apart from statute, a warehouse receipt simply imports that the goods are in the hands of a certain kind of bailee. A bailee asserting a lien for charges has the technical possession of the goods. But it always is recognized that if the bailee of the owner, by direction of the latter, assents

to becoming bailee for another, to whom the owner has sold, mortgaged, or pledged the goods, the change in the character of the bailee's holding satisfies the requirement of a change of possession to validate the sale or pledge. Therefore it is common for certain classes of bailees to give receipts to the order of the bailor, because, by a receipt in that form, the bailee assents in advance to becoming bailee for any one who is brought within the terms of the receipt by an indorsement of the same. That, at least, is the argument of Benjamin on Sales, 2d ed. 676 *et seq.*, 6th Am. ed. 795, § 817, is the understanding of merchants, and is the principle adopted as to public warehouse receipts by the statutes of Illinois (Rev. Stat. chap. 114, § 24), and probably adopted by the courts, apart from statute. *Union Trust Co. v. Trumbull*, 137 Ill. 146, 173, 27 N. E. 24; *Northrop v. First Nat. Bank*, 27 Ill. App. 527; *Millhiser Mfg. Co. v. Gallego Mills Co.* 101 Va. 579, 589, 44 S. E. 760; *Hallgarten v. Oldham*, 135 Mass. 1, 10, 46 Am. Rep. 433. The transfer of the receipt is not a symbolical delivery, it is a real delivery, to the same extent as if the goods had been transported to another warehouse named by the pledgee.

[537] If, then, the Security Warehousing Company had possession *of the goods, it had it as bailee; and, unless some reason appears to the contrary, the indorsement of its receipt, the same being drawn to Flanders' order, was a delivery sufficient to validate the pledge. But there can be no doubt on the facts as stated, without more, that the company had possession of the goods. It had them under lock and key, in a place to which it had a legal title and right of access by lease. Even if it had not had a right of access to the place, it would have had possession of the contents of the room, according to the analogy of the settled law that a carrier who breaks bulk and takes the goods is guilty of larceny. *Y. B. 13 Edw. IV. 9, pl. 5.* The act is a trespass, as agreed in *Keilway*, 160, pl. 2; *Ward v. Turner*, 1 Dick. 170, 172, 2 Ves. Sr. 431, 443; *Moore v. Mansfield*, 182 Mass. 302, 303, 95 Am. St. Rep. 657, 65 N. E. 398. So, again, if the goods had been in a place under the exclusive control of the company, even without the company's knowledge, they would have been in the company's possession. *Elwes v. Brigg Gas Co.* L. R. 33 Ch. Div. 562, 568; *Reg. v. Rowe*, Bell, C. C. 93. See *Barker v. Bates*, 13 Pick. 255, 257, 261, 23 Am. Dec. 678; *Northern P. R. Co. v. Lewis*, 162 U. S. 366, 378, 379, 382, 41 L. ed. 1002, 1007, 1008, 16 Sup. Ct. Rep. 831. When there is conscious control, the intent to exclude and the exclusion of others, with access to the place of custody

as of right, there are all the elements of possession in the fullest sense. *Gough v. Everard*, 2 Hurlst. & C. 1, 8. *Ancona v. Rogers*, L. R. 1 Exch. Div. 285.

We deal with the case before us only. No doubt there are other cases in which the exclusive power of the so-called bailee gradually tapers away until we reach those in which the courts have held as matter of law that there was no adequate bailment. *Tradesmen's Nat. Bank v. Thomas Kent Mfg. Co.* 186 Pa. 556, 65 Am. St. Rep. 876, 40 Atl. 1018; *Drury v. Moors*, 171 Mass. 252, 50 N. E. 618. So, different views have been entertained where the owner has undertaken to constitute himself a bailee by issuing a receipt. We may concede, for purposes of argument, that all the forms gone through in this case might be emptied of significance by a different understanding between the parties, which the form was intended to disguise. But no such understanding is stated here, and it cannot be assumed.

*There is no reason even to infer it as a [538] conclusion of fact, if such inferences were open to us to draw. It is true that the evident motive of Flanders was to get his goods represented by a document, for convenience of pledging, rather than to get them stored, and the method and amount of compensation show it. But that was a lawful motive, and did not invalidate his acts, if otherwise sufficient. He could get the goods by producing the receipt and paying charges, of course, but there is no hint that the company did not insist upon its control. It is suggested that the goods gave credit to the owner. But, in answer to this, it is enough to say that the goods were not visible to anyone entering the shop. They could be surmised only by going to the basement, where signs gave notice of the company's possession, and probably could be seen only if the company unlocked the doors. There is nothing stated which warrants us in doubting that all the transactions were in good faith.

Although the first question does not refer in terms to the statutes of Illinois, it is proper to add that we see no sufficient reason for denying to the place of storage the character of a public warehouse. "Public warehouses of Class C shall embrace all other warehouses or places where property of any kind is stored for a consideration." Rev. Stat. chap. 114, par. 121, § 2. These sweeping words embrace any place so used, whether owned or hired by the warehousemen; and, if so, they embrace as well a place hired of the owner of the goods as one hired of anybody else. See *Sumner v. Hamlet*, 12 Pick. 76; *Gough v. Everard*, 2 Hurlst. & C. 1. If we are right in this, then the indorsement of the receipts trans-

ferred the property in the leather by the express terms of the statute already referred to. Rev. Stat. chap. 114, § 24. If not, we should come to the same result by the common law; for even if we did not adopt the argument of Mr. Benjamin, to which we have referred above, against the earlier view of Blackburn on Sales, 297, followed in *Farina v. Home*, 16 Mees. & W. 119, still all the authorities agree that, if an assent in advance is not enough, yet, as soon as [539] the bailee *attorns to the assignee, the delivery is complete. The statement has not this point in view. But we should suppose that a fuller statement would make it plain that the warehouse company knew and assented to the transfers to the trust company, if that be material, which we do not imply. See also *Union Trust Co. v. Trumbull*, 137 Ill. 146, 173, 27 N. E. 24; *Millhiser Mfg. Co. v. Gallego Mills Co.* 101 Va. 579, 589, 44 S. E. 760; *Gibson v. Stevens*, 8 How. 385, 399, 12 L. ed. 1123, 1129.

As we answer the first and second questions in the affirmative, it is unnecessary to consider the third.

It will be so certified.

Mr. Justice **Harlan**, Mr. Justice **Brewer**, and Mr. Justice **Day** dissent.

EDWARD B. WHITNEY, as Trustee in Bankruptcy of Daniel Le Roy Dresser and Charles E. Riess, as Members of the Firm of Dresser & Co., *Appts.*,
v.

CHARLES H. WENMAN, Stuyvesant Fish, George C. Boldt, *et al.*

(See S. C. Reporter's ed. 539-553.)

Courts—jurisdiction of court of bankruptcy—suit to determine rights to property in its possession.

Jurisdiction of a proceeding in the nature of a plenary action, in which the parties were duly served and brought into court, to determine rights in or liens upon property which, under the facts as admitted by demurrer to the bill, came into possession of a court of bankruptcy as property of the bankrupt, whether held by him or for him, was conferred on such court by the bankrupt act of July 1, 1898, § 2 (30 Stat. at L. 545, chap. 541, U. S. Comp. Stat. 1901, p. 3420), authorizing the bankruptcy court to cause the estate of the bankrupt to be collected, reduced to money, and distributed, and to determine controversies in relation thereto, and bring in and substitute additional parties when necessary for the complete determination of a matter in controversy; and such jurisdiction is not ousted by an unauthorized surrender of the property by the receiver in bankruptcy.

[No. 576.]

Submitted April 24, 1905. Decided May 29, 1905.

A PPEAL from the District Court of the United States for the Southern District of New York to review a decree dismissing for want of jurisdiction a bill which seeks to determine rights in or liens upon property which, under the facts as alleged, came into the possession of the court as property of the bankrupt. *Reversed.*

Statement by Mr. Justice **Day**:

*Edward B. Whitney, as trustee in bank-[540] ruptcy of Daniel LeRoy Dresser and Charles E. Riess, members of the firm of Dresser & Company, filed a bill in equity against Charles H. Wenman, Stuyvesant Fish, and George C. Boldt, in the district court of the United States for the southern district of New York. Upon demurrer to the bill, the court dismissed the same for want of jurisdiction. The allegations of the bill set forth in substance: That on September 17, 1903, the complainant was duly appointed trustee in bankruptcy of Dresser and Riess, doing business as Dresser & Company, and that as such trustee he qualified on September 29, 1903. That during the time mentioned in the bill, and up to March 7, 1903, Dresser & Company were carrying on business as merchants in the city of New York. That the defendants the Security Warehousing Company and the United States Mortgage & Trust Company were corporations of the state of New York. That the defendant Charles H. Wenman acted as the agent and attorney in fact of the defendants Fish and Boldt. Prior to March 7, 1903, the bankrupts, partners, as Dresser & Company, became insolvent, and on that day assigned all their property for the benefit of their creditors. On March 9, 1903, upon the petition of certain creditors, Robert C. Morris and Charles S. Mackenzie were appointed by the district court for the southern district of New York receivers in bankruptcy of Dresser & Company. That at least six months prior to March 7, 1903, the firm of Dresser & Company had been insolvent and unable to pay its debts, and was only able to continue in business by borrowing large sums of money; and in order not to injure the creditors it became necessary to pledge the goods, wares, and merchandise in which the company was dealing, but to conceal said pledge from the unsecured creditors. That the goods dealt with by Dresser & Company consisted, for the most part, of Japanese silks imported for sale. For the purpose of pledging these goods with certain of the creditors, without the knowledge of the other creditors, Dresser & Company entered *into a plan or arrangement with the [541]

defendants the Security Warehousing Company: to wit, a certain alleged lease of the store, display and sales rooms was made by Dresser & Company to the Security Warehousing Company at a nominal rental of \$1 a year, in order that thereafter the said warehousing company might claim that the goods and display and sales rooms belonged to it. That the goods in reality belonged to the firm of Dresser & Company, and there was no change of location or ownership of the said goods, but Dresser & Company remained in possession and control thereof, and permitted the display of them in the same manner as that firm had done prior to the pretended storage. Dresser & Company exhibited the goods to their customers, sending portions to dyers and manipulators, and generally handled and used them as if they were their own, and free and clear from all claims and encumbrances. That the Security Warehousing Company exercised no supervision or control over the said goods, but merely employed, or pretended to employ, the confidential clerk and secretary of Daniel LeRoy Dresser and Dresser & Company, as its alleged custodian, in whose charge it was claimed the goods had been placed at a salary of \$1 per month. She exercised no control or supervision over the goods, but during the period of her employment continued to act as the confidential secretary of the bankrupts. The security company also placed a few small tags on the shelves and bins in which the goods were stored and displayed for sale, upon which tags the name of the security company was printed, but the tags were not easily discovered, and in most instances were so placed as not to be readily seen, and were not of such a character as to identify the goods.

The bill then avers the issue of certain warehouse receipts upon said goods, representing that they had been stored with the company at its warehouse at 15-17 Greene street, New York, which was, in fact, the store of Dresser & Company. Then follow allegations as to the delivery of the warehouse receipts, some to the United States [542] Mortgage & Trust Company and *some to the defendant Wenman for himself or defendants Fish and Boldt. And it is averred that the security instruments did not describe the goods in such a way as to make them capable of identification. That Daniel LeRoy Dresser was one of the incorporators of the Security Warehousing Company, and one of its directors and stockholders. That at the time of the delivery of the security instruments Charles S. Mackenzie was general counsel of the security company, and was fully cognizant of the system of pretended storage before described, and was also personal counsel for Daniel LeRoy

Dresser. That after the delivery of the warehouse instruments Dresser & Company continued to display and sell and dispose of the goods and manage the business in the same manner that they had been in the habit of doing prior to the said pretended storing, without objection from the Security Warehousing Company. Then follow allegations as to the knowledge or opportunity for knowing, on the part of the defendants, of the situation above described. When the receivers, Morris and Mackenzie, went into possession of the stock of Dresser & Company on March 9, 1903, upwards of \$150,000 worth of the goods was still in the possession and under control of Dresser & Company. After the receivers had taken possession of the store the Security Warehousing Company notified them that it claimed that the store, display and sales rooms belonged to it under the alleged lease, and that the goods therein contained had been stored with it by Dresser & Company, and requested the delivery of all the goods to it. The receivers did not dispute this claim of the warehousing company, but complied with it. Neither the court nor the unsecured creditors of Dresser & Company were advised of the facts concerning this claim or the character of the pretended storing upon which the issue of the so-called warehouse receipts was based. Then follow allegations as to the sale of the goods, and that the Security Warehousing Company claimed that certain of the goods supposed to have been stored with it by Dresser & Company, and covered by the security instruments, had been sold by *Dresser & Company be- [543] fore March 7, 1903, amounting to the sum of \$22,000. That said receivers collected upwards of \$20,000 of accounts receivable of Dresser & Company, and paid the same over to the Security Warehousing Company. That these goods were sold and the accounts collected by the warehousing company before the appointment of complainant as trustee in bankruptcy of Dresser & Company. None of said goods or their proceeds have come into the hands of the trustee except the sum of \$1,944.93, paid to the complainant by the security company. Then follow averments as to the payment of the proceeds of the goods sold and accounts collected to the other defendants and the holders of said warehouse receipts. It is averred that the books and records of the Security Warehousing Company are lost or destroyed. It is alleged that the attempt to create a lien upon the goods in the manner aforesaid was contrary to law and the statutes of the state of New York. That the silk goods had been sold at much less than their value. The prayer of the bill is that the security instruments be declared

invalid, fraudulent, and void, and that the complainant be decreed the owner of the goods and accounts, and that the defendants be required to account for the value of the same, and for general relief, as the nature of the case may require.

Messrs. Robert D. Murray, George H. Gilman, and J. Aspinwall Hodge submitted the cause for appellants.

Messrs. Edwin B. Smith and Louis F. Doyle submitted the cause for appellees. **Messrs. Smith & Barker** were on Mr. Smith's brief.

Mr. Justice **Day**, after making the foregoing statement, delivered the opinion of the court:

This case is here upon the question of the jurisdiction of the district court to entertain the action. The case in the court below was dismissed for want of jurisdiction, the demurrer having been sustained solely upon the ground that the bankruptcy act of July 1, 1898 [30 Stat. at L. 545, chap. 541, U. S. Comp. Stat. 1901, p. 3421], as amended by the act of February 5, 1903 [32 Stat. at L. 797, chap. 487], gave the court no jurisdiction. We are not concerned with the merits of the controversy further than the allegations concerning the same are necessary to be considered in determining the question of the jurisdiction of the district court, as a court of bankruptcy, to entertain this suit. It is sufficient to say that, in our opinion, the bill made a case which presented a controversy for judicial determination as to the right of the defendants to hold the lease and property under the alleged security of the warehouse receipts undertaken to be issued in the manner set forth in the petition. Whether it will turn out, upon full hearing, that the lease and securities are good, is not now to be determined. The bill makes allegations which raise a justiciable controversy as to [549] the validity *of the alleged lien in view of the lack of change of possession of the goods under the circumstances set forth. The question for this court now to determine is whether the bankruptcy court, on the allegations made and admitted as true by the demurrer, had jurisdiction to determine the controversy. It is positively alleged in the bill that the supervision and control of the goods continued in the firm of Dresser & Company, and that the alleged doings of the Security Warehousing Company and its agents were merely colorable, and did not, in fact, change the control over the goods, nor give any notice of the alleged lease of the warehousing company, nor the lien of the instruments thereby secured. It is further positively averred that when the receivers were appointed upwards of \$150,000 worth of goods belonging to the firm were in the possession and under the control of the bankrupts, and after the receivers had taken possession of the store the goods were delivered up to the warehousing company without any order or attempt to procure the sanction of the court to such surrender of the property. Under these circumstances, had the bankruptcy court jurisdiction to determine the rights of parties claiming interests in the property?

Section 2 of the bankrupt act of 1898, among other things, confers jurisdiction upon the district courts of the United States, as courts of bankruptcy, (3) to "appoint receivers or the marshals, upon application of parties in interest, in case the court shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition, and until it is dismissed or the trustee is qualified;" (7) to "cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided."

This section, in connection with § 23, was before this court for construction in the case of *Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. ed. 1175, 20 Sup. Ct. Rep. 1000, in which case it was held that § 23b of the act as it then stood prevented the courts of the United States from entertain-[550] ing jurisdiction over suits brought by trustees in bankruptcy to set aside fraudulent transfers of money or property made by the bankrupt to third parties before the institution of the bankruptcy proceedings, without the consent of the defendants. In that case it was held that the power conferred in subd. 7 of § 2, above quoted, was limited by the direct provisions of § 23 as to the jurisdiction of suits brought by trustees, the effect of which section was to compel the trustee to resort to the state courts to set aside conveyances of the character named where an alleged fraudulent transfer had been made by the bankrupt before the beginning of the proceedings, unless jurisdiction in the district court was by consent. This case (*Bardes v. First Nat. Bank*) did not determine the right of the district court to entertain jurisdiction of a proceeding having in view the adjudication of rights in or liens upon property which came into the possession of the bankruptcy court as that of the bankrupt, the right to proceed concerning which would seem to be broadly conferred in the section of the bankruptcy act above quoted. At the same term at which the *Bardes Case* was decided, this court determined the case of *White v.*

Schloerb, 178 U. S. 542, 44 L. ed. 1183, 20 Sup. Ct. Rep. 1007. In that case it was held that, after an adjudication in bankruptcy, an action in replevin could not be brought in the state court to recover property in the possession of and held by the bankrupt at the time of the adjudication, and in the hands of the referee in bankruptcy when the action was begun, and that the district court of the United States, sitting in bankruptcy, had jurisdiction by summary process to compel the return of the property seized. In the case of *Bryan v. Bernheimer*, 181 U. S. 188, 45 L. ed. 814, 21 Sup. Ct. Rep. 557, it appeared that the bankrupt had made a general assignment for the benefit of his creditors nine days before the filing of his petition in bankruptcy, and the assignee sold the property after the bankruptcy proceedings had been begun, after the adjudication in bankruptcy, but before the appointment of a trustee. Upon petition of creditors, the district court ordered that the marshal take possession, and *the purchaser appear within ten days and propound his claim to the property, or, failing so to do, be declared to have no right in it. The purchaser appeared and set up that he bought the property in good faith from the assignee, and prayed the process of the court that the creditors might be remitted to their claim against the assignee for the price, or the same be ordered to be paid into court by the assignee, and paid over to the purchaser, who was willing to rescind the purchase upon receiving his money. It was held that the purchaser had no title to the bankrupt's estate, and that the equities between him and the creditors should be determined by the district court, bringing in the assignee, if necessary. In this case Mr. Justice Gray, who also delivered the opinion in the *Bardes Case*, said:

"The bankrupt act of 1898, § 2, invests the courts of bankruptcy with such jurisdiction, at law and in equity, as to enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers, and during their respective terms to make adjudications of bankruptcy, and, among other things, '(3) appoint receivers or the marshals upon the application of the parties in interest, in case the courts shall find it absolutely necessary for the preservation of estates to take charge of the property of bankrupts after the filing of the petition, and until it is dismissed or the trustee is qualified;' '(6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy; (7) cause the estates of bankrupts to be collected, reduced to money,

and distributed, and determine controversies in relation thereto, except as herein otherwise provided.' The exception refers to the provisions of § 23, by virtue of which, as adjudged at the last term of this court, the district court can, by the proposed defendant's consent, but not otherwise, entertain jurisdiction over suits brought by trustees in bankruptcy against third persons, to recover property fraudulently conveyed by the bankrupt to them before the institution of proceedings in bankruptcy. **Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. ed. 1175, 20 Sup. Ct. Rep. 1000; *Mitchell v. McClure*, 178 U. S. 539, 44 L. ed. 1182, 20 Sup. Ct. Rep. 1000; *Hicks v. Knost*, 178 U. S. 541, 44 L. ed. 1183, 20 Sup. Ct. Rep. 1006."

This case (*Bryan v. Bernheimer*) would seem to limit the effect of the decision in the *Bardes Case* to suits against third persons on account of transfers made before the bankruptcy, and to recognize the right of the bankruptcy court to adjudicate upon rights in property in the possession of the court, belonging to the bankrupt. In the case of *Mueller v. Nugent*, 184 U. S. 1, 46 L. ed. 405, 22 Sup. Ct. Rep. 269, this court recognized the power of the bankruptcy court to compel the surrender of money or other assets of the bankrupt in his possession or that of some one for him. In that case the decisions in *Bardes v. First Nat. Bank*, *White v. Schloerb*, and *Bryan v. Bernheimer* were reviewed by the chief justice, who delivered the opinion of the court, and it was held that the filing of a petition in bankruptcy is a caveat to all the world, and, in effect, an attachment and injunction, and that, on adjudication, title to the bankrupt's estate became vested in the trustee, with actual or constructive possession, and placed in the custody of the bankruptcy court.

We think the result of these cases is, in view of the broad powers conferred in § 2 of the bankrupt act, authorizing the bankruptcy court to cause the estate of the bankrupt to be collected, reduced to money, and distributed, and to determine controversies in relation thereto, and bring in and substitute additional parties when necessary for the complete determination of a matter in controversy, that when the property has become subject to the jurisdiction of the bankruptcy court as that of the bankrupt, whether held by him or for him, jurisdiction exists to determine controversies in relation to the disposition of the same, and the extent and character of liens thereon or rights therein. This conclusion accords with a number of well-considered cases in

the Federal courts. *Re Whitener*, 44 C. C. A. 434, 105 Fed. 180; *Re Antigo Screen Door Co.* 59 C. C. A. 248, 123 Fed. 249; *Re Kellogg*, 57 C. C. A. 547, 121 Fed. 333. In the case of *First Nat. Bank v. Chicago Title & T. Co.* (decided on May 8 of this term), 198 U. S. 280, *ante*, 1051, 25 Sup. Ct.

[553] Rep. 693, in holding *that the jurisdiction of the district court did not obtain, it was pointed out that the court had found that it was not in possession of the property. Nor can we perceive that it makes any difference that the jurisdiction is not sought to be asserted in a summary proceeding, but resort is had to an action in the nature of a plenary suit, wherein the parties can be fully heard after the due course of equitable procedure.

It is insisted that in the present case the property was voluntarily turned over by the receiver, and thereby the jurisdiction of the district court, upon the ground herein stated, is defeated, as the property is no longer in the possession or subject to the control of the court. But the receiver had no power or authority, under the allegations of this bill, to turn over the property. He was appointed a temporary custodian, and it was his duty to hold possession of the property until the termination of the proceedings, or the appointment of a trustee for the bankrupt. The circumstances alleged in this bill tend to show that the transfer of the property was collusive, and certainly, if the allegations be true, it was made without authority of the court. The court had possession of the property, and jurisdiction to hear and determine the interests of those claiming a lien therein or ownership thereof. We do not think this jurisdiction can be ousted by a surrender of the property by the receiver, without authority of the court. Whether the rights of the claimants to the property could be litigated by summary proceedings, we need not determine. What we hold is, that under the allegations of this bill, the district court had the right, in a proceeding in the nature of a plenary action, in which the parties were duly served and brought into court, to determine their rights, and to grant full relief in the premises, if the allegations of the bill shall be sustained. This view renders it unnecessary to consider the effect of the amendments of the bankruptcy act, passed February 5, 1903, broadening the power of the bankruptcy courts to entertain suits by trustees to set aside certain conveyances made by the bankrupt.

Decree reversed.

198 U. S.

*HENRY VAN REED, *Plff. in Err.*, [554]
v.

PEOPLE'S NATIONAL BANK OF LEBANON, PENNSYLVANIA.

(See S. C. Reporter's ed. 554-560.)

Attachment against national banks—cannot issue from state court before judgment.

1. A national bank, whether solvent or insolvent, is within the exemption from the issue of attachment before judgment, which U. S. Rev. Stat. § 5242, U. S. Comp. Stat. 1901, p. 3517, affords in suits in the state courts.
2. No right to attachment against a national bank before judgment in a suit in a state court is given by the act of July 12, 1882, § 4 (22 Stat. at L. 163, chap. 290, U. S. Comp. Stat. 1901, p. 3458), making the jurisdiction for suits by or against national banks the same as the jurisdiction for suits by or against banks not organized under any law of the United States.
3. Jurisdiction over the person or property of a national bank is not acquired by the issue of an attachment out of a state court before judgment, which, by reason of U. S. Rev. Stat. § 5242, is beyond the power of the court.

[No. 229.]

Submitted April 25, 1905. Decided May 29, 1905.

IN ERROR to the Court of Appeals of the State of New York to review a judgment which affirmed the judgment of the Appellate Division, First Department, of the Supreme Court of that state, which, on appeal from the judgment of a Special Term of the Supreme Court held in and for the County of New York, denying a motion to vacate an attachment against a national bank, reversed such judgment and vacated the attachment. *Affirmed.*

See same case below in Appellate Division, 67 App. Div. 75, 73 N. Y. Supp. 514, and in Court of Appeals, 173 N. Y. 314, 66 N. E. 16.

Statement by Mr. Justice Day:

The plaintiff, who was the owner of a claim against the defendant, the People's National Bank of Lebanon, Pennsylvania, commenced an action in the state of New York by levying an attachment upon the funds of the defendant in that state, upon the ground that it was a foreign corporation. The defendant, appearing specially for that purpose, moved to have the attachment vacated upon the ground that it was prohibited by the Revised Statutes of the United States. At special term the motion was denied; the appellate term reversed the

NOTE.—On attachment against national banks—see note to *Armstrong v. Chemical Nat. Bank*, 6 L. R. A. 226.

judgment of the special term, and vacated the attachment. The court of appeals answered two questions certified to it by the appellate division, and affirmed the judgment of that court. The two questions propounded are as follows:

"1. Is the defendant exempt from attachment before judgment under § 5242, U. S. Rev. Stat., U. S. Comp. Stat. 1901, p. 3517?"

[555] "2. Are the rights claimed by plaintiff, to attachment against the defendant before judgment, and to the jurisdiction *thereby acquired, preserved and given by § 4 of the act of Congress of July 12, 1882?"

The court of appeals, in affirming the judgment of the court below, answered the first question in the affirmative and the second question in the negative. The case was then brought to this court upon writ of error.

Mr. James W. M. Newlin submitted the cause for plaintiff in error.

Mr. Percy S. Dudley submitted the cause for defendant in error. **Mr. George B. Woomer** was on the brief.

Mr. Justice Day delivered the opinion of the court:

We deem the answer to the first question already determined by the decision of this court in *Pacific Nat. Bank v. Mixer*, 124 U. S. 721, 31 L. ed. 567, 8 Sup. Ct. Rep. 718. The right of Congress to determine to what extent a state court shall be permitted to entertain actions against national banks, and how far these institutions shall be subject to state control, is undeniable. National banks are quasi-public institutions, and for the purpose for which they are instituted are national in their character, and, within constitutional limits, are subject to the control of Congress, and are not to be interfered with by state legislative or judicial action, except so far as the law-making power of the government may permit. Section 5242 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 3517) is as follows:

[558] "All transfers of the notes, bonds, bills of exchange, or other *evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to

another, except in payment of its circulating notes,—shall be utterly null and void; and no attachment, injunction, or execution shall be issued against such association or its property before final judgment in any suit, action, or proceeding in any state, county, or municipal court."

The language of the latter clause of this section would seem to be too plain to admit of discussion as to its meaning. It in terms forbids the issuing of an attachment, injunction, or execution against a national bank or its property before final judgment in any suit, action, or proceeding in any state, county, or municipal court. This was the view taken by this court in *Pacific Nat. Bank v. Mixer*, 124 U. S. 721, 31 L. ed. 567, 8 Sup. Ct. Rep. 718. The origin of § 5242, and its growth from previous enactments, were pointed out by Mr. Chief Justice Waite, who delivered the opinion of the court in that case:

"It is clear to our minds that, as it stood originally as part of § 57 [13 Stat. at L. 116, chap. 106], after 1873, and as it stands now in the Revised Statutes, it operates as a prohibition upon all attachments against national banks under the authority of the state courts. . . . It stands now, as it did originally, as the paramount law of the land, that attachments shall not issue from state courts against national banks, and writes into all state attachment laws an exception in favor of national banks. Since the act of 1873 all the attachment laws of the state must be read as if they contained a provision in express terms that they were not to apply to suits against a national bank."

*Since the rendition of that decision it has [559] been generally followed as an authoritative construction of the statute holding that no attachment can issue from a state court before judgment against a national bank or its property. *Freeman Mfg. Co. v. National Bank*, 160 Mass. 398, 35 N. E. 865; *Planters Loan & Sav. Bank v. Berry*, 91 Ga. 264, 18 S. E. 137; *First Nat. Bank v. La Due*, 39 Minn. 415, 40 N. W. 367; *Safford v. First Nat. Bank*, 61 Vt. 373, 17 Atl. 748; *Rosenheim Real-Estate Co. v. Southern Nat. Bank* (Tenn. Ch. App.), 46 S. W. 1026; *Garner v. Second Nat. Bank*, 66 Fed. 369. It is argued by the plaintiff in error that the decision in the *Mixer Case*, 124 U. S. 721, 31 L. ed. 567, 8 Sup. Ct. Rep. 718, should be limited to cases where the bank is insolvent; but the statement of facts in that case shows that, at the time when the attachment was issued, the bank was a going concern and entirely solvent so far as the record discloses. The language of Chief Justice Waite, above quoted, is broad and applicable to all conditions of national banks,

whether solvent or insolvent; and there is nothing in the statute, which is likewise specific in its terms, giving the right of foreign attachment as against solvent national banks. We find nothing in the case of *Earle v. Pennsylvania*, 178 U. S. 449, 44 L. ed. 1146, 20 Sup. Ct. Rep. 915, which qualifies the decision announced in the *Mixter Case*. We therefore conclude that the *Mixter Case* is applicable here, and the decision therein announced meets with our approval.

The answer to the second question involves a consideration of the act relating to national banks of July 12, 1882, § 4. (22 Stat. at L. 162, chap. 290, U. S. Comp. Stat. 1901, p. 3458), which is as follows:

[560] "That any association so extending the period of its succession shall continue to enjoy all the rights and privileges and immunities granted, and shall continue to be subject to all the duties, liabilities, and restrictions imposed, by the Revised Statutes of the United States and other acts having reference to national banking associations, and it shall continue to be in all respects the identical association it was before the extension of its period of succession: *Provided, however*, That the jurisdiction *for suits hereafter brought by or against any association established under any law providing for national banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States, which do or might do banking business where such national banking associations may be doing business when such suits may be begun. And all laws and parts of laws of the United States inconsistent with this proviso be and the same are hereby repealed."

There is nothing in this section enlarging the right of attachment against national banks. Before the passage of this section circuit courts of the United States had jurisdiction of suits against national banks because they were corporations of Federal origin. It was the purpose of this legislation to deprive such banks of the right to invoke the jurisdiction of the Federal courts simply upon the ground that they were created by and exercised their powers under the acts of Congress. *Petrie v. Commercial Nat. Bank*, 142 U. S. 644, 35 L. ed. 1144, 12 Sup. Ct. Rep. 325; *Continental Nat. Bank v. Buford*, 191 U. S. 119-123, 48 L. ed. 119, 120, 24 Sup. Ct. Rep. 54. It regulated the jurisdiction of the courts to entertain such actions against corporations of this character, and had nothing to do with the kind and character of remedies which could be
198 U. S.

had against them. Certainly there is nothing in the act repealing the prior provisions of § 5242, above quoted.

It is further insisted that, whether or not the lien is absolute upon the property of the bank, jurisdiction is obtained of it by the issuing of the attachment; but we cannot take this view. There was no personal service in the court of original jurisdiction, and the attachment being without the power of the court by reason of the terms of the Federal statute, no jurisdiction was acquired in the case, either over the person or property of the defendant. *We see no error in the judgment of the Court of Appeals of New York, and the same is affirmed.*

*GREAT WESTERN MINING & MANUFACTURING COMPANY, by L. C. Black, its Receiver, *Petitioner*,

v.

CHARLES A. HARRIS *et al.*, Executors of D. B. Harris, Deceased.

(See S. C. Reporter's ed. 561-578.)

Receivers—right to sue outside of state of appointment.

The receiver of a corporation, with no other title to its assets and property than that derived from his appointment in a suit brought to adjudicate and enforce liens and subject the property to the payment of the claims of creditors, cannot be empowered by the court of his appointment to sue in a foreign jurisdiction, either in his own name or in that of the corporation, to realize its assets.

[No. 217.]

Argued April 14, 17, 1905. Decided May 29, 1905.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a decree which reversed a decree of the Circuit Court for the District of Vermont, in favor of the receiver of a foreign corporation in a suit to realize its assets. *Affirmed.*

See same case below, 128 Fed. 321.

Statement by Mr. Justice Day:

This case was begun by bill in equity, filed in the circuit court of the United States for the district of Vermont, in the name of the Great Western Mining & Manufacturing Company, a Kentucky corporation, by L. C. Black, its receiver, against B. D. Harris, a citizen of the state of Ver-

NOTE.—On rights of receiver as to property outside of the jurisdiction in which he is appointed—see note to *Gilman v. Hudson River Boot & Shoe Mfg. Co.* 23 L. R. A. 52.

mont. It is averred that the corporation was duly organized under the laws of the state of Kentucky. In substance the bill sets forth: That the Great Western Mining & Manufacturing Company was organized by the Kentucky legislature on January 19, 1856, for the purpose of owning and operating mining property, and selling coal. On or about February 10, 1859, it became the owner of coal properties to the value of about \$40,000, situated in Lawrence county, Kentucky. The capital stock of said company was \$200,000, divided into 2,000 [562] shares *of \$100 each. That previous to November 10, 1887, the capital stock of the company was owned as follows:

B. D. Harris, the defendant herein, 600 shares, par value....	\$60,000 00
G. D. Harris, 600 shares, par value	60,000 00
John Carlisle, 440 shares, par value	44,000 00
George W. Carlisle, 300 shares, par value	30,000 00
James C. Holden, 4 shares, par value	400 00
Loren Hinsdale, 4 shares, par value	400 00
George S. Richardson, 52 shares, par value	5,200 00

On November 10, 1887, the stockholders increased the capital stock in the sum of \$50,000, the same being distributed among the stockholders as follows:

To B. D. Harris, 150 shares, par value	\$15,000 00
To G. D. Harris, 150 shares, par value	15,000 00
To John Carlisle, 110 shares, par value	11,000 00
To George W. Carlisle, 75 shares, par value	7,500 00
To George S. Richardson, 13 shares, par value	1,300 00
To James C. Holden, 1 share, par value	100 00
To Loring Hinsdale, 1 share, par value	100 00

[The record shows that this increase was in fact made on January 11, 1888, in pursuance of a meeting authorized to be called at that date in the meeting of November 10, 1887, and certificates issued January 14, 1888.]

On April 22, 1889, a further increase of capital stock was had by adding 1,000 shares of \$100 each, which was distributed as follows:

To B. D. Harris, 300 shares, par value	\$30,000 00
To G. D. Harris, 300 shares, par value	30,000 00

To John Carlisle, 220 shares, par value	22,000 00
To George W. Carlisle, 150 shares, par value	15,000 00
To George S. Richardson, 26 shares, par value	2,600 00
To James C. Holden, 2 shares, par value	200 00
To Loring Hinsdale, 2 shares, par value	200 00

*The complainant avers that at the time [563] the increases of capital stock were made and carried out, the stockholders had formed a plan of issuing bonds and selling the same, and that the issues and distribution of said stock were made for the purpose of defrauding said company, and obtaining, without consideration, the aforesaid shares of capital stock, and for the purpose of selling the same to the company in connection with the said loan, and defrauding the company out of a part thereof. That said issues of capital stock were made by the shareholders and board of directors, of whom the defendant was one, ostensibly in consideration of alleged betterments of said mining property, which betterments, it was pretended, were made and paid for out of the net earnings of the company, which, it was represented, had increased the value of the property belonging to the stockholders. Complainant alleges that no such betterments had been made, and if made they were paid for out of money borrowed upon the credit of the company, for which an indebtedness then existed and still exists. That in fact there had been no net earnings which had been put into betterments by the company, and that the issue of said stock was without consideration, illegal and void, and a breach of duty upon the part of the stockholders and the directors of the corporation to its creditors. That said stock so issued still remains outstanding in the names of the parties to whom it was issued, or their assignees. That on May 13, 1889, the directors of the company, of whom the defendant Harris was one, and who were also stockholders in the company, for the purpose of defrauding said company, and abstracting the assets of the company for their own use and benefit, the corporation then being insolvent, without means to pay its floating indebtedness, which then amounted to \$100,000, or more, agreed that they would obtain a loan of \$300,000 for said company, said loan to be evidenced by bonds to the number of 300, in the denomination of \$1,000 each, to be secured by mortgage upon the property of the company. That the issues of stock had been made upon the consideration that certain betterments *had been added to the property, and had been paid for out of the profits [564]

of the operation thereof, which profits would otherwise belong to the stockholders, when in truth and fact the said company was largely insolvent, and had a mortgage debt of about \$60,000 upon it, and a floating debt of \$100,000 or more. In fact, said company had not made any net profits whatever, and said betterments had not been made at all; or, if made, had been paid for out of the earnings of the company, and no consideration than that herein stated was ever paid by the stockholders for the stock issued to them. That it was for the purpose of carrying out the scheme of abstracting from the company money arising from the sale of the bonds, and for that purpose only, that said stock was issued to the defendant Harris and others. That said bonds were sold at a price of 85 cents on the dollar, including a bonus of 50 per cent of the par value of said bonds in the stock of the company; that is, a purchaser of a \$1,000 bond was entitled to have with said bond \$500 of the capital stock of the company. That in pursuance of the combination aforesaid the said directors and stockholders furnishing said bonus stock were paid for the same from the proceeds of the sale of the bonds. The stock was furnished as follows, in pursuance of the said arrangement:

By B. D. Harris, 450 shares, par value	\$45,000 00
G. D. Harris, 450 shares, par value	45,000 00
John Carlisle, 336 shares, par value	33,600 00
George W. Carlisle, 225 shares, par value	22,500 00
George S. Richardson, 39 shares, par value	3,900 00

That out of the proceeds of the sale of the bonds the sum of \$75,000 was distributed among the parties, as follows:

To B. D. Harris, the defendant herein	\$22,500 00
To G. D. Harris	22,500 00
To John Carlisle	16,800 00
To George S. Richardson	1,950 00
To George W. Carlisle	11,250 00

[565] *That, as a matter of fact, when the stock was contributed the company was insolvent, and could not carry on its business without making the said loan; that said stock was worthless, and was sold to the company at 50 cents on the dollar for the purpose above mentioned, and thereafter said stock was transferred to the purchasers of the bonds. Then follow allegations as to the mismanagement of the company, and the wrongful payment of dividends, and the averment that on or about September 12, 1892, one of the creditors of the company was compelled

to make an application to the United States circuit court of Kentucky, wherein a request was made for the appointment of a receiver of the property and franchises of the company for the purpose of realizing its assets, and distributing them among its creditors; that in said proceedings all of the property of the Great Western Mining & Manufacturing Company was sold, and was found to be of the value of \$75,666.66, which left a large floating indebtedness of about \$90,000, besides a large balance due upon the bonded indebtedness, aggregating about \$270,000; that in said proceedings in the United States court for the district of Kentucky, L. P. Black was appointed receiver of the assets of the company, for the purpose of realizing upon the same for the benefit of its creditors, and it is averred that, by special order of the United States court, said receiver had been directed to prosecute this suit, either in his own name or that of the company, as may be proper. The prayer of the bill is for an accounting respecting the matters and things set up in the bill, and that the defendant be required to pay to the complainant the sums which may be found to be due by reason of the matters and things set forth, and for general relief. An answer and replication were filed, and the issues made up were heard upon the pleadings and testimony. The circuit court found the estate of B. D. Harris, he having died pending the suit, liable in the sum of \$15,000, being the amount Harris received from the company in exchange for the 300 shares of stock issued to him in April, 1889, and held that the estate was *not liable on account of the [566] amounts received by him for stock previously issued to him, and was not liable to account for the amounts taken by other officers, directors, or stockholders of the company. The case in the circuit court is reported in 111 Fed. 38. Upon cross appeals the circuit court of appeals for the second circuit reversed the judgment of the court below upon the ground that the circuit court had no jurisdiction of the action, as the same could not be brought by the receiver in the name of the corporation, and if it could be maintained by the corporation, or in its behalf, no case was made for a recovery, because of the consent of the stockholders to the transactions complained of. 128 Fed. 321. The order appointing the receiver in the circuit court is found in the record, and is as follows:

"The above cause coming on this day to be heard upon the motion of complainant for appointment of a receiver, and having been fully heard and considered, it is ordered by the court that said motion be granted, and that the order hereinbefore en-

tered, appointing L. C. Black as temporary receiver, be continued, and said L. C. Black be and he is hereby appointed receiver of all the property, rights in action, choses in action, and all assets of every description, of the defendant, The Great Western Mining & Manufacturing Co., with all the powers and authority conferred by the order appointing him temporary receiver herein; and that he is to act and continue to act under the orders hereinbefore made, and that he hold and keep the property and assets arising from the funds of said business, or that may come into his hands, subject to such order as may be made from time to time; and it is also ordered that he shall have power to purchase such current supplies as are or may be needed in the proper conduct and operation of the business of said company."

The application for the order to bring this action sets forth:

[567] "The receiver represents that he has ascertained from the books and records of the Great Western Mining & Manufacturing Company, in his possession, that, in connection with *the floating of the loan of \$300,000 in the year 1889, upon the property of the Great Western Mining & Manufacturing Company, situate in Lawrence county, Kentucky, certain stockholders and officers of said company combined to obtain for themselves, and did so obtain, proceeds resulting from the sale of said bonds in the sum of \$75,000, which money belonged to, and should have been paid into, the treasury of said company.

"Your receiver says that he finds shares of capital stock of the Great Western Mining & Manufacturing Company were issued at the instance of, and through the action of, certain of said stockholders and officers of said company, to the amount of \$150,000, which said stock was distributed among said stockholders and officers; that, as your receiver is informed and believes, there was no consideration for the issue and distribution of said stock; that the said stock was sold by said stockholders, so as aforesaid receiving it, to the defendant, The Great Western Mining & Manufacturing Company, and, by means of said sale, moneys to the amount of \$75,000 were abstracted from the treasury of said company; that the issue and distribution of said capital stock was, as your receiver believes, a mere device or instrumentality to abstract said moneys from the treasury of said company; that said company, as your receiver believes, has a valid claim against said persons to recover said moneys; that some of said parties are solvent and able to repay said moneys, and proceedings should be taken to recover it for said company and its creditors.

1166

"Your receiver further says that he has discovered from the books of the company that apparently, by reason of the inattention and negligence of the board of directors of the said Great Western Mining & Manufacturing Company, and apparently by reason of the mismanagement and misappropriation of the funds of the company, by certain members of said board, that the said company has been greatly damaged, and its assets depreciated in value in a large amount, the exact sum of which is unknown to your receiver, and that said losses *should now be made part of the said com-[568] pany's assets; and that the same is, in the opinion of your receiver, a valid claim against the said board of directors, and that proceedings should be taken to recover the same for the said company and its creditors.

"Wherefore your receiver prays the direction of your honorable court as to his duty in the premises."

Upon this application the court made the following order:

"This cause coming on to be heard upon the application of L. C. Black, receiver herein, asking for instructions as to his duty in the matters and things set forth in the said application, and wherein said receiver represents to the court that, in certain transactions connected with the floating of a loan of \$300,000 upon the property of the Great Western Mining & Manufacturing Company, apparently \$75,000 was withdrawn by certain stockholders and officers of the said company, whereas the same should have been paid into the treasury of the said company; and wherein said receiver further represents that apparently certain stock was issued to the stockholders and officers of the said company without consideration, and that apparently, by reason of the inattention and negligence and mismanagement of the board of directors of the said company, and the misappropriation of the funds of the said company, said company has been greatly damaged and its assets depreciated.

"And it appearing to the court that it will be for the advantage of the said company that suit shall be instituted against the stockholders and directors of the same for the recovery of the sums so represented to be lost, it is, therefore, directed that said receiver proceed in his own name as receiver, or in the name of the company, as he may be advised, to recover said sums."

Mr. Harlan Cleveland argued the cause and filed a brief for petitioner:

When the United States circuit court for the district of Kentucky appointed a receiver for the Great Western Mining & Manufacturing Company, and by that act assumed charge of the assets and affairs

of the corporation, did it not take the place, and could it not exercise the powers, of the directors? Did it have to consult the directors, or ask their permission to bring suit for the corporation? Could the court not execute any corporate function, or direct any act to be done for a corporate purpose that the directors could have done or directed to be done?

This court has repeatedly so held as to "a call or assessment" on stockholders for the unpaid portion of the subscription price of stock.

Scovill v. Thayer, 105 U. S. 143, 155, 26 L. ed. 968; *Hawkins v. Glenn*, 131 U. S. 319, 329, 335, 33 L. ed. 184, 191, 193, 9 Sup. Ct. Rep. 739; *Glenn v. Marbury*, 145 U. S. 499, 510, 36 L. ed. 790, 794, 12 Sup. Ct. Rep. 914; *Great Western Teleg. Co. v. Purdy*, 162 U. S. 329, 336, 40 L. ed. 986, 990, 16 Sup. Ct. Rep. 810.

If the court can make an assessment in place of the directors, it is submitted it can direct a suit to be brought by the corporation in a foreign jurisdiction, and authorize its receiver to see that the suit is brought, just as the directors might have done had the court not taken charge of the affairs of the corporation. In such a suit the corporation is the actor, not the receiver, and is set in motion by the court, instead of by its former directors.

Hayward v. Leeson, 176 Mass. 310, 49 L. R. A. 725, 57 N. E. 656.

Even if the suit be treated as one brought by the receiver in his own name, it is maintainable on the principle of comity.

Hale v. Allinson, 188 U. S. 56, 71, 47 L. ed. 380, 390, 23 Sup. Ct. Rep. 244.

The state of Kentucky allows foreign receivers to sue in that state by comity when there are no domestic creditors requiring protection, or no infringement of the public policy of that state, or no injustice would be done thereby to the citizens within its jurisdiction.

Rogers v. Riley, 80 Fed. 759; *Zacher v. Fidelity Trust & Safety Vault Co.* 45 C. C. A. 480, 106 Fed. 593; *Kirtley v. Holmes*, 52 L. R. A. 738, 46 C. C. A. 102, 107 Fed. 1; *Johnston v. Rogers*, 19 Ky. L. Rep. 1272, 43 S. W. 234; *Zacher v. Fidelity Trust & Safety Vault Co.* 109 Ky. 441, 59 S. W. 493; *Weedon v. Granite State Provident Asso.* 109 Ky. 504, 59 S. W. 758.

This seems to be the general rule.

Howarth v. Angle, 162 N. Y. 179, 47 L. R. A. 725, 56 N. E. 489; *Howarth v. Lombard*, 175 Mass. 570, 49 L. R. A. 301, 56 N. E. 888; *Howarth v. Ellwanger*, 86 Fed. 54; *Sands v. E. S. Greeley & Co.* 31 C. C. A. 424, 59 U. S. App. 610, 88 Fed. 130; *Burr v. Smith*, 113 Fed. 858; *Lewis v. American Naval Stores Co.* 119 Fed. 396; *Metzner v.* 198 U. S.

Bauer, 98 Ind. 425; *Boulware v. Davis*, 90 Ala. 207, 9 L. R. A. 601, 8 So. 84; *Cooke v. Orange*, 48 Conn. 401; *Planters' Bank v. Bass*, 2 La. Ann. 430; *Comstock v. Frederickson*, 51 Minn. 350, 53 N. W. 713; *Hurd v. Elizabeth*, 41 N. J. L. 1; *Sobernheimer v. Wheeler*, 45 N. J. Eq. 614, 18 Atl. 234; *Runk v. St. John*, 29 Barb. 585; *Barclay v. Quicksilver Min. Co.* 6 Lans. 25; *Pugh v. Hurtt*, 52 How. Pr. 22; *Dyer v. Power*, 39 N. Y. S. R. 136, 14 N. Y. Supp. 873; *Merchants' Nat. Bank v. McLeod*, 38 Ohio St. 174; *Parker v. Stoughton Mill Co.* 91 Wis. 174, 51 Am. St. Rep. 881, 64 N. W. 751; *Wyman v. Kimberly-Clark Co.* 93 Wis. 554, 67 N. W. 932.

The practice is entirely familiar to courts of chancery.

Taylor v. Allen, 2 Atk. 213; *Pitt v. Snowden*, 3 Atk. 750; *Yeager v. Wallace*, 44 Pa. 294; *Merritt v. Merritt*, 16 Wend. 405; *Freeman v. Winchester*, 10 Smedes & M. 577; *Green v. Winter*, 1 Johns. Ch. 60, 7 Am. Dec. 475.

Mr. **Brainard Tolles** argued the cause, and, with Mr. *Julien T. Davies*, filed a brief for respondents:

The order of the circuit court for the district of Kentucky was not effective to authorize the receiver to maintain a suit in the name of the Great Western Mining & Manufacturing Company in the circuit court for the district of Vermont.

Booth v. Clark, 17 How. 322, 15 L. ed. 164; *Brigham v. Ludington*, 12 Blatchf. 237, Fed. Cas. No. 1,874; *Kittel v. Augusta, T. & G. R. Co.* 78 Fed. 855; *Hazard v. Durrant*, 19 Fed. 471; *Philadelphia & R. Coal & I. Co. v. Daube*, 71 Fed. 583; *Wigton v. Bosler*, 102 Fed. 70; *Hale v. Allinson*, 188 U. S. 56, 47 L. ed. 380, 23 Sup. Ct. Rep. 244; *Hilliker v. Hale*, 54 C. C. A. 252, 117 Fed. 220.

Mr. Justice **Day** delivered the opinion of the court:

The theory of the complainant's case seems to be that the transfers of the stock of the defendant and other directors and stockholders, paid for out of the proceeds of the bonds, in view of the allegations of the bill as to the condition of the company, and the purposes in view by the defendant and associates, amounted to a breach of duty upon the part of the defendant and other directors, and a conversion to their own use of the property of the company, for which they should be held to account in an action brought by the company, through its receiver, under the order of the circuit court of Kentucky. The particulars of the suit in which the receiver was appointed are not very fully set forth, but enough appears to show that he *was appointed in a suit to[574]

adjudicate and enforce liens, and subject the property to the payment of the claims of creditors. In the brief of the learned counsel for complainant, it is styled a "general creditors' and foreclosure suit." It does not appear that, by order of the court or otherwise, there has been any conveyance of the property and assets of the company to the receiver, nor has the corporation been dissolved, and the receiver made its successor, entitled to its property and assets. The minute books of the company, in evidence, do not show any authority by the corporation for the filing of this bill in the name of the Great Western Mining & Manufacturing Company or otherwise, although meetings were held after the appointment of the receiver. Nor is our attention called to any statute vesting the title of the corporation in the receiver. So far, then, as the receiver is concerned, his right to prosecute the action must depend upon his powers as such officer of the court and the order of the court, set forth in the statement of facts, authorizing him to bring suit against the stockholders and directors for the purpose of realizing the assets, either in his own name or that of the corporation, as may be proper. This condition of the record brings up for consideration at the threshold of this case the question of the extent of the power of the receiver to maintain this action under the order of the court, either in his own name or that of the company. As to the power of the court to authorize the receiver to sue, we think the case is ruled by *Booth v. Clark*, 17 How. 338, 15 L. ed. 170, in which case the authority of the court to authorize a receiver appointed in one jurisdiction to sue in a foreign jurisdiction was the subject of very full consideration. In that case it was held that a receiver is an officer of the court which appoints him, and, in the absence of some conveyance or statute vesting the property of the debtor in him, he cannot sue in courts of a foreign jurisdiction upon the order of the court which appointed him, to recover the property of the debtor. While that case was decided in 1854, its authority has been frequently recognized in this court, and as late as *Hale*

[575] *v. Allison*, *188 U. S. 56, 47 L. ed. 380, 23 Sup. Ct. Rep. 244, it was said by Mr. Justice Peckham, who delivered the opinion of the court:

"We do not think anything has been said or decided in this court which destroys or limits the controlling authority of that case."

In that case the following language, as to a receiver's powers, from *Booth v. Clark*, 17 How. 338, 15 L. ed. 171, is quoted with approval:

"He has no extraterritorial power of of-

ficial action; none which the court appointing him can confer, with authority to enable him to go into a foreign jurisdiction to take possession of the debtor's property; none which can give him, upon the principle of comity, a privilege to sue in a foreign court or another jurisdiction, as the judgment creditor himself might have done, where his debtor may be amenable to the tribunal which the creditor may seek."

Mr. Justice Wayne, who delivered the opinion of the court in *Booth v. Clark*, stated, among others, the following reasons for refusing to recognize the powers of a receiver in foreign jurisdictions:

"We think that a receiver could not be admitted to the comity extended to judgment creditors without an entire departure from chancery proceedings as to the manner of his appointment, the securities which are taken from him for the performance of his duties, and the direction which the court has over him in the collection of the estate of the debtor, and the application and distribution of them. If he seeks to be recognized in another jurisdiction, it is to take the fund there out of it, without such court having any control of his subsequent action in respect to it, and without his having even official power to give security to the court, the aid of which he seeks, for his faithful conduct and official accountability. All that could be done upon such an application from a receiver, according to chancery practice, would be to transfer him from the locality of his appointment to that where he asks to be recognized, for the execution of his trust in the last, under the coercive ability of that court; and that it would be *difficult[576] to do, where it may be asked to be done, without the court exercising its province to determine whether the suitor, or another person within its jurisdiction, was the proper person to act as receiver."

It will thus be seen that the decision in *Booth v. Clark* rests upon the principle that the receiver's right to sue in a foreign jurisdiction is not recognized upon principles of comity, and the court of his appointment can clothe him with no power to exercise his official duties beyond its jurisdiction. The ground of this conclusion is that every jurisdiction, in which it is sought, by means of a receiver, to subject property to the control of the court, has the right and power to determine for itself who the receiver shall be, and to make such distribution of the funds realized within its own jurisdiction as will protect the rights of local parties interested therein, and not permit a foreign court to prejudice the rights of local creditors by removing assets from the local jurisdiction without an order of the court, or its approval as to the officer

who shall act in the holding and distribution of the property recovered. In *Quincy M. & P. R. Co. v. Humphreys*, 145 U. S. 82, 36 L. ed. 632, 12 Sup. Ct. Rep. 787, the powers of a receiver were under consideration, and the following language was quoted with approval (p. 98, L. ed. p. 637, Sup. Ct. Rep. p. 792): "The ordinary chancery receiver, such as we have in this case, is clothed with no estate in the property, but is a mere custodian of it for the court, and by special authority may become an officer of the court to effect a sale of the property, if that be deemed necessary for the benefit of the parties concerned." There are exceptional cases, such as *Relfe v. Rundle (Life Asso. of America v. Rundle)*, 103 U. S. 222, 26 L. ed. 337, in which the entire property of the insolvent company was vested in the superintendent of insurance of the state, where his authority did not come from the decree of the court, and his right to sue was maintained. In *Hawkins v. Glenn*, 131 U. S. 319, 33 L. ed. 184, 9 Sup. Ct. Rep. 739, it appeared that Glenn had derived title by assignment and deed, and he was permitted to sue. In the case now before us it does not appear that the receiver had any other title to the assets and property of the company than that derived from *his official relation thereto as receiver under the order of the court. In such a case we think the doctrine of *Booth v. Clark* is fully applicable. It is doubtless because of the doctrine herein declared that the practice has become general in the courts of the United States, where the property of a corporation is situated in more than one jurisdiction, to appoint ancillary receivers of the property in such separate jurisdictions. It is true that the ancillary receiverships are generally conducted in harmony with the court of original jurisdiction, but such receivers are appointed with a view of vesting control of property rights in the court in whose jurisdiction they are located. If the powers of a chancery receiver in the Federal courts should be extended so as to authorize suits beyond the jurisdiction of the court appointing him, to recover property in foreign jurisdictions, such enlargement of authority should come from legislative, and not judicial, action.

Nor do we think the jurisdiction is established because the action is authorized to be instituted by the receiver in the name of the corporation. Such actions subjecting local assets to a foreign jurisdiction and to a foreign receivership would come within the reasoning of *Booth v. Clark*. If a recovery be had, although in the name of the

[577]

198 U. S.

corporation, the property would be turned over to the receiver, to be by him administered under the order of the court appointing him.

It is urged that jurisdiction in this case is sustained by the case of *Great Western Teleg. Co. v. Purdy*, 162 U. S. 329, 40 L. ed. 986, 16 Sup. Ct. Rep. 810, in which it was held that the assets and affairs of an insolvent corporation being in the hands of a receiver, the court might direct the calls or assessments upon delinquent shareholders who had not paid for their shares, thereby using the authority the directors might have exercised before the appointment of the receiver. In that case, a receiver appointed by the circuit court of Cook county, in Illinois, under the direction of that court brought an action in the name of the Great Western Telegraph Company, an Illinois corporation, by its receiver, against Purdy, a citizen of Iowa, to recover a sum alleged to *be due from him upon an assessment[578] upon his stock subscription, and it was held that the Illinois court might make the assessment and calls necessary to collect the stock which would be binding in another court. The jurisdiction of the Iowa court was not called in question in the state court of Iowa, where the original action was brought, nor was the question of jurisdiction raised in this court, or passed upon in deciding the case. While not detracting from the authority of that case as to the matter decided, we see nothing in it to indicate that, had the question herein presented been made, it would have been decided otherwise than herein indicated.

There are numerous and conflicting decisions in the state courts as to the rights of a receiver to sue in a foreign jurisdiction upon principles of comity, which it is not necessary to review here. In this court, since the case of *Booth v. Clark*, 17 How. 338, 15 L. ed. 170, we deem the practice to be settled, and to limit a receiver who derives his authority from his appointment as such, to actions, either in his own name or that of an insolvent corporation, such as may be authorized within the jurisdiction wherein he was appointed.

We think the Circuit Court of Appeals was right in holding that the Circuit Court had no jurisdiction of this action.

This view of the case renders it unnecessary to consider the other questions made in the record.

Decree affirmed.

Mr. Justice **Brewer** concurs in the decree.

MEMORANDA

OF

CASES DISPOSED OF WITHOUT OPINIONS.

[579] *MIKE HERNAN, *Plaintiff in Error*, v. STATE OF TEXAS. [No. 204.]

In Error to the Court of Criminal Appeals of the State of Texas.

See same case below (Tex. Crim. App.) 77 S. W. 225.

Messrs. Cecil H. Smith, Amos L. Beaty, Wm. P. Ellison, and R. H. Ward for plaintiff in error.

Mr. C. K. Bell for defendant in error.

April 17, 1905. Judgment affirmed, with costs. *Noble v. Mitchell*, 164 U. S. 367, 372, 41 L. ed. 472, 473, 17 Sup. Ct. Rep. 110; *Osborne v. Florida*, 164 U. S. 650, 41 L. ed. 586, 17 Sup. Ct. Rep. 214; *Murray v. Gibson*, 15 How. 425, 14 L. ed. 757.

H. C. LANE v. WILLIAM E. BENNER. [No. 216.]

On a Certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. Wm. P. Jewett for Lane.

Messrs. M. B. Davis and John H. King for Benner.

April 17, 1905. Second question answered in the negative, on the authority of *Knepper v. Sands*, 194 U. S. 476, 48 L. ed. 1083, 24 Sup. Ct. Rep. 744.

LEE LOOK, *Appellant*, v. FRANK H. ROSS, JR., Sheriff of Santa Clara County, Cal. [No. 544.]

Appeal from the District Court of the United States for the Northern District of California.

See same case below, 134 Fed. 308.

Mr. A. H. Jarman for appellant.

Mr. James H. Campbell for appellee.

April 17, 1905. Final order affirmed, with costs. *Lee Look v. California*, 195 U. S. 623, ante, 349, 25 Sup. Ct. Rep. 746; *Markuson v. Boucher*, 175 U. S. 184, 44 L. ed. 124, 20 Sup. Ct. Rep. 76; *People v. Lee Look*, 143 Cal. 216, 76 Pac. 1028.

198 U. S.

CHICAGO & WESTERN INDIANA RAILROAD COMPANY, *Plaintiff in Error*, v. THOMAS NEWELL. [No. 493.]

In Error to the Supreme Court of the State of Illinois.

See same case below, 212 Ill. 332, 72 N. E. 416.

Mr. G. W. Kretzinger for plaintiff in error.

Mr. Harvey Lantz for defendant in error.

April 17, 1905. Dismissed for the want of jurisdiction. *Equitable Life Assur. Soc. v. Brown*, 187 U. S. 311, 47 L. ed. 192, 23 Sup. Ct. Rep. 123; *Bethell v. Demaret*, 10 Wall. 540, 19 L. ed. 1008; *F. G. Oxley Stave Co. v. Butler County*, 166 U. S. 653, 41 L. ed. 1151, 17 Sup. Ct. Rep. 709; *Harding v. Illinois*, 196 U. S. 78, ante, 394, 25 Sup. Ct. Rep. 176; *Washington, A. & G. R. Co. v. Brown*, 17 Wall. 450, 21 L. ed. 677; *Illinois C. R. Co. v. Barron*, 5 Wall. 104, 18 L. ed. 594; 3 Starr & C. Anno. Stat. (Ill.) 3247, chap. 114, ¶ 53; *Chicago & G. T. R. Co. v. Hart*, 209 Ill. 414, 66 L. R. A. 75, 70 N. E. 654; *Glenn v. Garth*, 147 U. S. 368, 37 L. ed. 206, 13 Sup. Ct. Rep. 350; *Bacon v. Texas*, 163 U. S. 216, 41 L. ed. 136, 16 Sup. Ct. Rep. 1023. [580]

ROBINSON & WATSON *et al.*, *Plaintiffs in Error*, v. W. J. WINGATE, County Judge of Orange County, Tex., *et al.* [No. 513.]

In Error to the Court of Civil Appeals of the First Supreme Judicial District of the State of Texas.

See same case below (Tex. Civ. App.) 80 S. W. 1067; (Tex.) 83 S. W. 182.

Mr. Thomas H. Clark for plaintiffs in error.

Mr. Rebel Lee Robertson for defendants in error.

April 24, 1905. Dismissed for the want of jurisdiction. *F. G. Oxley Stave Co. v. Butler County*, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; *Erie R. Co. v. Purdy*, 185 U. S. 148, 46 L. ed. 847, 22 Sup. Ct. Rep. 605; *Harding v. Illinois*, 196 U. S. 78, ante, 394, 25 Sup. Ct. Rep. 176.

EDWARDS SANFORD HATCH, *Appellant*, v. HENRY B. KETCHAM, Trustee in Bankruptcy, etc., *et al.* [No. 534.]

Appeal from the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 135 Fed. 504.

Messrs. John C. F. Gardner and A. B. Cruikshank for appellant.

Mr. Benjamin N. Cardozo for appellees.

April 24, 1905. *Dismissed* for the want of jurisdiction, on the authority of *Holden v. Stratton*, 191 U. S. 115, 48 L. ed. 116, 24 Sup. Ct. Rep. 45.

[581]*EX PARTE: IN THE MATTER OF OLI NIFOU, *Petitioner*. [No., Original.]

Motion for Leave to File Petition for Writs of Habeas Corpus and Certiorari.

Mr. Gilbert F. Little for petitioner.

The Attorney General and Solicitor General Hoyt opposing.

May 1, 1905. *Denied*.

NICK GURVICH v. UNITED STATES. [No. 435.]

On a Certificate from the United States Circuit Court of Appeals for the Ninth Circuit.

No appearance for Gurvich.

The Attorney General for the United States.

May 1, 1905. On the authority of *Rasmussen v. United States*, 197 U. S. 516, ante, 862, 25 Sup. Ct. Rep. 514, the question is answered that the district court of the United States for the district of Alaska, division No. 1, erred in compelling the plaintiff in error to go to trial before a jury composed of only six persons. Announced by Mr. Chief Justice Fuller.

JOHN C. ORRELL *et al.*, *Plaintiffs in Error*, v. BAY MANUFACTURING COMPANY. [No. 398.]

In Error to the Supreme Court of the State of Mississippi.

See same case below, 83 Miss. 800, 36 So. 561.

Messrs. E. L. Russell, E. M. Barber, Frederic D. McKenney, J. Spalding Flannery, Wm. Hitz, and Wayne MacVeagh for plaintiffs in error.

Mr. E. J. Bowers for defendant in error.

May 29, 1905. *Dismissed* for the want of jurisdiction, on the authority of *Schlosser v. Hemphill*, 198 U. S. 173, ante, 1000, 25 Sup. Ct. 654, decided at this term.

IGNACIO ROSALES Y CUELI, *Plaintiff in Error*, v. DOLORES MOYA Y RODRIGUEZ, Guardian, etc., *et al.* [No. 431.]

In Error to the District Court of the United States for the District of Porto Rico.

Messrs. Frederic D. McKenney, J. Spalding Flannery, and Wayne MacVeagh for plaintiff in error.

Mr. George H. Lamar for defendants in error.

May 29, 1905. *Dismissed* for the want of jurisdiction. *Royal Ins. Co. v. Martin*, 192 U. S. 149, *48 L. ed. 385, 24 Sup. Ct. [582] Rep. 247; *Baltimore & P. R. Co. v. Hopkins*, 130 U. S. 210, 32 L. ed. 908, 9 Sup. Ct. Rep. 503; *Filhiol v. Maurice*, 185 U. S. 108, 46 L. ed. 827, 22 Sup. Ct. Rep. 560; *Louisville & N. R. Co. v. Louisville*, 166 U. S. 709, 41 L. ed. 1173, 17 Sup. Ct. Rep. 725; *Harrison v. Morton*, 171 U. S. 38, 43 L. ed. 63, 18 Sup. Ct. Rep. 742.

EDWARD W. SHOESMITH, *Appellant*, v. H. MEYER BOOT & SHOE MANUFACTURING COMPANY *et al.* [No. 588.]

Appeal from the District Court of the United States for the Northern District of Illinois.

See same case below, on appeal to the Circuit Court of Appeals, 135 Fed. 684.

Mr. Wm. R. Payne for appellant.

Mr. Gwynn Garnett for appellees.

May 29, 1905. *Dismissed* for want of jurisdiction. *McLish v. Roff*, 141 U. S. 661, 35 L. ed. 893, 12 Sup. Ct. Rep. 118; *Maynard v. Hecht*, 151 U. S. 324, 38 L. ed. 179, 14 Sup. Ct. Rep. 353; *United States v. Jahn*, 155 U. S. 113, 39 L. ed. 89, 15 Sup. Ct. Rep. 39; *Louisville Trust Co. v. Knott*, 191 U. S. 232, 48 L. ed. 161, 24 Sup. Ct. Rep. 119.

EX PARTE: IN THE MATTER OF BENJAMIN F. MCCAULLY, *Petitioner*. [No., Original.]

Motion for Leave to File Petition for Writs of Habeas Corpus and Certiorari.

Messrs. Arthur A. Birney and Henry F. Woodard for petitioner.

May 29, 1905. *Denied*.

PETER CAHILL, Owner, etc., *Petitioner*, v. NORRIS & CUMINGS DREDGING COMPANY. [No. 598]; PETER CAHILL, Owner, etc., *Petitioner*, v. ANNIE OLSEN, Administratrix, etc. [No. 599.]

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. James J. Macklin and *LaRoy S. [583] Gove for petitioner.

Mr. Albert A. Wray for respondents.

April 17, 1905. *Denied*.

HARRY L. JEWELL, *Petitioner*, v. CITY OF SUPERIOR. [No. 605.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 135 Fed. 19.

Mr. Chester B. Masslich for petitioner.

No opposition.

April 17, 1905. *Denied*.

HERMAN ASTRICH, *Petitioner*, v. GERMAN-AMERICAN INSURANCE COMPANY OF NEW YORK. [No. 602.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 65 C. C. A. 251, 131 Fed. 13.

Mr. Charles H. Bergner for petitioner.

Mr. Wm. M. Hargest for respondent.

April 24, 1905. *Denied*.

ALLAN N. MACNABB, Trustee, etc., *Petitioner*, v. BANK OF LE ROY. [No. 611.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 133 Fed. 912.

Mr. Frank M. Loomis for petitioner.

Mr. Vincent H. Riordan for respondent.

April 24, 1905. *Denied*.

UNITED STATES, *Petitioner*, v. EMIL DIECKERHOFF *et al.* [No. 610.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

The Attorney General and Solicitor General Hoyt for petitioner.

Mr. W. Wickham Smith for respondents.

April 24, 1905. *Granted*.

UNITED STATES, *Petitioner*, v. CORNELL STEAMBOAT COMPANY. [No. 624.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[584] *The Attorney General and *Solicitor General Hoyt* for petitioner.

Mr. Robert D. Benedict for respondent.

May 1, 1905. *Granted*.

LEATHER MANUFACTURERS' NATIONAL BANK OF NEW YORK CITY, *Petitioner*, v. CHARLES H. TREAT, Collector, etc. [No. 561.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 62 C. C. A. 644, 128 Fed. 262.

Mr. Frank W. Hackett for petitioner.

The Attorney General and Solicitor General Hoyt for respondent.

May 1, 1905. *Denied*.

198 U. S.

NEW YORK TELEPHONE COMPANY, *Petitioner*, v. CHARLES H. TREAT, Collector, etc. [No. 582.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 64 C. C. A. 586, 130 Fed. 340.

Messrs. C. Walter Artz and Melville Eggleston for petitioner.

The Attorney General and Solicitor General Hoyt for respondent.

May 1, 1905. *Denied*.

LOTTIE R. RUSSELL, *Petitioner*, v. BENJAMIN RUSSELL *et al.* [No. 586.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 134 Fed. 840.

Messrs. John G. Carlisle and John H. Hazelton for petitioner.

Mr. Walter H. Bacon for respondents.

May 1, 1905. *Denied*.

DISTRICT OF COLUMBIA, *Petitioner*, v. JOHN W. LEE. [No. 616.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

Messrs. A. B. Duvall, E. H. Thomas, and F. H. Stephens for petitioner.

Mr. A. E. L. Leckie for respondent.

May 1, 1905. *Denied*.

FRANK KELLEY *et al.*, *Petitioners*, v. DIAMOND DRILL & MACHINE COMPANY. [No. 620.]

Petition for a Writ of Certiorari to the United States Circuit Court of *Appeals for [585] the Third Circuit.

See same case below, 59 C. C. A. 370, 123 Fed. 882, on rehearing 64 C. C. A. 284, 129 Fed. 756.

Mr. Horace Pettit for petitioners.

Mr. Wm. C. Strawbridge for respondent.

May 1, 1905. *Denied*.

CHARLES C. WILSON, *Petitioner*, v. ATLANTIC COAST LINE RAILROAD COMPANY *et al.* [No. 625.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 133 Fed. 1022.

Mr. Burton Smith for petitioner.

Mr. F. G. du Bignon for respondents.

May 1, 1905. *Denied*.

HERBERT BARBER *et al.*, *Petitioners*, v. EDWARD R. LAZARUS. [No. 626.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 136 Fed. 534.

Mr. J. Parker Kirlin for petitioners.

Mr. Anson M. Beard for respondent.

May 1, 1905. *Denied*.

PETER PEARSON *et al.*, *Petitioners*, v. WILLIAM WILLIAMS, United States Commissioner of Immigration. [No. 622.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Eugene Treadwell for petitioners.

The Attorney General and Solicitor General Hoyt for respondent.

May 8, 1905. *Granted*.

WILLIAM S. BRYAN, *Petitioner*, v. JOSEPH C. DUPOYSTER *et al.* [No. 632.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 64 C. C. A. 417, 130 Fed. 83.

Messrs. C. C. Calhoun and S. T. G. Smith for petitioner.

Mr. Ira Julian for respondents.

May 8, 1905. *Denied*.

CONSUMERS' GAS TRUST COMPANY *et al.*, *Petitioners*, v. BYRON C. QUINBY. [No. 637.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[586] Mr. Addison C. *Harris for petitioners.

Messrs. Ferdinand Winter and Alexander C. Ayres for respondent.

May 8, 1905. *Denied*.

LOUIS A. DARNAL, *Petitioner*, v. UNITED STATES. [No. 641.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Mr. W. M. Smith for petitioner.

No brief in opposition.

May 8, 1905. *Denied*.

STEPHEN A. RALLI *et al.*, *Petitioners*, v. DIRECT NAVIGATION COMPANY [No. 639]; P. C. HEINEKEN *et al.*, *Petitioners*, v. DIRECT NAVIGATION COMPANY [No. 640].

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. John F. Lewis, Francis S. Laws, and James B. Stubbs for petitioners.

Mr. M. F. Mott for respondent.

May 15, 1905. *Denied*.

BENJAMIN F. MCCAULLY, *Petitioner*, v. UNITED STATES. [No. 651.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

See same case below, 33 Wash. L. Rep. 306.

Messrs. Arthur A. Birney and Henry F. Woodard for petitioner.

The Attorney General and Solicitor General Hoyt for respondent.

May 15, 1905. *Denied*.

FRANCIS H. DUEHAY, *Petitioner*, v. DISTRICT OF COLUMBIA. [No. 638.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

Mr. Samuel Maddox for petitioner.

Messrs. A. B. Duvall and F. H. Stephens for respondent.

May 29, 1905. *Denied*. Mr. Justice Brewer took no part in the consideration and disposition of this application.

D. G. FRITZLEN *et al.*, *Petitioners*, v. BOATMEN'S BANK OF ST. LOUIS, Mo. [No. 647.]

Petition for a *Writ of Certiorari to the [587] United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 135 Fed. 650.

Messrs. D. R. Hite and H. J. Bone for petitioners.

Mr. James S. Botsford for respondent.

May 29, 1905. *Denied*.

PITCH PINE LUMBER COMPANY, *Petitioner*, v. WILLIAM S. ROSASCO *et al.* [No. 653.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. Harrington Putnam and Chas. C. Burlingham for petitioner.

Messrs. J. Parker Kirlin and Charles R. Hickox for respondents.

May 29, 1905. *Denied*.

BRUNSWICK - BALKE - COLLENDER COMPANY, *Petitioner*, v. JOHN G. KLUMPP *et al.* [No. 654.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 65 C. C. A. 447, 131 Fed. 255.

Mr. Joseph C. Clayton for petitioner.

Mr. Louis C. Raegner for respondents.

May 29, 1905. *Denied*.

WILLIAM H. STAAKE, Trustee, *Petitioner, v. WATTS, ROBERTSON, & ROBERTSON, et al.* [Nos. 656, 657.]

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 133 Fed. 717.

Messrs. H. Gordon McCouch and Samuel W. Cooper for petitioner.

Mr. S. Hamilton Graves for respondents.
May 29, 1905. *Denied.*

MARTHA RAPHAEL, Administratrix, etc., *Petitioner, v. RIO GRANDE WESTERN RAILWAY COMPANY et al.* [No. 659.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 65 C. C. A. 632, 132 Fed. 12.

Mr. Charles Locke Easton for petitioner.

Messrs. Wm. Mason Smith, A. H. Joline, and E. M. Shepard for respondents.

May 29, 1905. *Denied.*

[588] JOHN B. MCPHERSON, Judge, etc., *Petitioner, v. AMERICAN SODA FOUNTAIN COMPANY.* [No. 663.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Mr. Wm. G. Henderson for petitioner.

No opposition.

May 29, 1905. *Denied.*

ATLANTIC LUMBER COMPANY, *Petitioner, v. L. BUCKI & SON LUMBER COMPANY.* [No. 220.]

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below on first appeal, 53 C. C. A. 513, 116 Fed. 1, on second appeal, 63 C. C. A. 73, 128 Fed. 343.

Mr. R. H. Liggett for petitioner.

Messrs. H. Bisbee and George C. Bedell for respondent.

April 11, 1905. *Dismissed, with costs, pursuant to the Tenth Rule.*

MARY K. WALP, *Plaintiff in Error, v. C. E. MOAB et al.*, Copartners as Lamkin & Foster. [No. 297.]

In Error to the Supreme Court of Errors of the State of Connecticut.

198 U. S.

See same case below, 76 Conn. 515, 57 Atl. 277.

Messrs. Henry G. Newton and Bernard E. Lynch for plaintiff in error.

No appearance for defendants in error.

April 11, 1905. *Dismissed, with costs, on authority of counsel for plaintiff in error.*

PLYMOUTH CORDAGE COMPANY *et al.*, *Appellants, v. J. A. SMITH et al.* [No. 323.]

Appeal from the Supreme Court of the Territory of Oklahoma.

Mr. Edwin A. Krauthoff for appellants.

No appearance for appellees.

April 19, 1905. *Dismissed, with costs, on motion of counsel for appellants.*

JOSE MAULEON Y CASTILLO, *Appellant, v. JOSE URRUTIA Y CORTON, Warden, etc.* [No. 241.]

Appeal from the Supreme Court of Porto Rico.

Mr. Federico Degetau for appellant.

No appearance for appellee.

April 26, 1905. *Dismissed, with costs, pursuant to the Tenth Rule.*

*ISAAC K. KERR, *Plaintiff in Error, v. UNITED STATES.* [No. 257.]

In Error to the United States Circuit Court of Appeals for the Seventh Circuit.

Mr. A. L. Sanborn for plaintiff in error.

The Attorney General for defendant in error.

May 1, 1905. *Dismissed, on authority of counsel for the plaintiff in error, on motion of Mr. Solicitor General Hoyt for the defendant in error.*

GUSTAV SCHERF, *Appellant, v. P. J. CURTIS, Sheriff of the City and County of San Francisco, Cal.* [No. 682.]

Appeal from the Circuit Court of the United States for the Northern District of California.

No counsel for appellant.

Mr. Wm. R. Harr for appellee.

May 29, 1905. *Docketed and dismissed, with costs, on motion of Mr. William R. Harr for the appellee.*

APPENDIX I.

Supreme Court of the United States.

OCTOBER TERM, 1904.

ORDER.

The Reporter having represented that, owing to the number of decisions at the present term, it would be impracticable to put the reports in one volume, it is, therefore, now here ordered that he publish an additional volume in this year, pursuant to section 681 of the Revised Statutes.

February 27, 1905.

APPENDIX II.

Supreme Court of the United States.

OCTOBER TERM, 1904.

ORDER.

It is now here ordered by the court that all the cases on the docket not decided, and all the other business of the term not disposed of by the court be, and the same are hereby, continued until the next term of the court.

May 29, 1905.

1177

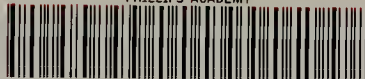


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